

JERSEY / JUDGMENT

Crociani -v- Crociani [2015]

JRC 145 (01 July 2015)

[2015] JRC 145

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons for refusing the plaintiffs' application for disclosure of certain legal advice given to the first, second third and fourth defendants based on waiver and said to have been referred to in the third affidavit of the first defendant and two letters from Carey Olsen dated 3rd June, 2015, and 9th June, 2015, written on behalf of the first, second and fourth defendants. 2. The context of the application for disclosure by the plaintiffs concerns an application to amend its answer brought by the first, second fourth defendants to plead a counterclaim. The material parts of the proposed counterclaim are that the first defendant seeks to plead, firstly that she is permitted to benefit from the Grand Trust by reason of her interest in the sixth defendant; secondly, she seeks to argue that, if she is not entitled to benefit from the Grand Trust, then the Grand Trust was set up by mistake, or dispositions pursuant to which the first defendant settled assets on the Grand Trust were made by mistake, such that the Grand Trust should be set aside. Relevant events 3. It is necessary to refer to part of the procedural history of this complex dispute relevant to the application before me. 4. In July 2012, the plaintiffs sent a letter before action on behalf of the first plaintiff outlining the claims that the plaintiffs now pursue in the order of justice. 5. The letter before action led to a consultation with Brian Green, Q. C. for the benefit of the first to fourth defendants on 25th July, 2012. A note of the consultation was produced dated 26th July, 2012. Page 6 of the attendance contains the following:- "Robert raised the possibility of rectification or setting aside for mistake . Mr Green said of those would require extensive contemporaneous evidence as to the establishment of the Trust which appears that we may be in some difficulty assembling as records no longer exist. In Mr Green's view, if the Trustees are forced to apply for directions they will have to say that the Grand Trust was not fit purpose for one reason or another. Mr Green is reluctant to give up that ground. In any event, a counterclaim for rectification could be made in any hostile proceedings brought by Christiana . Robert pointed out that Christiana faces a 3 year limitation period expiring in February 2013 and that may constrain

her to commence proceedings before that time. Mr Green said that in his view, seeking directions is tantamount to an admission that something has gone wrong and indeed that the way that the Trust has been administered for almost 25 years has been wrong." (emphasis added) 6. Proceedings were commenced by an order of justice dated 18 th February, 2013, against the first to fourth defendants and an answer was filed in June 2013. The first to fourth defendants were the only named defendants when proceedings were issued. 7. Before an answer was filed, the first to fourth defendants issued an application, initially challenging the jurisdiction of the Royal Court to hear the proceedings, which challenge was subsequently amended to contend that Mauritius rather than Jersey was the appropriate forum to hear the plaintiffs' claims. 8. By an act of court of 19 th April, 2013, Commissioner Clyde-Smith ordered at paragraph 4:- "The Defendants shall file a full answer on or before the 29 th May, 2013." 9. In his detailed written reasons given the same day, reported at *Crociani-v-Crociani*

[2013] JRC 080 , the Commissioner stated as follows:- "24. That leads me to the issue of the answer. I need to balance the potential prejudice to the defendants in having to file a full answer to the Order of Justice against the potential prejudice to the plaintiffs in their claim being very substantially delayed. I take into account the following:- (1) By Maurant Ozanne's letter of 17 th August, 2012, (written in response to a letter before action by a very experienced trust litigation lawyer assisted by leading counsel) no question was raised by the defendants as to the appropriateness of this jurisdiction for the determination of the plaintiffs' claims - indeed, as referred to above, it seems to me that this jurisdiction was positively accepted as appropriate by the defendants and their advisers. (ii) Service of the proceedings was accepted by Maurant Ozannes on behalf of all of the defendants in January 2013, from which it is reasonable to infer that at that later stage, this jurisdiction was accepted by the defendants on advice as the appropriate jurisdiction for the determination of these claims. (iii) That once the proceedings had been issued, the defendants sought and the plaintiffs agreed to, an extension of time for the filing of an answer on or before 29th March, 2013, (a not inconsiderable extension) and a consent order was issued to that effect. (iv) Having accepted this jurisdiction and obtained an extension of time for the filing of an answer, the defendants then changed the whole of their legal team and embarked upon a quite different strategy (I do not use that term in any disparaging way), which involved challenging this Court as the appropriate forum and invoking the jurisdiction of the courts of Mauritius. Nothing had happened in the meantime to make Jersey less appropriate as the forum as had occurred in *Leeds-v-Weston* . (25) In the light of this, I take the view that until such time as the Forum Challenge Hearing takes place, there should be (subject to on-going review) no interruption of the proper progress of the substantive case to trial. A full answer should therefore be filed. It would be filed for the purposes of the main proceedings but it will incidentally be of benefit to the Court dealing with the Forum Challenge Hearing. However, I should make it clear that the on-going progress of this case will not prejudice the position of the defendants in the Forum Challenge Hearing when that takes place." 10. On 14 th May, 2013,

Commissioner Clyde-Smith gave a further judgment refusing to give leave to appeal where he stated as follows:- "The purpose of the Defendants' filing an answer was to ensure that the main proceedings would progress. I accepted that an answer was not a requirement for the purposes of the forum hearing, as Advocate Robinson had contended, but its filing for the purposes of the main proceedings will no doubt assist the court in the forum hearing." 11. On 24 th May, 2013, Fleming J. A., sitting, as a single judge of the Court of Appeal, refused the application for leave to appeal paragraph 4 of the act of court dated 19 th April, 2013, set out above. 12. Paragraph 6(i) of the act of court of 19 th April, 2013, also permitted the plaintiffs within 7 days to consider extending an undertaking recorded at paragraph 18 of Commissioner Clyde-Smith's judgment (to the effect that if the court were to order the defendants to file an answer that would not be used against the defendants at the Forum Challenge hearing), to cover any further steps taken by the defendants in the proceedings pending determination of the forum challenge. 13. Such an undertaking was given by a letter dated th April, 2013, where Advocate Robinson for the plaintiffs stated to Advocate MacRae for the first to fourth defendants:- "as regards any procedural steps which your clients take in the Jersey proceedings in relation to the pleadings beyond the filing of an answer prior to the Forum Challenge hearing which is to be determined by the Royal Court on 28 - 30 August, 2013 before Commissioner Clyde-Smith, these will not be used against your clients at that hearing, or any such equivalent hearing in Mauritius." (emphasis added) 14. The Forum Challenge was ultimately heard by the Royal Court in October 2013 and determined in the plaintiffs' favour. An appeal to the Court of Appeal was dismissed in April 2014. 15. Following a contested application to amend the plaintiffs' order of justice (when the fifth, sixth and seventh defendants were added as parties) heard by me on 2 nd May, 2014, (reported at *Crociani-v-Crociani*

[2014] JRC 102A), a reply was filed by the plaintiffs on 28 th May, 2014. 16. Shortly after the reply was filed, somewhat to the surprise of all parties, a date became available in September 2014 for the hearing of the first to fourth defendants' appeal to the Privy Council against the decision of the Court of Appeal, rejecting their Forum Challenge. 17. The Privy Council ultimately delivered its opinion dismissing the first to fourth defendants' Forum Challenge on 26 th November, 2014. 18. Following the dismissal of the Forum Challenge, the first to fourth defendants, through Carey Olsen on 22 nd December, 2014, indicated that they were looking to amend their answer but without indicating the nature of any amendments that were to be sought. 19. In giving directions on 12 th January, 2015, at paragraph 3 I recorded that:- "...no order is made in respect of the intention of the First to Fourth Defendants to apply to amend their Answer. Any such application is a matter for another day by way of separate summons". 20. On 30 th April, 2015, the first to fourth defendants provided a draft amended answer and counterclaim to the plaintiffs for their agreement. No such agreement has been forthcoming. This led to the defendants issuing an application by summons to amend their answer and counterclaim. 21. Earlier in April 2015, the plaintiffs had issued an application seeking pre-emptive costs orders out of the Grand Trust for future funding of the plaintiffs' claims. 22. The plaintiffs' application for a pre-emptive

costs order led to directions being given by Commissioner Clyde-Smith on 20 th April, 2015, pursuant to which the first defendant filed her third affidavit on 15 th May 2015. Paragraph 15 of the third affidavit provides as follows:- "I certainly would never have set up the Grand Trust as I did, or settled any assets into it, if I had thought that - in effect, and as the Plaintiffs argue - I would no longer have any right to enjoy them. It is for this reason that I now seek - insofar as the Plaintiffs are correct that I am not an object of the power in clause 11 of the Grand Trust Agreement (pages 70 to 71) and that I am not allowed to benefit from distributions or appointments made in favour of the Foundation - to pursue a counterclaim in these proceedings setting aside the Grand Trust, and all settlements of assets that I have made into the Grand Trust, on the grounds of mistake. The only reason why I have not sought to pursue this counterclaim sooner is that I was advised (without in any way waiving privilege) that to do so might jeopardise or otherwise adversely affect the challenge to forum that was pursued by me and the other defendants ("the Forum Challenge"). (emphasis added). 23. It is the reference to advice in the final sentence of this paragraph that has led to the plaintiffs' present application for discovery of legal advice. 24. A directions hearing took place in relation to the pre-emptive costs application on 29 th May, 2015, before Commissioner Clyde-Smith, when the first defendant's third affidavit was referred to in the course of submissions, although it appears that paragraph 15 was not specifically referred to. 25. At a directions hearing before me on 2 nd June, 2015, (dealing with discovery issues and the consequences of the third and seventh defendants having recently retained separate legal advisers to replace Carey Olsen) I directed that the advisers to the plaintiffs and the first second and fourth defendants should provide written submissions on when the application to amend should be heard. 26. On 3 rd June, Messrs Carey Olsen wrote to me setting out why their clients' application to amend should not be delayed. At this point in time the plaintiffs were resisting an early determination of the application to amend. The relevant parts of Carey Olsen's letter stated as follows:- "On 26 November 2014 the Privy Council delivered its opinion dismissing Ds1-4's forum challenge. Ds1-4 had not sought to make the amendments until the forum challenge had been determined for the following

reasons.

The proposed amendments are, in large part, responsive to the position that the Plaintiffs pleaded for the first time in their Reply on 28 May 2014. It was only in their Reply that the Plaintiffs first pleaded the basis on which they allege that the Second and Third Plaintiffs became beneficiaries of the Grand Trust (at paragraph 2 of the Reply); first pleaded the allegation that "the Foundation is not and never has been legally able to be a corporate vehicle for Madame Crociani to benefit from the Grand Trust" (at paragraph 3a of the Reply); and first pleaded the allegation that any property appointed to the Foundation by the trustees of the Grand Trust (from time to time) could "only be applied for the charitable objects of the Foundation in 1987 to the exclusion of the family beneficiaries of the Grand Trust" (at paragraph 3b of the Reply). Between 28 May 2014 and November 2014, Ds1-4, and - in particular - their legal team, were heavily

involved in preparing the appeal to the Privy Council. This was no mean feat, especially as the preparation for the appeal had to take place on a particularly tight timetable since the parties were fortunate enough to be offered an early listing by the Privy Council (requested by, it should be noted, Ds1-4). The Plaintiffs have themselves stated that the appeal to the Privy Council was "complex" and that it "raised novel issues which required intense preparation and attention from the... Plaintiffs' legal team in Jersey and London" (at paragraph 18 of their written submissions to the Privy Council on costs). As a result of this, Ds1-4's legal team was only properly able to consider the ramifications of the Reply after the appeal was over. Beyond this, whilst the forum challenge was being conducted: Ds1-4's legal team were concerned that it might prejudice the forum challenge if they were to pursue a claim in the Jersey proceedings at the same time as arguing that those proceedings should not take place in Jersey. It would not have been a productive use of time or money for Ds1-4's legal team to have produced amendments to the Answer that would immediately have become redundant if these proceedings had been stayed in favour of proceedings in Mauritius. Ds1-4 had consistently concluded - entirely reasonably - that it would be a waste of resources to undertake procedural tasks necessary for these proceedings that would not be of assistance if the proceedings were to be stayed in favour of Mauritius. Shortly after learning that the forum challenge had been dismissed, and that the proceedings would progress to trial in Jersey rather than Mauritius, Ds1-4 gave detailed consideration to the contents of the Plaintiffs' Reply and the amendments for which Ds1, 2 & 4 now seek permission."

27. On 8 th June, 2015, Advocate Robinson wrote to Carey Olsen informing them that the plaintiffs were no longer pursuing their pre-emptive costs application. The same day he also wrote to me in reply to Carey Olsen's letter of 3 rd June, 2015, referred to above. In his letter to me, Advocate Robinson complained about paragraph 15 of the first defendants third affidavit, alleging:- (i) That the mistake claim the first to fourth defendants now wish to plead would have been highly material to the Forum Challenge; and (ii) The only reason the first to fourth defendants held back from making an application to amend earlier was in case such an application damaged the first to fourth defendants' prospects of success in their Forum Challenge." 28. Advocate Kistler replied by a letter dated 9 th June, 2015, again addressed to me, complaining firstly that the plaintiffs' allegations were inappropriate and secondly that the allegations were wrong. The final section of the letter in relation to why the allegations were wrong states as follows:- "The allegations are wrong In any event, Advocate Robinson's allegations are wholly misguided. They are premised upon the suggestion that "the effect of the mistake claim is to remove the essential plank on which the forum challenge was based. At every stage... D's maintained the line that the Grand Trust was a valid trust and the appointment of D4 in 2012 was entirely valid such that Mauritian law now governs the GT and D4 could avail itself of an exclusive jurisdiction clause in favour of Mauritius." This misunderstands the proposed amendments. Ds1, 2&4's primary case remains that the Grand Trust was a valid trust, the appointment of D4 was valid, and that clause 12 of the Grand Trust (previously said to be an exclusive jurisdiction clause) points in favour of Mauritius. The "essential plank on which the forum challenge was based" remains unchanged. Thus, by the proposed counterclaim, D1 first seeks (in broad terms) various declarations as to the proper construction/effect of certain provisions of the Grand Trust. It is only if D1 "is not entitled to those declarations" (as is set out, in terms, at paragraph 157 of the draft Amended Answer) that

she seeks to pursue an alternative case for declarations to the effect that she settled the Grand Trust (and settled assets on the Grand Trust) by mistake. I set out in detail why this counterclaim was not pursued or articulated sooner at pages 2 to 3 of my letter of 3 June 2015 (which I would respectfully invite the Master to revisit). As mentioned, Ds1-4's positive case, as originally pleaded, was not challenged by the Plaintiffs until the end of May 2014, when the Plaintiffs served their Reply. Accordingly the counterclaim could not have been contemplated before then, and could not have been in issue before the Royal Court or the Court of Appeal. For the avoidance of any doubt whatsoever, neither any of Ds1-4 nor any of their legal representatives "deliberately chose to hold back [the mistake claim] and to say nothing to any court about it... in case it damaged their prospects in the forum challenge" - and there is no proper basis for any allegation to the contrary. Whilst, as I said in my letter dated 3 June 2015, Ds1-4's legal team were concerned that it might prejudice the forum challenge (consciously or unconsciously) if they were to pursue a counterclaim in the Jersey proceedings at the same time as arguing that those proceedings should not take place in Jersey, the nature of any counterclaim that might have been contemplated would have made absolutely no difference to the forum challenge. Insofar as Advocate Robinson seeks to infer otherwise at the beginning of the second full paragraph on page 2 of his letter dated 8 June 2015, he is mistaken. Further, the Plaintiffs' reliance on their April 2013 undertaking is also misplaced; a counterclaim was never in anyone's contemplation at that time and can readily be said to have fallen outside of the description "procedural steps... in the Jersey proceedings". I trust that this will answer and resolve the unfortunate allegations made by the Plaintiffs and bring the exchange of correspondence on this topic to an end." 29. Following receipt of this correspondence, I directed that the application to amend be heard on 2 nd July, 2015. The present application came before me as a matter of urgency on 18 th June because the plaintiffs contended that they required disclosure of the legal advice in advance of the 2 nd July hearing. This was because they contended that determination of such disclosure was highly material to their resistance of the application to amend. The parties' submissions 30. Advocate Robinson for the plaintiffs contended as follows;- (i) This was a late application to amend which required the Court to know why the amendment had not been pleaded earlier. He relied on *Brown v Barclay's Bank*

[2002] JLR Note 1 and *Cunningham v Cunningham*

[2009] JLR 227 as recently applied in *MacFirbhisigh v C. I. Trustees*

[2014] JRC 033 . (ii) As his argument developed, what was at the heart of his complaint was that seeking to plead the counterclaim now was an abuse of process and this is why the application to amend should not be allowed. (iii) The application to amend was an abuse of process because of the effect of paragraph 4 of the order of 19 th April, 2014, and paragraphs 24 and 25 of Commissioner Clyde-Smith's judgment referred to at paragraphs 8 and 9 above. (iv) Moreover, in light of the undertaking given by the plaintiffs referred to at paragraph 13 above, there was no danger of an application to amend being seen as a step in the proceedings. Rather, this was a deliberate decision not to amend because the possibility of pleading the matters the first, second and fourth defendants now wish to

plead was known even before proceedings had been commenced. In support of this submission, he relied on the extract of the attendance note of the consultation with Brian Green Q. C. that I have referred to at paragraph 5 above. In Advocate Robinson's view, it was simply not credible that the first to fourth defendants did not know by the time they filed their answer in June 2013 that they could have pleaded a counterclaim to set aside the Grand Trust on the basis of mistake. (v) It was also clear from paragraph 15 of the first defendant's third affidavit and the final sentence that the decision not to apply to amend earlier was a deliberate decision taken on advice. (vi) The gist of the advice had been referred to and that is how I should construe the final sentence of paragraph 15. The first second and fourth defendants were engaged in cherry picking by referring to the gist of the advice but not disclosing the detailed advice referred to in paragraph 15. (vii) The advice had been deployed by the third affidavit of the first defendant being filed with the Court and was before the Royal Court on 29 th May, 2015, when the Royal Court gave directions in respect of the pre-emptive costs application. By reference to the extracts of *Brennan v Sunderland County Council*

[2009] ICR 479 , referred to in my decision in *Vilsmeier v AI Airports International Limited and PI Power International Limited*

[2014] JRC 101, he contended that waiver had occurred. He drew my attention in particular to the following extracts from *Brennan*:- "63 In our view the fundamental question is whether, in the light of what has been disclosed and the context in which disclosure has occurred, it would be unfair to allow the party making disclosure not to reveal the whole of the relevant information because it would risk the court and the other party only having a partial and potentially misleading understanding of the material. The court must not allow cherry picking, but the question is when has a cherry been relevantly placed before the court? 64. Typically, as we have seen, the cases attempt to determine the question whether waiver has occurred by focusing on two related matters. The first is the nature of what has been revealed; is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed; has it been simply been referred to, used, deployed or relied upon in order to advance the party's case?" (viii) In order to adjudicate on the application to amend by the first, second and fourth defendants, fairness required disclosure of the legal advice referred to. (ix) The two letters written to me by Carey Olsen dated 3 rd June and 9 th June, 2015, had also effectively deployed legal advice and so also justified disclosure being ordered. (x) The advice sought was not the substantive advice on the merits of the mistake counterclaim, rather the advice sought related to the issues of when the mistake claim was first contemplated and why it was not advanced when it was first contemplated. (xi) The express reservation of privilege not being waived in paragraph 15 of the third affidavit was not sufficient to prevent a waiver of privilege occurring (see paragraph 31 of *Digicel (St Lucia) Limited v Cable and Wireless Plc*

[2009] EWH Civ 1437 and *ACD (Landscape Architects) Limited v Overall*

- [2011] EWH Civ 3362 at paragraph 23(f). 31. Advocate Kelleher in response made the following submissions:- (i) I had no power to debar an amendment application. (ii) This was an ordinary application to amend. It was not one being made late in the sense that expression was understood in the Brown and Cunningham cases. (iii) The affidavit of the first defendant did not refer to the gist of the advice but only its content. There was therefore no cherry picking. He referred me to paragraphs 47 to 50 of Brennan which had not been cited in Vilsmeier as follows:- "48. At first instance Leggatt J concluded that, since the paragraph was being relied upon by the plaintiffs, it followed that they had waived privilege. The Court of Appeal disagreed. Lawton LJ drew a clear distinction between the contents of the document and its effect. His Lordship referred to a decision of Sir Wilfred Greene MR in *Infields Ltd v P Rosen & Son* [1938] 3 All ER 591, who observed that reliance was not of itself sufficient to constitute waiver and then said: 47 The "benevolent view", as Matthews & Malek on Disclosure describes it, is supported by other authorities which were specifically referred to in the Dunlop case. First, in *Marubeni Corpn v Alafouz* (unreported) 5 November 1986; [1986] CA Transcript No 996, explained and approved in *Dubai Bank v Galadari* (No 2)
- [1990] 1 WLR 731, 739, the deponent to an affidavit sworn on behalf of the plaintiffs, who were seeking permission to serve out of the jurisdiction, stated: "The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever "In my judgment, the same principle applies here. All that the deponent was doing was saying: 'Well, I am asking the court to allow service out of the jurisdiction. I am being frank with the court. I have received certain information from Japan and I believe it provides no defence to the defendants.' In other words, he was not relying on the contents of the document: he was relying on the effect of the document. He had to refer to the Japanese lawyers because he was under a duty to *492 give the source of his information and he could only do so by referring to what they had told him." 49. Lloyd LJ drew a similar distinction between mere reference to a document and a quotation of its contents. The judge noted that "In some cases it will be hard to draw the line between disclosure of contents and the mere effect of advice", but he was satisfied in the particular circumstances of that case that what was disclosed did not extend beyond the effect of the advice. 50. A third case relied upon was the decision of the Court of Appeal in *Government Trading Corpn v Tate and Lyle Industries Ltd* (unreported) 24 October 1984;
- [1984] CA Transcript No 376. That case concerned a reference to information derived from Iranian lawyers. The solicitor in an affirmation had set out his understanding of Iranian law on the incorporation of a government trading corporation in Iran and stated that his information had been derived from a firm of lawyers practising in Tehran, and he believed it to be correct. Robert Goff LJ emphasised that it will often be necessary, particularly in interlocutory applications, to refer to certain facts or certain advice and it may be necessary, in order to provide full and frank disclosure, to refer to the source of that advice. However, he concluded that that was a long way from waiving privilege." (iv) The

advice had not been deployed. The broader context of this submission was that the application for a pre-emptive costs order had been withdrawn before it was determined. Although the third affidavit of the first defendant was before the Court on 29 th May, 2015, this was only a directions hearing and no reference was made to paragraph 15. (v) It was important for me to consider the specific context of the third affidavit to evaluate whether or not it had been deployed. At best it simply explained that the Court could not make a pre-emptive costs order because there was pending an application to amend, as yet undetermined, which might have the effect of the entire trust being set aside, if it was granted. (vi) While he accepted by reference to paragraphs 11 and 12 of JFCS v A. P. Black (Jersey) Limited

[2003] JLR 609 at paragraphs 11 and 12, that the ultimate test was one of fairness, it was still relevant to ascertain whether or not legal advice had been deployed in evidence in deciding whether or not waiver had occurred. (vii) As what was meant by evidence being deployed, he referred me to the following passage from Hollander on Evidence , chapter 23 on Waiver of Privilege at page 373 as follows:- "In General Accident Fire and Life Corp v Tanter Hobhouse J held that an application based on collateral waiver was premature unless it took place after the evidence had been "deployed in court" in the strict sense, namely after the material was relied on in evidence. The significance of "deploying in court" is that once the material has been used in court in support of an application or at trial, it will be difficult to turn the clock back and thus retrieve the position. If the document has been read out in opening, or relied on in the course of evidence, and thus deployed in court, it will be too late to turn the clock back. If, however, the document, affidavit or witness statement has been disclosed to the other side not yet deployed in court, it is not too late to retrieve the situation." (viii) He further contended that the letters of 3rd and 9th June, 2015 did not refer to legal advice so that the principle of waiver could not apply. Ultimately the application was therefore a fishing expedition. (ix) He did not dispute the authorities referred to by Advocate Robinson that an express statement to maintain privilege does not prevent a waiver arising if in fact the privileged material has been deployed and that fairness required disclosure. Decision 32. Before I set out my detailed written reasons for my decision, I wish to repeat the observations I made orally at the outset of the hearing. The context of these observations is that this is a bitter family dispute involving large sums of money. At times this has meant each party taking every point available to it, almost irrespective of the merits of the point; the correspondence between the advisers has also on occasions descended into emotive terms and using rhetoric that can only add to the bitterness of the dispute. It was in this context that I reminded the parties of the well know words of the Court of Appeal in Re Esteem Settlement

[2000] JLR Notes-41a which stated:- "The objective of all involved in civil proceedings is to progress to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time." (my emphasis) 33. Notwithstanding this intervention on my part, during the course of argument, both advocates promptly cited

Esteem in support of their criticisms of the other. That was not was intended by my preliminary observations. Moving forward I therefore repeat that the parties and their advisers must have regard to the approach required by the Court of Appeal failing which cost or other consequences may arise. It is quite clear from the Court of Appeal's observations that they apply as much to the legal advisers involved as to the parties. 34. In relation to whether or not waiver has occurred, I firstly considered whether paragraph 15 of the first defendant's third affidavit referred to the gist of legal advice or merely its effect. As noted in Brennan this is not always an easy line to draw. That distinction in Brennan was clear because what the plaintiff was referring to the Court was the effect of a particular agreement based on legal advice. 35. In the present case, by contrast, I concluded that the first defendant was referring to the gist of advice received. The final sentence of paragraph 15 does not explain the effect of a particular document based on advice; rather it sets out the only reason why the counterclaim was not pursued earlier. The reason given was the legal advice received i.e. the application was not made because of the advice received. The final sentence did not say, as it could have done, that the application was not made earlier as a consequence of legal advice without saying what that advice was. In my judgment, the final sentence went further and therefore has crossed the line beyond referring to the effect of the advice. 36. I also reached the view that Carey Olsen's letter of 3 rd June, 2015, understood in its context, was also referring to the gist of the advice referred to in the final sentence of paragraph 15. The reason why the letter of 3 rd June, 2015, written was because, as set out in the chronology above, I had directed the parties to file written submissions as to when the application to amend should be heard. At the time I gave this direction, the plaintiffs were still pursuing their pre-emptive costs application. The point I was directing the parties to address therefore concerned the timing of when an application to amend should take place and whether there was sufficient time for such an application to be determined, as well as the parties preparing for the pre-emptive costs application and completing their discovery obligations. 37. The observations set out in Carey Olsen's letter cited above were not necessary in order to address the issue of when the application to amend should occur. Rather they were more general observations, in particular the observation that " D1-D4's legal team were concerned that it might prejudice the forum challenge if they were to pursue a claim in the Jersey proceedings at the same time as arguing those proceedings should not take place in Jersey". This statement was not relevant to why I directed the parties to write to me. I consider it therefore can only be understood in the context of paragraph 15 of the first defendant's third affidavit. Whilst I accept this quotation does not use the word "advised" that appears in paragraph 15, it remains, in effect, a repetition of the reasons advanced by the first defendant as to why a mistake claim was not advanced earlier. In that sense the use of the word "concerned" was an attempt to avoid referring to legal advice. However this is semantics; the concerns of the legal advisers cannot be anything other than a reference to the legal advice given to the first to fourth defendants, which is the reason why the first defendant deposed that an application to amend the counterclaim was not made earlier. 38. In respect of Carey Olsen's letter of 9 th June, 2015,

the extract of the letter I have referred to represents the first, second and fourth defendants' contentions in response to Advocate Robinson's letter of 8 th June, 2015. The only reference to legal advice is a reference back to the letter of 3 rd June, 2015. The letter of 9 th June, 2015, does not itself otherwise refer any further to any such legal advice or concerns. 39. What both letters do assert is that the defendants only considered the possibility of filing a counterclaim once the plaintiffs filed a reply in May 2015, where the plaintiffs pleaded that the foundation (the sixth defendant) was never legally able to be a corporate vehicle for the first defendant to benefit from the Grand Trust (see paragraph 3(a)) of the reply. 40. This assertion contrasts with the following references in the order of justice:- (a) The foundation was incorporated for charitable purposes - paragraph 19; (b) The Grand Trust was not created with the purpose or intention of providing any benefit to Madam Crociani. Under its terms Madam Crociani was not able to benefit otherwise than as a default beneficiary - see paragraph 27; (c) The Trustee's justification for the Agate Appointment was to be influenced by the false assertion that Madam Crociani is and always has been intended to benefit from the Grand Trust via the foundation

- see paragraph 100; (d) The foundation was at the time of the creation of the Grand Trust a wholly charitable foundation from which Madam Crociani could not benefit - see paragraph 100.2; 41. All of these allegations were denied in the answer filed by the first to fourth defendants. At paragraph 4 the answer also pleaded that the first defendant "was advised before entering into the Grand Trust agreement, that it had been drafted in such a way as to allow [her to benefit]. It was on this basis that she contributed to the Grand Trust substantial assets. If Madam Crociani had not been able to benefit from those assets then she would never have settled the Grand Trust or contributed to its substantial assets". 42. Paragraph 15 of the answer also states "it was never intended that Madam Crociani should not benefit, or should be excluded, from the Grand Trust". 43. The allegation that the first defendant could not benefit from Grand Trust was therefore raised in the order of justice as set out above and denied by the answer. 44. I also refer to the note of the consultation with Brian Green Q. C. the relevant part of which is set out at paragraph 5 above where it was expressly noted that a "counterclaim for rectification could be made in any hostile proceedings brought by Christiana" as early as July 2012. This extract means that the basis to plead a counterclaim of the kind now contemplated was known to the defendants in July 2012. 45. Taking this note and the pleadings as originally filed leads me to conclude, based on what has been provided to me so far, that pleading a mistake claim was known about even before proceedings had been commenced and the issue of whether or not the first defendant could benefit was already part of the matters in dispute between the plaintiffs and first to fourth defendants by June 2013. I address the significance of this conclusion later in these detailed

reasons.

46. I also reached the view that the combined effect of the order of 19 th April, 2013, the detailed written reasons given the same day by Commissioner Clyde-Smith, and the undertaking given by the plaintiffs in May 2013, would have allowed the first to fourth defendants to

either plead the counterclaim at the time they filed their answer, or to have made an application to amend long before they did. Although Carey Olsen's letter of 9 th June, 2015, suggests that a counterclaim was not covered by the undertaking given, I disagree. The language of the undertaking could not have been clearer. It extended to any step in the proceedings and I construe the filing of a counterclaim or an application to amend to plead a counterclaim as such a step. Again I return to the effect of this later. 47. In reaching my decision, although the gist of the advice had been referred to, I concluded that the third affidavit of the first defendant was not deployed in evidence. The broader context of the third affidavit was to resist the pre-emptive costs application, which was an application that was withdrawn before it was even argued. Furthermore, it was withdrawn without the first to fourth relying on the third affidavit including paragraph 15 in any court hearing. Although the third affidavit was before Commissioner Clyde-Smith on 29 th May, 2015, that hearing was a directions hearing and it appears not to be in dispute between the parties that no reference was made specifically to paragraph 15 of the third affidavit on 29 th May. 48. The specific context of paragraph 15 is that it appears in a section headed "the setting of the Grand Trust and the role of the promissory note". The relevance of paragraph 15 to the pre-emptive costs application was therefore to draw to the court's attention that one factor against making a pre-emptive costs order was that an application to amend had been brought to seek to set aside the Grand Trust on the basis of mistake. If the Grand Trust was set aside, or it was going to be set aside these possibilities were factors against ordering a pre-emptive payment of costs out of the assets of the Grand Trust. Advocate Kelleher was therefore correct in his submission that the Royal Court was not going to determine the application to amend; the relevance of paragraph 15 was to draw to the court's attention the fact that such a counterclaim was being made. The matters referred to in the final sentence of paragraph 15, which is the part relied on by the plaintiffs, were not being used to advance a case as to why a pre-emptive costs order should not be made. If anything, those observations appear to me to have been designed to head off a possible question that the Royal Court might have asked as to why the counterclaim was not pleaded earlier, in particular bearing in mind the order made in April 2013, requiring a full answer. However, the answer to any such question at best might have been relevant to any exercise of discretion. This should be kept in context. From the third affidavit alone, there were clearly many other factors that the Royal Court would have had to consider in exercising any such discretion, assuming it had the power to make such an order in principle, relating to the merits of whether or not a pre-emptive costs order should be made. 49. For all these reasons I therefore concluded that the third affidavit and, in particular paragraph 15 and the gist of the advice referred to, had not been deployed in evidence. I was also conscious that privilege is not easily lost as noted in *Vilsmeier and Brennan* . In view of this principle and the context in which the gist of the advice had been referred to and the affidavit deployed, I also concluded that fairness did not require disclosure of the affidavit. 50. However, that was not the end of the matter. Although the affidavit had not been deployed, it had been filed with the court and served on the other parties. It was part of the Court record. The plaintiffs, as they had done in making the present application, were entitled to refer to the third affidavit

and to rely on any parts of it in any subsequent court application, whether interlocutory or at trial. Even though I have found that the third affidavit had not been deployed by the first to fourth defendants, it is an affidavit that the plaintiffs may and do refer to me in the context of the first, second and fourth defendants' application to amend. In that sense it is the plaintiffs who have deployed the first defendant's third affidavit to resist the first, second and fourth defendants' application to amend. The reliance on the affidavit is in the context that the plaintiffs contend that the issue of when and why advice was given, is material to the application to amend. I agree as matters presently stand, with the plaintiffs' contention. I also consider that, if the application to amend is allowed, when and why advice was given may be relevant to any terms upon which such an amendment are permitted. 51. I therefore firstly required the first, second and fourth defendants to disclose when the advice referred to in paragraph 15 of the affidavit of the first defendant and the letter of 3rd June, 2015, of Carey Olsen was given. In view of the fact that the gist of advice had been referred to, I did not consider, on the facts of this case, that referring to when advice was given, amounted to a waiver of privilege. Although the fact of taking advice can be privileged, (see *Rokos v Brevan-Howard*

[2014] JRC 232A at paragraphs 39 and 40), in this case the fact of advice having been taken was expressly referred to in paragraph 15. The first, second and fourth defendant, having referred to advice being taken, are no longer entitled to refuse to say when that advice was taken. As the question of when that advice was taken and the date, if different, of any decision to act on it is relevant to the application to amend, I concluded that I was not requiring privileged advice to be disclosed when the fact of taking advice had already been revealed. 52. Secondly, I gave the first to fourth defendants permission to file affidavit evidence setting out the reasons why the counterclaim had not been filed earlier, in support of the contentions set out in the letter of 9th June, 2015, from Carey Olsen referred to above. I indicated that any such explanations should be supported by evidence. In the absence of such an affidavit, based on the material already before me, I indicated I would proceed on the assumption that the counterclaim could have been pleaded at the time the answer was filed in June 2013. My reasons for being able to proceed on such an assumption following on from paragraphs 40-46 above are as follows:- (i) The fact that the concept of seeking rectification by counterclaim based on mistake was known to the defendants and their advisers prior to the commencement of the proceedings following the consultation with Brian Green Q. C. (ii) The obligation to file a full answer required by Commissioner Clyde-Smith and confirmed by a single judge of the Court of Appeal. (iii) The clear effect of the undertaking given by the plaintiffs in May 2013, covering any step in the proceedings. (iv) The fact that the order of justice and the answer already placed in issue whether or not the first defendant was entitled to benefit from the Grand Trust. 53. I granted the first, second and fourth defendants an opportunity to file an affidavit explaining why the application was not made earlier, to permit them to adduce evidence that what has occurred was as contended for in Carey Olsen's letter of 9th June, 2015. The fact that such an affidavit may lead to the first, second and fourth defendants choosing to

disclose legal advice, which has to date not been waived, does not matter. Any such disclosure is a consequence of what has already taken place in this case which, in the absence of any further evidence, permits me to proceed on the assumption I have referred to in the preceding paragraph. 54. It is therefore for the first, second and fourth defendants to choose whether they wish to maintain privilege and proceed on the assumptions that I have set out in this judgment or whether they wish to explain why the application was not made sooner. When I gave my decision I made it clear that if I proceeded either on the assumption set out in this judgment or I reached the view that the application was not made earlier, as a result of a deliberate, in the sense of a conscious, decision not to run the risk of prejudicing the forum challenge, what the consequences of such a position might be is a matter for the application to amend currently returnable on 2 nd July, 2015. I also observe in passing that, at present, there is an issue between the plaintiffs and the first, second and fourth defendants as to whether or not I possess such a power to refuse to allow an arguable amendment, which is also a matter to resolve on 2 nd July, 2015. 55. In light of this decision I ordered that the question of costs be left over until the hearing on 2 nd July, 2015. Authorities *Crociani v Crociani*

[2013] JRC 080 . *Crociani v Crociani*

[2014] JRC 102A. *Brown v Barclay's Bank*

[2002] JLR N 1. *Cunningham v Cunningham*

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[2014] JRC 101. *Digicel (St Lucia) Limited v Cable and Wireless Plc* [2009] EWH Civ 1437 ACD
(*Landscape Architects*) Limited v Overall [2011] EWH Civ 3362 *JFCS v A. P. Black (Jersey)*
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[2003] JLR 609 . *Hollander on Evidence*, chapter 23 on Waiver of Privilege at page 373. *Re Esteem Settlement*

[2000] JLR Notes-41a *Rokos v Brevan-Howard*

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