Leave to amend cause

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **ALNASHIR POPAT** **Plaintiff**

-and-

(1) ADIL POPAT
(2) AZIM POPAT
(3) GULZAR POPAT
(4) SEAGRACE LIMITED
(5) LOUVRE TRUST (GUERNSEY) LIMITED

Defendants

Hearing date: 9th January 2017 (pm only)

Judgment handed down: 13th February 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for the Plaintiff: **Advocate A M Ozanne**
Advocate for the Fifth Defendant (and new Third Defendant): **Advocate C J Hay**
The Second Defendant was excused attendance
The Third and Fourth Defendants have now ceased to be parties

Cases & legislation referred to:

Royal Court Civil Rules 2007
Jefcoate v Spread Trustee Company Limited [2013] GLR 220

Ogier v Grande Havre Holdings Limited (2000) 29.GLJ.80
The Civil Procedure Rules (*The White Book*)
Alpha Developments Limited v Barclays Wealth (Guernsey) Limited (unreported, 19 June 2014)
Cobbold v Greenwich LBC (unreported, 9 August 1999)
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339 (Ch)
Financial Services Authority v Rourke [2002] CP Rep 14
Fidelity Management Limited v Royal Bank of Canada (Channel Islands) Limited [2007-08] GLR N-14
Lewin on Trusts, 19th ed.
Thomas on Powers, 2nd ed.
Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511
In the matter of the T 1998 Discretionary Settlement [2008] JRC 062
Collins v AMP Superannuation Ltd [1997] FCA 643
In re Ackerley [1913] 1 Ch 510
In the matter of the C Trust (unreported, 21 March 2013)
In the matter of the Internine and the Intertraders Trusts 2005 JLR 236
Arbuthnott v Fagan [1995] CLC 1396
The Trusts (Guernsey) Law, 2007

Introduction

1. This action, which involves a dispute between certain members of the Popat family, was commenced in 2015. None of the Popat family lives in Guernsey. The Fifth Defendant, Louvre Trust (Guernsey) Limited, is, though, a Guernsey-registered company. The Second Defendant did not seek to challenge the service on him out of the jurisdiction of the Summons convening him to the action, but the First, Third and Fourth Defendants challenged the orders made in respect of them. I set aside those orders on 23 July 2015 and I do not need to repeat in this judgment the details of the background to the action, which can be gleaned by re-visiting that judgment. The Plaintiff sought to appeal against that decision, but leave was refused. The Plaintiff now seeks to re-cast his action to reflect the information that has now come to light and so has made the two applications with which I am seized. Because the Second Defendant, represented by Appleby, has indicated that he consents to both of those applications, I excused his attendance. Because the only other party currently convened in the action is the Fifth Defendant, I have heard only from Advocate Alison Ozanne on behalf of the Plaintiff and Advocate Hay on behalf of the Fifth Defendant, and more particularly on behalf of a different entity in the Louvre Group, which is to become the new Third Defendant.

2. Both of the Plaintiff's applications are dated 30 August 2016. The first is to substitute Louvre Trustees Limited, which is a wholly owned subsidiary of Louvre Trust (Guernsey) Limited, in place of the Fifth Defendant, ie, a contemporaneous removal and addition of parties pursuant to rule 37 of the Royal Court Civil Rules, 2007. In effect, the Plaintiff recognises now that he had identified the wrong entity within the Louvre Group as the proper Defendant to his action. Although it is not expressly part of that application, the Plaintiff also seeks to remove the original Third and Fourth Defendants, against whom the Plaintiff now also recognises that there is no cause of action. The second application is for leave to amend the Cause pursuant to rule 59 of the 2007 Rules. As I will explain shortly, the draft Cause appended to that application marks a significant change from the original Cause, although certain facts remain pleaded as they were before.

3. The evidence in relation to these applications is comparatively brief. A First Affidavit of Ewan Mackay was sworn on 25 August 2016, by which he exhibited a copy of a letter dated 17 April

2015 sent by Advocate Hay to Advocate Ozanne. That letter explained that there was no entity within the Louvre Group which had provided services to the original Fourth Defendant, Seagrace Limited, but volunteered the information that Louvre Trustees Limited had been the trustee to the Almancil Settlement, of which the Plaintiff had been a member of the beneficial class. Mr Mackay swore a Second Affidavit on 3 November 2016, by which he exhibited again the letter dated 17 April 2015, although it was unnecessary for him to do so because it was already in evidence, together with later correspondence. There was a letter dated 14 August 2015 sent by Advocate Ozanne to Advocate Hay asking a number of questions about the Almancil Settlement, Millgate Limited, Penrose Properties Limited, Simba Colt Motors Limited, Seagrace Limited and the Popat family. A reply was sent by Collas Crill dated 4 September 2015. It carefully distinguished between information that Louvre Trustees Limited could properly provide to the Plaintiff in his capacity as a former beneficiary of the Almancil Settlement and other information which Collas Crill, on behalf of their clients, considered could not be provided to him. Enclosed with the letter were copies of the instruments constituting the Almancil Settlement, and an explanation that it had been terminated on 17 March 2010 and that the Plaintiff has received no distribution from it. Copies of three years of accounts for the Settlement were provided. Some information relating to Millgate Limited and Penrose Limited, gleaned from those accounts, was supplied. The letter repeated that the Louvre Group had not provided services to Seagrace Limited and pointed out that it was believed that the Plaintiff is a shareholder of Simba Colt Motors Limited, and so might be able to obtain information about that company directly, but added that, in any event, shares in that company were not subject to any trust with which the Louvre Group was involved. The final document exhibited to that Affidavit was a table attempting to set out a synopsis of information that had been contained in the evidence lodged in relation to the applications to set aside service out of the jurisdiction.

4. In response, Haidée Stephens, a director on behalf of the proposed new party, Louvre Trustees Limited, produced copies of three documents relating to the Almancil Settlement. The first is the instrument constituting the Settlement dated 8 March 1993. The second is a deed dated 1 December 2009 by which Louvre Trustees Limited as trust of the Kalys Trust was added to the class of beneficiaries of the Settlement. The third is a deed of Appointment, Indemnity and Termination dated 24 March 2010, by which all the assets of the Settlement were appointed to the Kalys Trust of which grandchildren of the settlor of the Almancil Settlement, who was Abdulkarim Popat, the father of the Plaintiff, and also of the First and Second Defendants, were and are beneficiaries.

Change of parties

5. The application in respect of which entity within the Louvre Group should be a party is comparatively straightforward. Apart from wishing to be heard on the question of costs, Advocate Hay did not oppose the removal of the original Fifth Defendant and the joining of Louvre Trustees Limited as a new party. In doing so, it is being acknowledged that the original Fifth Defendant had unnecessarily been made a party, or had ceased to be a necessary party, as a result of the information contained in the letter dated 17 April 2015.

6. I queried with the Advocates why it was that the Plaintiff had chosen to seek to re-cast the existing action rather than seeking leave to withdraw it, no doubt on terms as to costs, and start afresh. The option of starting afresh, by which Louvre Trustees Limited would have been made a party and service would have been effected through HM Sergeant without more ado, the Second Defendant may have been content to provide an address for service and the issue of serving the First Defendant out of the jurisdiction would have arisen in any event, appeared to have some merit because the application for leave to amend would not then have been necessary. Advocate Ozanne agreed that the option had been considered but that the Plaintiff's preference, bearing in

mind the costs situation, was to proceed by way of these two applications. She indicated that it was regarded as the most cost-effective way to proceed (and also confirmed that the costs of the parties that had been ordered to be paid by the Plaintiff in the action to date had been settled, which was something I had indicated previously might become a barrier to entertaining the Plaintiff's applications if the orders of the Court has not been complied with). Advocate Hay helpfully pointed out that the position of Louvre Trustees Limited, as the new Third Defendant, was arguably better under the two applications than it would be if there was a new action commenced. This is because the new Third Defendant can raise opposition against the proposed amended Cause rather than being placed in a position of having to make its own application to strike out parts of the Cause or seek summary judgment. In particular, the second limb of the test in rule 19 of the 2007 Rules does not fall to be considered. In those circumstances, I am persuaded that the overriding objective points towards dealing with the two applications in the way they have been presented and opposed rather than ruling that the more appropriate way forward was for the Plaintiff to start a new action from scratch.

7. Although it might seem a little artificial to do so, in order to give Louvre Trustees Limited the opportunity to oppose some of the amendments to the Cause proposed by the Plaintiff, the question arises as to whether Louvre Trustees Limited, rather than the original Fifth Defendant, could be a party to the unamended Cause. If it could not, then the application pursuant to rule 37 would have to be dismissed. Such dismissal would then have an impact on the application for leave to amend the Cause.

8. Paragraph 5 of the original Cause mentions the Fifth Defendant as administering the Fourth Defendant, Seagrace Limited. Paragraph 11 refers to the delegation by the Fourth Defendant of the day-to-day administration of its affairs "*and control of the Offshore Wealth*" to the Fifth Defendant. The term "*Offshore Wealth*" refers to part of the profits of the Popat family business, which was used to make investments in various commercial assets (para. 9). Although the bulk of the Cause relates to allegations relating to the First Defendant, the Fifth Defendant is alleged to be one of the persons having control of the Offshore Wealth and there is *inter alia* specific relief in para. (2) of the prayer for "*A declaration that the assets … controlled by [the Fifth Defendant] form part of the Offshore Wealth*" and in para. (8) for an injunction restraining the Fifth Defendant "*from dealing with the Plaintiff's one third share of the Offshore Wealth*". In those circumstances, although it is a little strained, I accept that Louvre Trustees Limited could replace the original Fifth Defendant and the original Cause would still just about remain meaningful. This is because the information provided on behalf of the Louvre Group indicates that some assets that would fall into the definition given to "*Offshore Wealth*" are held within it. I am, therefore, satisfied that rule 37(1)(b)(ii) has been shown by the Plaintiff to be met and it is likely that rule 37(1)(b)(i) is also met because the Plaintiff chose the wrong Louvre entity to convene.

9. The application pursuant to rule 37 of the 2007 Rules is, therefore, granted.

10. In dealing with the Plaintiff's application for leave to amend, it is apparent that the Plaintiff no longer wishes to pursue any relief involving the original Third or the Fourth Defendant. Accordingly, it is convenient to make an order that those persons shall cease to be a party as no longer being necessary. This results from the fact that the proposed amended Cause is agreed by the Second Defendant and not opposed in its entirety by Louvre Trustees Limited with the effect that there is an ongoing action before the Court by which the Plaintiff seeks relief only against the First Defendant, who has yet to be convened to the action, the Second Defendant and Louvre Trustees Limited, who becomes the Third Defendant, which is how I will hereafter refer to it.

Leave to amend

11. The proposed amended Cause marks quite a significant change from what was originally pleaded by the Plaintiff, albeit that it still amounts to an action seeking a remedy in respect of what he claims is his portion of the Popat family's wealth. The genesis of the proposed amendments is the new information that has been disclosed on behalf of the Louvre entities and, in particular, the identification of the Almancil Settlement as a trust of which the Plaintiff was a beneficiary. This provides a new link to a Louvre entity, including the fact that in its capacity as trustee of the Kalys Trust, the Third Defendant now holds the assets appointed out of the Almancil Settlement, which becomes relevant for the Plaintiff who potentially wishes to trace certain assets into the Third Defendant's hands.

12. There was broad agreement as to the test applicable to applications for leave to amend. In *Jefcoate v Spread Trustee Company Limited* [2013] GLR 220, the Bailiff extracted a set of principles by reference to what the Court of Appeal had stated in *Ogier v Grande Havre Holdings Limited* (2000) 29.GLJ.80 (which was quoted at para. 30 of the Bailiff's judgment) and the principles developed under comparable provisions of the Civil Procedure Rules in England and Wales. Those principles are stated at para. 52:

> "*(a) The court has a wide discretion under the Royal Court Civil Rules, r.59 to permit amendments where one or more of the parties have not consented.*
>
> *(b) The discretion must be exercised judicially having regard to legal principles.*
>
> *(c) The overriding objective requires that cases be dealt with justly.*
>
> *(d) What justice requires depends on the circumstances of the particular case but includes taking account of the matters particularized in the Royal Court Civil Rules, r.1(2), which will be of special importance when a late amendment is sought.*
>
> *(e) In general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs.*
>
> *(f) In the ordinary course it will not be just to allow an amendment if it will defeat a defence of prescription that may otherwise be available.*
>
> *(g) If a defence of prescription may be defeated, it is necessary to establish whether the proposed amendment seeks to introduce a new cause of action.*
>
> *(h) What constitutes a new cause of action is not determined by the label attaching to the proposed claim but by the factual situation which is required to be proved to entitle the plaintiff's claim to succeed. If the new cause of action which is sought to be added or substituted arises out of the same facts or substantially the same facts as a cause of action already pleaded, the court will not normally regard it as a new cause of action and hence will have a discretion to allow it.*
>
> *(i) However, even if the new cause of action arises from similar or substantially the same facts as already pleaded, the court will disallow the amendment if the justice of the situation so requires.*
>
> *(j) Where a new cause of action may be prescribed, the effective date as to when the limitation period expired is the date of the application, although if the*

amendment is permitted, the effect is that it is deemed to date back to the date of the original proceedings.

(k) When considering the limitation period, it is necessary to have regard to any period of time during which the plaintiff was empêché d'agir.

(l) An amendment will not be allowed if the case introduced by it has no realistic prospect of success.

(m) Apart from considerations of prescription, the mere fact that the change effected by a proposed amendment would involve introducing a new cause of action or that it would substantially alter the character of the proceedings or the burden of conducting them is not a reason for refusing leave to amend provided that the change can be made without inflicting injustice on the other parties of a kind incapable of being compensated by an order for costs."

13. There has been no suggestion that any question of prescription arises. Indeed, the Plaintiff could simply have chosen to commence a new action by summonsing the Second and Third Defendants and seeking leave for service out of the jurisdiction on the First Defendant. Accordingly, many of the principles extracted by the Bailiff are of no relevance to the present application. The dispute is really between the contention of the Third Defendant that some of the amendments proposed have no realistic prospect of success and the contention of the Plaintiff that the Third Defendant has failed to rebut the presumption that amendments should generally be allowed. This was the way the principles were analysed in *Alpha Developments Limited v Barclays Wealth (Guernsey) Limited* (unreported, 19 June 2014), which has been highlighted by Advocate Ozanne: "*In essence, the sequential approach of the Jefcoate principles is that there is a presumption in favour of allowing amendment if this can be done without injustice, effectively a procedural injustice, to the other party; see (e)*" (see para. 26) and re-emphasised in para. 49: "*The principle is that all amendments should be allowed, however late and however much they may be the product of second thoughts (or even discovery of facts arising from the evidence in the case as it progresses) provided this can be done without injustice to the other parties.*" Because these principles have been adopted and applied in respect of rule 59 of the 2007 Rules, there is no need to quote the passage from the judgment of Peter Gibson LJ from *Cobbold v Greenwich LBC* (unreported, 9 August 1999), which is also set out in the commentary in para. 17.3.5 of *The White Book*, and with which Advocate Ozanne chose to start her submissions, when the starting point should always be reference to whatever domestic authority exists.

14. Because the Third Defendant places considerable reliance on principle (l), some of the propositions usually advanced when considering whether or not to grant an application for summary judgment become relevant. The first limb of the test in rule 19(2) of the 2007 Rules is whether the plaintiff is shown to have no real prospect of succeeding on the claim or issue. There is no substantive difference between this test and whether the case to be introduced by amendment has no realistic prospect of success. It would clearly be contrary to the overriding objective to give leave to amend a Cause only for it to be subjected to a successful application for summary judgment to remove that element again.

15. In that regard, Advocate Hay has drawn attention to the paragraph from the judgment of Lewison J (as he then was) in *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339 (Ch), to which I have referred regularly when determining applications for summary judgment. It is the seventh and final principle summarised by His Lordship, which he suggests shows that the points of construction raised in this case can be determined now in favour of the Third Defendant:

"*On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real as opposed to fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.*"

16. The amendments for which leave is sought are not easy to understand in the form in which the draft Amended Cause appended to the application has been prepared. It is a document that uses track changes and marginal boxes. Some of those boxes appear to confirm that the content of the original Cause remains but has been moved to appear in a different location within the draft Amended Cause. The document has so much underlining in it, though, that at first sight it seems to be almost entirely a new pleading. This is unsurprising where the original 25 paragraphs have grown to 74 paragraphs in the draft Amended Cause. It would have been more helpful to me to have had a document presented in a more straightforward manner, retaining all the text as it had appeared in the original Cause and making appropriate deletions and additions in what might be termed the traditional fashion, ie, by scoring through text to be deleted and underlining in red the new text. In the event that there might be later applications to amend further this pleading, the only feasible way I can see anyone being able to understand how the Cause has evolved is if it is done in that fashion.

17. The Third Defendant does not oppose the amendments proposed by the Plaintiff to be made to the Cause that will describe the parties in different terms. This is an example of how the facts have developed as a result of the Plaintiff becoming aware of information to which he was previously not a party. It also results from the decision taken by the Plaintiff not to pursue the original Third Defendant, his mother, and to remove from this case the company that had been identified before (Seagrace Limited) as being the part of the corporate structure holding the assets in respect of which the Plaintiff claims to be entitled to a one-third share. There is nothing objectionable in the Plaintiff seeking to set out more accurately these matters and the way in which he claims that the Popat family chose to arrange their affairs and handle the wealth being generated for their benefits. Accordingly, the changes to paragraphs 1 to 13 of the original Cause to become paragraphs 1 to 18 of the draft Amended Cause are not opposed.

18. Similarly, the Third Defendant raises no opposition to the way in which the Plaintiff wishes to claim that the First Defendant and their late father owed duties in respect of the property that the Plaintiff claims was held on trust. Accordingly, the replacement of paragraph 14 of the original Cause by paragraphs 19 to 24 of the draft Amended Cause is effectively agreed. The same stance is taken by the Third Defendant in relation to the allegations that there have been breaches of those duties, which give rise to claims that are given the labels "*the Failure to Account Claim*" and "*the Unauthorised Disposition Claim*". Again, because these paragraphs in the draft Amended Cause are directed at the First Defendant rather than the Third Defendant, there is no

opposition to paragraphs 25 to 51 in the draft Amended Cause (which broadly replace paragraphs 15 to 20 of the original Cause).

19. Under the heading "*The Unauthorized Disposition Claim*", this involves introducing paragraphs 41 to 46 into the draft Amended Cause. These paragraphs refer to the creation of the Almancil Settlement in 1993, the various trustees of that Settlement, the beneficiaries of that Settlement, including the addition of the Third Defendant in November 2009 in its capacity as trustee of the Kalys Trust, the assets believed to have been held within that Settlement and the allegation that this was part of what is defined as "*the Offshore Wealth*", which continues to be the subject-matter of the Plaintiff's claims in this action. As Advocate Hay indicated, the Third Defendant accepts that, as the present trustee of the Kalys Trust, there is a nexus to the allegations the Plaintiff wishes to advance in respect of which it will take a neutral position. This is further developed in the draft Amended Cause in paragraphs 55 to 62, to which there is also no objection from the Third Defendant.

20. Having covered the aspects of the draft Amended Cause to which the Third Defendant agrees, what is left are two sections that the Plaintiff wishes to introduce into his Cause, which are headed "*Claim against Louvre as former trustee of the Almancil Settlement*" and "*Breach of trust claim against Louvre as trustee of the Almancil Settlement*". The corresponding paragraphs are paragraphs 52 to 54 and paragraphs 63 to 73. It became apparent at the hearing that the Third Defendant is most exercised by paragraphs 63 to 73, where it argues that there is no realistic prospect of that claim succeeding, and that it objects to para 54.5 as being an attempt by the Plaintiff to raise a proprietary claim in respect of assets that everyone knows now sit with the Third Defendant as trustee of the Kalys Trust. Accordingly, seeking to introduce a remedy against the Third Defendant as former trustee of the Almancil Settlement is said to be unnecessary and disproportionate.

Proprietary claim

21. In the draft Amended Cause, paragraph 52 simply states that "*Paragraphs [41] to [46] above are repeated*". I do not believe that including such a paragraph is necessary because paragraphs 41 to 46 already form an integral part of the pleading which must, in my view, always be read as a whole. By way of distinction, the claim being made against the Third Defendant, in its capacity as the former trustee of the Almancil Settlement, is not a separate claim in a different pleading, as would be the case if it were a counterclaim. Because it is unnecessary, being the mere repetition of pleading what are said to be material facts and the consequence the Plaintiff says arises from those facts, I will not permit it to be included. (The same reasoning applies to para. 55 in the draft Amended Cause, which is also not permitted.)

22. The wording in respect of which the Plaintiff seeks leave in paragraphs numbered 53 and 54 is:

> "*53. Louvre was appointed as trustee of the Almancil Settlement by a deed of appointment and retirement dated 8 February. Louvre is a company registered in Guernsey and wholly owned by Louvre (Guernsey) Limited.*
>
> *54. Accordingly, at all material times from March 1993 when the Almancil Settlement was established until March 2010 when it was terminated:*
>
> *54.1 Alnashir retained a beneficial interest in the Offshore Wealth.*
>
> *54.2 The Offshore Wealth and/or its traceable proceeds was the source of the assets of the Almancil Settlement.*

54.3 The transfer of assets to the Almancil Settlement from the Offshore Wealth Trust was unauthorised by the Brothers and further Alnashir was unaware until shortly after 17 April 2015 that the [sic] his equitable interest in part of the Offshore Wealth and/or its traceable proceeds had been disposed of in favour of the trustees of the Almancil Settlement.

54.4 In the premises at all material times Alnashir had a proprietary interest in the Offshore Wealth in the hands of Louvre as trustee of the Almancil Settlement.

54.5 Accordingly, Louvre as trustee of the Almancil Settlement from 1999 to 2010 was a constructive trustee of the Offshore Wealth and/or its traceable proceeds and is liable to account for its dealings with such Offshore Wealth and/or the traceable proceeds for the period from their appointment in 1999 until the termination of the Almancil Settlement in March 2010."

This claim results in relief being sought against the Third Defendant in para. 2) of the prayer:

"*i) A declaration that it was a constructive trustee of the Offshore Wealth and its traceable proceeds; and*

ii) An account of its dealings with the Offshore Wealth and its traceable proceeds."

23. The objection raised by the Third Defendant to para. 54.5 and the corresponding paragraph of the prayer is that the declaration sought against the Third Defendant as trustee of the Almancil Settlement serves no useful purpose at all because it is historic. The primary claim the Plaintiff wishes to advance, to which no objection is raised, is that the assets held by the Third Defendant as trustee of the Kalys Trust represent assets that fall within the description "*the Offshore Wealth*", as a result of which the Third Defendant holds them on a constructive trust rather than on the terms of the Kalys Trust and has a duty to account to the beneficiaries of that constructive trust. Seeking relief against the Third Defendant in its capacity as the former trustee of the Almancil Settlement will simply draw that Settlement into having to incur unnecessary costs. In any event, the Third Defendant has already volunteered to the Plaintiff the accounts relating to the Almancil Settlement for the years ending on 31 December 2008, 31 December 2009 and up to the termination of the Settlement on 24 March 2010, which means there is no need for the Third Defendant to be ordered to account to the Plaintiff; he already knows what has been done with the assets.

24. In support of the submission that a court should be cautious about considering whether to grant any declaration sought, Advocate Hay has referred to what Neuberger J (as he then was) had to say in *Financial Services Authority v Rourke* [2002] CP Rep 14:

> "*It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.*"

The fact that a different cautionary message from that case was cited with approval by Deputy Bailiff Collas (as he then was) in *Fidelity Management Limited v Royal Bank of Canada (Channel Islands) Limited* [2007-08] GLR N-14 does not in itself mean that this guidance from Neuberger J is applicable, but I am satisfied that this accurately reflects the approach this Court takes when considering whether a plaintiff's claim for a declaration should be granted.

Accordingly, if an application to amend a Cause to introduce declaratory relief is made, one of the considerations for the Court will be whether the declaration to be sought serves any useful purpose. If it does not, then the overriding objective will probably lead to the conclusion that leave to make that amendment should not be granted.

25. In response, Advocate Ozanne suggests that there is an inherent illogicality in the position of the Third Defendant. No objection is being raised to the introduction of the paragraphs leading to para. 61, which, as can be seen, is in similar terms to para. 54.5:

> "*Accordingly, Louvre as trustee of the Kayls [sic] Trust is constructive trustee of the property representing the Offshore Wealth and its traceable proceeds and is liable to account to Alnashir for its dealings with such Offshore Wealth and traceable proceeds for the period from the transfer of the Appointed Assets and Alnashir is entitled to the beneficial ownership of one-third interest in the Offshore Wealth and its traceable proceeds now held by Louvre upon his election which he will make at or before trial.*"

26. The position of the Plaintiff is that the First Defendant and, during his lifetime, their father breached their responsibilities to him as a beneficiary of what is termed the Offshore Wealth Trust with the consequence that a portion of the Offshore Wealth was settled by their father into the Almancil Settlement. What is in the Kalys Trust now is the end of a process that will involve looking at what happened to the assets in question from the time they were settled into the Almancil Settlement. The step prior to the assets being within the Kalys Trust, recognising that the Plaintiff's allegation is that these assets are held on constructive trust *inter alia* for him, was that the Third Defendant owned them, but as successor trustee of the Almancil Settlement. In order to establish that the Third Defendant is currently the constructive trustee in the manner alleged, the Plaintiff will have to show that it was also the constructive trustee before the assets were purportedly appointed out of the Almancil Settlement in 2010. If he succeeds in satisfying the Court that his claim is correct, the Plaintiff can properly require the Third Defendant to account to him in respect of the entirety of its stewardship of those assets.

27. Advocate Ozanne also draws a distinction between the provision of a document that is an account and a trustee's duty to account, citing various passages from *Lewin on Trusts*, 19th ed., in support:

> "***7-015*** *Within the first category [of constructive trust] are those where a fiduciary relationship precedes the occurrence of the acts which are complained of and for which a remedy is sought. Here the person upon whom the constructive trusteeship is imposed is a trustee or fiduciary already and the imposition of a constructive trust enables equitable relief to be obtained against him (or those who derive title from him) because of the pre-existing fiduciary relationship …*
>
> ***39-002*** *The claim to an account or to equitable compensation, as it is generally called, must be considered in any given case together with other remedies available where a breach has occurred. It may be possible to trace the trust property, or to pursue a third party personally for dishonest assistance or knowing receipt. Where however a breach has caused loss to the fund and the trustee retains (or is able to recover) the trust property, or has the means to satisfy an award against him, the claim to compensation is the primary claim to be considered.*
>
> ***39-003*** *The claim to compensation for breach of trust has traditionally been brought by way of action for an account. This may be for an account in common form, whereby the claimant falsifies the accounts to show the position as it was before*

the breach of trust was committed. Such an account would be used where a trustee, say, has paid out part of the trust fund to the wrong beneficiary. If such an allegation is proved, then the account is taken as though the unauthorised payment had not been made. …

39-006 *It should be borne in mind that an account does not provide the remedy; it is the first step in a process which enables any deficit in the trust fund to be ascertained. Where the basis upon which a sum has been paid out from the trust fund is not clear, a claim that the beneficiaries be entitled to falsify the accounts may put the burden on the trustee to explain the payment without the claimant having to specify the nature of the breach. A claim for an account involves at least two steps. First, at the end of the trial the trial judge gives a judgment that the defendant do account to the beneficiaries of the trust estate. Later, after more evidence (usually taken by a Master or district judge, not the trial judge), there is a calculation. Then there is judgment for the balance thus found due. Where, however, the evidence at trial has established the amount of any deficit, no account may be needed and the claimant may instead ask for an award of the appropriate amount of compensation. …*

39-010 *It was confirmed by the House of Lords in Target Holdings Ltd v Redferns, that the basic rule on the personal liability of a trustee is that he must restore or pay to the trust estate either the assets which have been lost to the trust estate by reason of the breach of trust or failure to account properly for the trust fund, or compensation for such loss. The form of relief is couched in terms appropriate to require the defaulting trustee to restore the missing assets to the trust estate. If specific restitution of the trust property is not possible, the trustee must pay sufficient compensation to put the estate back to what it would have been had the breach not been committed. Where the trusts are no longer subsisting at the date of trial, the award of compensation is made to the beneficiary who is absolutely entitled. At such point, there is no longer a right to specific restitution of the trust estate. The trustee's liability thus continues in existence after the termination of the trust. Trustees cannot mitigate or alter the quantum of their liability by bringing the trust to an end, such as to require each beneficiary to prove that he has suffered loss.*"

28. My understanding of the claim the Plaintiff wishes to advance is that the First Defendant, or perhaps more accurately their father, settled some of the Offshore Wealth into the Almancil Settlement. The consequence of doing so is that the trustee of the Almancil Settlement, an office to which the Third Defendant was eventually appointed, holds the assets representing those assets on trust for *inter alia* the Plaintiff, rather than under the terms of the Settlement itself. That position applies to the Third Defendant from the time it became the owner, as trustee, of those assets, through to the present time. The switch between the Almancil Settlement and the Kalys Trust is, for these purposes, of no relevance.

29. I cannot, therefore, properly conclude at this stage, on an application for leave to amend, that there is definitely no useful purpose in the declaration sought. It may do little more than reflect the factual position if that is how the Court's findings are made and it will be a matter, after trial, as to whether or not the declaration is to be made or matters left as only a factual finding. It is apparent to me that this will be an issue at trial on the basis of the facts that are to be pleaded by the Plaintiff. Because of the similarity between para. 54.5 and para. 61, I regard each as being what the Plaintiff contends is the consequence of the facts which he will seek to prove. It is, in

my judgment, premature to decide whether or not the declaration the Plaintiff wishes to seek has a useful purpose or not because that can only properly be assessed after a trial.

30. The position in relation to the relief being sought for the period when the Offshore Wealth assets were being held by the Third Defendant, as it thought as trustee of the Almancil Settlement, is similar. If the Plaintiff is correct, I can see how the Plaintiff will then be able to argue that the Third Defendant should be ordered to account in respect of those assets for a longer period than is represented by the accounts that have already been disclosed voluntarily. Further information may be required anyway because the accounts shown to me show that there was some movement in the assets during those two and a bit years, but with no explanation as to why this occurred. There is support for such an argument in *Lewin*. A more wide-ranging enquiry might well be needed in order to understand whether the assets now held as trustee of the Kalys Trust can be used to satisfy the claim made by the Plaintiff to be entitled to a one-third share of the Offshore Wealth. Again, whether or not any particular relief is available will depend on the evidence adduced and the findings of the Court. It is too early to conclude that what has been provided thus far is all that falls to be provided.

31. For these reasons, I reject the opposition of the Third Defendant to the inclusion of para. 54.5 and prayer 2) in the draft Amended Cause. I am satisfied that the Third Defendant has failed to rebut the presumption in favour of allowing those amendments. Had the Plaintiff chosen to bring fresh proceedings including these claims, I very much doubt that the Third Defendant would have succeeded in having these parts of the Cause struck out or summary judgment on them entered in its favour. These would be matters to proceed to trial, at which time the question of whether any relief should be granted against the Third Defendant in respect of the time it was the trustee of the Almancil Settlement will be determined. I take the view that there is nothing inconsistent with the overriding objective in permitting these amendments to the Cause to be made.

Breach of trust claim

32. Paragraph 63 of the draft Amended Cause begins "*In the alternative to the claims pleaded against Louvre above …*". It is apparent, therefore, that the Plaintiff would only reach this alternative claim for breach of trust if it fails on its primary case. The complaint the Plaintiff wishes to make is found in para. 64:

> "*Louvre acted in breach of those duties:*
>
> *64.1 by adding itself to the class of beneficiaries in November 2009, as trustee of the Kalys Trust; and*
>
> *64.2 subsequently appointing the assets of the Almancil Settlement to itself, as trustee of the Kalys Trust in March 2010*
>
> *as set out in more detail below.*"

From the documents exhibited to Ms Stephens' Affidavit, it is clear that both of these steps took place.

33. Those details include referring to clause 7 of the Settlement (although the use of automatic numbering means that the passage quoted in para. 65 of the draft Amended Cause contains numbering that it should not) and the definition of "Excluded Person" in clause 1(i). Paragraph 69 states:

> "*On the true construction of clause 7 and clause 1(i)(i) of the settlement by reference to its wording and syntax, the settlement as a whole and the obvious intention of the parties Louvre was an "Excluded Person" and thereby not capable of being added to the class of beneficiaries.*"

Accordingly, para. 70 alleges that the purported addition of the Third Defendant as a beneficiary of the Almancil Settlement was ultra vires and so the purported appointment to it of the assets of the Settlement was a misapplication of the trust fund and in breach of trust, thereby resulting in loss to the Settlement (as set out at para. 71). The relief is set out in para. 72:

> "*Louvre is liable to account to the Brothers and/or pay equitable compensation for the breach of trust such sum as will restore the value it would have had if the said breach had not been committed.*"

Prayer 4) seeks an account of profits and/or equitable compensation for breach of trust.

34. Paragraph 73 of the draft Amended Cause then states:

> "*Alnashir makes no allegation of negligence against the Defendants at this stage, but reserves the right to do so upon the provision of information and disclosure by the Defendant should it appear that the Defendants (or any of them) have conducted themselves negligently in relation to their dealings with, or safeguarding of, the Offshore Wealth.* "

This is a slightly modified re-statement of para. 19 in the original Cause. Paragraph 19 referred to the first three Defendants who were at the time parties to the action. It did not extend to the original Fifth Defendant. The amendment sought seeks to cover the new Third Defendant. I do not think that para. 73 in the draft Amended Cause falls to be considered as an integral part of the breach of trust claim being proposed against the Third Defendant and as set out in paragraphs 63 to 72. Instead, it seems to me that this is the Plaintiff giving notice of the possibility of raising negligence against any of the Defendants, but clearly not having done so yet. I do not think that there is anything wrong in permitting the substitution of a reference to the Plaintiff's mother, as the original Third Defendant, by a reference that covers all three of the Defendants as they will now be to this Cause. However, because the Amended Cause continues to use sub-headings, it should be made clear that this paragraph is something of general application and not only applicable to the breach of trust claim, in the same way as the proposed para. 74 claiming interest (which is a re-cast version of original para. 25). This clarification could be achieved by adding an appropriate sub-heading or perhaps even by re-positioning the paragraph.

35. The Third Defendant argues that the breach of trust claim in paragraphs 63 to 72 of the draft Amended Cause is hopeless and so leave to introduce it into the Cause should be refused. In the alternative, it argues that even if the claim itself is not hopeless, meaning that a breach of trust has occurred, the Third Defendant is not liable for that breach because of the terms of clause 22 of the Almancil Settlement deed. Advocate Hay submits that these are the very types of questions of construction that are suitable for summary disposal and so an assessment can be made on the material before the Court as to whether the breach of trust claim the Plaintiff wishes to bring has any realistic prospect of success.

36. In contrast, Advocate Ozanne submits that the Court has not been provided with any evidence that will enable it at this very early stage to construe the words of the trust deed in such a way that it can be satisfied that there is no real prospect of success. The threshold for permitting the amendment is a low one. Of course, I reiterate that I am conscious that the Plaintiff might have

chosen to bring this claim for an alleged breach of trust as a beneficiary of the now-terminated Almancil Settlement as of right and the Third Defendant would then have had to decide whether or not to apply to have that claim struck out or for summary judgment in its favour on it. There might not have needed to be any evidence of the type Advocate Ozanne suggests should have been adduced on the present application if the Third Defendant had sought to strike out this claim, but if it had been an application for summary judgment, it is likely that there would have been something more expansive adduced on both sides. Because the short-hand test for a strike out is whether the claim is bad in law and bound to fail, I consider that I can properly approach the question of whether there is a realistic prospect of success on a similar basis. There is no justification for permitting an amendment where the claim is a bad one.

37. Advocate Hay refers to clause 6 of the Almancil Settlement deed as comprising a power on the part of the Third Defendant to do what it did when appointing the entire trust fund of the Almancil Settlement to the Kalys Trust. Clause 6 provides:

> "*NOTWITHSTANDING the trusts and provisions hereinbefore declared and contained the Trustees may at any time or times during the Trust Period (but with the consent in writing of the Protector if any) if in their absolute discretion they shall so think fit:-*
>
> *(a) By any deed or deeds revocable during the Trust Period or irrevocable appoint such new or other trusts power and provisions governed by the law of any part of the world or and concerning the Trust Fund or any part or parts thereof for the benefit of the Beneficiaries or any one or more of them exclusive of the other or others at such age or time or respective ages or times and in such shares and proportions and subject to such terms and limitations and with and subject to such powers of appointment vested in any person or persons and such provisions for maintenance education or advancement or for accumulation of income during minority or for the purpose of raising a portion or portions or for forfeiture in the event of bankruptcy and otherwise at the discretion of any person or persons and with such discretionary trusts and powers exercisable by such persons and generally in such manner as the Trustees may think fit for the benefit of such Beneficiaries or any one or more of them as aforesaid and for the purposes of giving effect to any such appointment by the same deed revoke all or any of the trusts powers and provisions herein contained with respect to the Trust Fund or the part or parts thereof to which such appointment relates and so that in the event of any such appointment the Trustees shall thenceforward hold the Trust Fund or the part or parts thereof to which such appointment relates upon with and subject to the trusts powers and provisions so appointed in substitution for any of the trusts powers and provisions hereof so revoked as aforesaid and in priority to the other trusts powers and provisions herein declared and contained and in any appointment under the foregoing power the Trustees may delegate to any person or persons all or any of the powers and discretions by this Settlement or by law vested in the Trustees.*
>
> *(b) In exercise of the powers conferred upon them by the preceding paragraph of this clause:-*
>
> *(i) Pay or transfer the whole of part or parts or the capital or income of the Trust Fund to the trustees for the time being of any other trust wheresoever established or existing and whether governed by the law of the Island of Guernsey or by the law of any other state or territory under which any one or more of the Beneficiaries are interested*

> *notwithstanding that such other trust may also contain trusts powers and provisions (discretionary or otherwise) in favour of some other person or persons or objects of the Trustee shall in their absolute discretion consider such payment to be for the benefit of such one or more of the Beneficiaries (as defined in Clause 1(a) hereof) …*".

38. Although I have not seen the deed in respect of the Kalys Trust, Ms Stephens deposes to the fact that "*grandchildren of the settlor of the Almancil Settlement (Abdulkarim Popat) were and are beneficiaries*". In the Almancil Settlement deed, "*The grandchildren of the Settlor*" are listed in the Second Schedule, to which reference is made in the definition of "*Beneficiaries*" at clause 1(a). I have evidence, therefore, that the Kalys Trust is a trust to which an appointment pursuant to clause 6 was permissible.

39. Recital F) in the Deed of Appointment, Indemnity and Termination dated 24 March 2010 states:

> "*Under Clause 6 of the Trust the Trustees may by deed during the Trust period with the consent in writing of the Protector appoint such new or other trusts, powers and provisions of and concerning the Trust Fund or any part or parts thereof for the benefit of the Beneficiaries or any one or more of them exclusive of the other or others at such age or time and in such shares and proportions and generally in such manner as the Trustees may think fit for the benefit of such Beneficiaries ("**the Power of Appointment**").*"

(The required written consent of the protector of the Almancil Settlement was given by the protector signing that deed (see recital I)).) In those circumstances, Advocate Hay argues that there is no question but that the appointment made was a valid one and so not in breach of trust as now alleged by the Plaintiff.

40. Further, if there is a problem about parts of the Deed of Appointment, Indemnity and Termination mis-describing the position, because of the reference to the Third Defendant as trustee of the Kalys Trust, and so the Appointee, being a beneficiary of the Almancil Settlement, Advocate Hay submits that such an inaccurate or incomplete description of the power does not invalidate its exercise. In doing so, he relies on the summary of the position set out in *Thomas on Powers*, 2nd ed., para. 7.136:

> "*All that is required is an intention that the property shall pass to someone who is the object of the power. When that intent appears, and the only means by which effect can be given to it is by an exercise of a power by the done, then the law will presume that he must have meant to make use of the only means within his reach of achieving his expressed purpose.*"

41. One of the authorities for that proposition in the footnote to it is *Davis v Richards & Wallington Industries Ltd* [1990] 1 WLR 1511, where Scott J agreed that reliance could be placed on "*the principle that a disposition of property may be regarded as the implied exercise by the disponor of a power vested in him and the exercise of which would be necessary for the disposition to take effect*" (at page 1530A). His Lordship further explained (page 1530F):

> "*A disponor (A) purports to make a disposition of property. The disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and cases to which I have referred is that A's intention to make the disposition*

> *justifies imputing to him an intention to exercise the power, provided always that an intention not to exercise the power cannot be inferred. If the requisite intention can be imputed, the court will treat the disposition as an exercise of the power.*"

This case was cited by the Royal Court of Jersey in *In the matter of the T 1998 Discretionary Settlement* [2008] JRC 062, but that case does not appear to me take Advocate Hay's submissions any further forward..

42. I can refer briefly to two other cases relied upon by Advocate Hay on this issue. The first is an Australian case, *Collins v AMP Superannuation Ltd* [1997] FCA 643, where it was acknowledged that "*an incorrect or incomplete description of the power exercised is not fatal if the intention to exercise the power is otherwise clear.*" An earlier pronouncement of the point by Sargant J in *In re Ackerley* [1913] 1 Ch 510, 515 was "*that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for that purpose.*" All of these cases point in the same direction. Accordingly, if the power being exercised was available to the person exercising it and there is no evidence from which it is apparent or can be inferred that it was not the intention to exercise it, the court will regard the power as having been exercised, thereby perfecting what has happened. In effect, it is the substance and not the form that matters.

43. Advocate Ozanne addresses this submission by querying why there is a definition of "*Excluded Person*" in the Almancil Settlement deed, arguing that this means that the question of whether the Third Defendant intended to exercise the power in Clause 6 needs to be explored at trial. It is not sufficient for the Third Defendant to suggest that this intention to make a disposition from the Almancil Settlement "*can be gleaned*". She goes so far as to suggest that the position of Advocate Hay in arguing that this is a simple construction point enabling leave to amend to be refused amounts to demonstrating why it is that the cause of action to be introduced for alleged breach of trust has a prospect of success. She proceeds to challenge the arguments of Advocate Hay that the Almancil Settlement deed can be read in such a way that the appointment made of the Third Defendant as a beneficiary was valid in any event. Accordingly, before considering the primary position adopted by Advocate Hay I will rehearse the Advocates' respective arguments on that issue.

44. Advocate Hay refers to *In the matter of the C Trust* (unreported, 21 March 2013) in which I had set out (at para. 21) the helpful guidance for the construction of a trust instrument given by the Royal Court of Jersey in *In the matter of the Internine and the Intertraders Trusts* 2005 JLR 236. Without repeating it in full, that guidance involves aiming to establish the presumed intention of the maker(s) of the document from the words used, with those words being construed against the background of the surrounding circumstances, ie, the matrix of facts existing at the time the document was created. However, evidence of subjective intention is inadmissible.

45. Advocate Ozanne has highlighted the reference made to what Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, which was quoted at para. 23 of the *C Trust* case:

> "*Courts will never construe words in a vacuum. To a greater or lesser extent depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error.*"

As a result of this guidance, she argues that there has been no evidence given on behalf of the Third Defendant either about how the Almancil Settlement came to include what it does or in relation to the steps taken by the Third Defendant when executing the Deed of Addition of Beneficiary dated 1 December 2009 or the Deed of Appointment, Indemnity and Termination. In the absence of any such evidence relating to presumed intention, the Court should be reluctant to jump to the conclusions that the Third Defendant suggests it should.

46. Returning to the issue of whether or not the Third Defendant is an Excluded Person, at clause 1(i)(i) of the Almancil Settlement deed, the term "*The Excluded Persons*" is defined *inter alia* as being:

> "*any person who is for the time being one of the Trustees or the spouse of any such person (and for the purposes of this paragraph if any one of the Trustees is a company the expression "Trustees" shall include the shareholders directors and officers of such company and of its subsidiaries and holding companies)*".

The power of addition found in clause 7 of the deed provides:

> "*THE Trustees (with the consent in writing of the Protector if any) shall have power at any time or times during the Trust Period:-*
>
> *(i) to add to the class of Beneficiaries such one or more persons or class of persons (not being an Excluded Person or Excluded Persons) as the Trustees shall in their absolute discretion determine. Any such addition shall be made by deed and:-*
>
> *(a) shall name or describe the person or persons or class of persons to be thereby added to the class of beneficiaries; and*
>
> *(b) shall specify the date (not being earlier than the date of the declaration but during the Trust Period) from which such person or persons or class of persons shall be so added.*"

47. The argument of Advocate Hay is that adding the Third Defendant in its capacity as the trustee of another trust, as opposed to in its personal capacity, does not offend the mischief that the prohibition on adding an Excluded Person is designed to prohibit. He points out that the rationale underlying this prohibition is to prevent a trustee (and this extends also to the protector) and any associates from benefiting from the trust so as to ensure that the trustee's duties to the beneficiaries of the settlement cannot conflict with any direct or indirect personal interest resulting from benefiting from the settlement. This removes temptation from being put in a trustee's way. Accordingly, he suggests that the combined wording of clauses 1(i)(i) and 7 fall to be construed in such a way that there is a distinction between a trustee personally and a trustee in a different representative capacity. This construction is supported by the express power conferred on the trustee by clause 6 of the deed. He suggests that this construction can be tested by considering what the position would be if a trust service provider other than an entity within the Louvre Group were to be appointed as an additional beneficiary and the trust fund, or part of it, appointed to that beneficiary. It would be the beneficiaries of the trust of which the new beneficiary so appointed in that capacity is the trustee who would be the ultimate beneficiaries in exactly the same way as the Third Defendant in the present case holds for the benefit of the beneficiaries of the Kalys Trust. To construe the provision otherwise would, he submits, lead to an illogical result.

48. Advocate Ozanne points out that the wording of clause 7 is clear and unambiguous. Because a trustee is an Excluded Person, the Plaintiff's contention is quite simply that the appointment of the Third Defendant, even in its capacity as trustee of the Kalys Trust as was expressly stated in the Deed, must be ultra vires. In any event, the different arguments about whether or not clause 7 has been properly complied with demonstrate that this is a construction point that cannot be resolved on this application for leave to amend the Cause. As such, it cannot be said that the position the Plaintiff wishes to argue has no realistic prospect of success.

49. I incline to the construction advanced by Advocate Ozanne as to whether the Third Defendant is an Excluded Person, but find that I do not need to reach a conclusion on that issue now in order to decide this part of the application. It seems to me that the construction advanced by Advocate Hay necessarily involves reading in wording to clause 7 that is simply not there. Whether that is something that can be done or even needs to be done could only be resolved after considering further evidence and submissions. However, because there is nothing on the face of the deed indicating that it is only in a trustee's personal capacity that the exclusion engages, my starting point would be to give the words their ordinary meaning, namely that the Third Defendant in 2009 was an Excluded Person and so could not lawfully be added as a beneficiary. Having regard to the definition of "*beneficiary*" given in section 80(1) of the Trusts (Guernsey) Law, 2007 ("*a person entitled to benefit under a trust or in whose favour a power to distribute property may be exercised*"), there is no suggestion that the Third Defendant is a person entitled to benefit under the Almancil Settlement and the power to distribute any property was not really <u>in favour</u> of the Third Defendant as I would ordinarily construe that term. This is because the power to appoint some or all of the trust fund to it to hold on a different trust for the benefit of one or more of the beneficiaries of the Almancil Settlement (properly so categorised) already existed by virtue of clause 6. There is, in my opinion, a difference between becoming a beneficiary to whom a distribution might be made for its benefit and being the trustee of a trust to whom it is permissible to appoint some or all of the trust fund. The existence of clause 6 is precisely why clause 7 operates as it does in accordance with the broad terms used as to who is an Excluded Person.

50. It is in respect of that point where I find myself agreeing with Advocate Hay rather than Advocate Ozanne. The power of appointment in clause 6 is not in a particularly unusual form, indeed, the ability to appoint out assets of a trust into another trust, whether in the hands of the same trustee or others, is sufficiently commonplace for me to hold that I can properly construe what has happened as having been a valid exercise of that power. In reaching that conclusion, it is important to remember that the Plaintiff's wish to bring this alternative claim by introducing paragraphs 63 to 72 into the Amended Cause is predicated on him having been one of the beneficiaries of the Almancil Settlement. However, unlike his contention in respect of the Offshore Wealth Trust, or about the Offshore Wealth generally, in his capacity as a beneficiary of the Almancil Settlement the Plaintiff has no entitlement to any share in the trust fund. He was simply an identifiable beneficiary of a discretionary trust.

51. The likely error, of course, in what the Third Defendant did was to get itself appointed, as trustee of the Kalys Trust, as an additional beneficiary. However, when it came to exercising the power of appointment, it did not matter whether it was a beneficiary or not. As I read clause 6, what has happened was permissible. Moreover, and of some importance, what the Plaintiff wishes to allege as a breach of trust is both the addition of the Third Defendant as beneficiary and the appointment thereafter of the trust fund to the Third Defendant in its capacity as trustee of the Kalys Trust. However, the two steps can only properly be considered conjunctively because the mere addition of the Third Defendant as beneficiary did not result in any loss to the Almancil Settlement capable of being pursued by the Plaintiff as a former beneficiary. It is the step of appointing the whole trust fund and then terminating the Almancil Settlement with which he can

potentially take issue. However, because this was something that could be done pursuant to clause 6, even if some of the wording on the face of the Deed of Appointment, Indemnity and Termination is erroneous, I am quite satisfied this is a cause of action that has no prospect of succeeding. Accordingly, the presumption of permitting it to be included in the Amended Cause has been rebutted by the Third Defendant. It is arguably a *non sequitur* for the Plaintiff in para. 64.2 of the draft Amended Cause to allege that the invalid addition of the Third Defendant as beneficiary means that there could be no valid appointment made to it. To make that leap ignores the effect of clause 6.

52. In these circumstances, I do not need to consider the Third Defendant's alternative argument that there is no realistic prospect of this limb of the Plaintiff's claim succeeding relating on clause 22 of the Almancil Settlement deed. However, had I needed to do so, I would have been inclined to find that clause 22 provided the complete answer for which Advocate Hay argued and this would have been a sound basis for refusing to give leave to amend for the brief reasons that follow.

53. Clause 22 provides:

> "*IN the execution of the trusts and powers hereof no trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investments made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing or act of gross negligence on the part of the trustee who is sought to be made liable.*"

As Advocate Hay points out, this indemnity has to be read in the light of para. 73 of the draft Amended Cause. There is currently no allegation of negligence against the Third Defendant, let alone gross negligence or fraud, so the claimed breach of trust, even if found to exist, would be covered by this indemnity.

54. Advocate Ozanne suggests that the Third Defendant has ignored the effect of clause 21, which provides:

> "*IF a Trustee retires … such Trustee shall be released from all claims demands actions proceedings and accounts of any kind on the part of any person … other than and except only actions:- …*
>
> *(2) to recover from such trustee trust property or the proceeds of trust property in the possession of such trustee or previously received by such trustee (or in the case of a corporate trustee) by any of the officers and converted to its use*."

In my view, reading the trust deed as a whole and bearing in mind the case the Plaintiff wishes to advance in respect of the alleged breach of trust and the remedies to flow from it, clause 21(2) of the deed is not suggested by the Plaintiff to be engaged in the way he wishes to plead his case and clause 22 would afford to the Third Defendant a defence even if there were an actionable breach of trust, which I have found there cannot be. I also question whether it can properly be said that the Third Defendant has retired as trustee anyway, given that the trust has been terminated but, even if it has, the Plaintiff does not appear to be alleging that the trust property has been converted to the Third Defendant's own use.

55. I have even proceeded to consider of my own motion whether, by drawing an analogy with how this issue would have been argued had the Plaintiff started from scratch and faced an application to strike out this claim of breach of trust, any deficiencies in what the Plaintiff wishes to allege could be overcome through further amendment. For example, I have considered what scope, if any, there is for alleging that the Third Defendant has acted dishonestly. I have concluded that

there is no material I have seen that even hints at that possibility. The Plaintiff is really taking a point starting from the premise that the Third Defendant could not be added as a beneficiary, with the consequence that the appointment to it was also a breach of trust. There has been no suggestion in the way it pleads those facts that there was anything untoward about this. However, the consequence of that apparent error is not that the appointment made in 2010 was invalid because of the principles to which I have referred that show that it was the valid exercise of the power contained in clause 6. Accordingly, there is no basis for not concluding that this claim has no real prospect of success. If I am wrong, and there is some material available to him that could be adduced indicating as much, then it remains open to the Plaintiff to seek to bring that claim, whether in this action or separately, by him taking such further steps as are necessary.

Conclusion

56. For the reasons I have given, the Plaintiff's application for leave to amend his Cause is partially successful but not completely so. Many of the proposed amendments were not opposed by the Third Defendant and, insofar as leave is required for them, it is granted. In relation to the paragraphs to which objection has been made, the Plaintiff has persuaded me that there is nothing wrong with para. 54.5, in the sense of there being nothing inconsistent with the overriding objective. Whether or not the relief sought will ultimately be given is a matter for trial rather than being rejected as even capable of being pursued at this stage. However, in respect of the principle matter to which opposition has been raised, I find that the potential claim for breach of trust found in paragraphs 63 to 72 of the draft Amended Cause is a claim which has no realistic prospect of success. In reaching that conclusion, I am satisfied that this raises questions of construction that can properly be determined on the material before me and that this is not an instance where I would be construing the Almancil Settlement deed in any evidential vacuum.

57. As I have indicated, there are a couple of paragraphs that I do not think need to be included where they purport to repeat earlier paragraphs unnecessarily (ie, paragraphs 52 and 55). Leave to include those paragraphs is not given. There are also instances where the pleading is a bit sloppy, eg, mis-spellings of the Kalys Trust and there are other typographic errors that really should have been ironed out before the application was made. Advocate Ozanne acknowledged this and so I think the next step should be the preparation of a revised Amended Cause that takes into account this judgment. It would also be helpful if it were prepared as a document that starts with the original Cause and avoids marginal boxes, but has text that is no longer to be included in the pleading scored through and text to be added underlined in colour. If Advocate Ozanne also wishes to have a "clean copy" where all the changes to be made are incorporated, that is a matter for her.

58. I recall that there had been agreement with the Second Defendant that the time for tabling of defences will be deferred until the parties have all been convened. If there has been no similar agreement with the Third Defendant, because the major part of the Plaintiff's case involves the First Defendant, I suggest that the Third Defendant will have until the normal period of 28 days after the Cause in respect of the First Defendant has been tabled (recognising that there will have to be an application for leave to serve out of the jurisdiction first, unless the First Defendant is approached and provides an address for service) before it is obliged to table its defence. If necessary, I would make such an order of my own motion but, before doing so, invite any comments on how this action will now proceed. I will be dealing with the costs of these applications at the adjourned hearing now fixed for 28 February 2017 and so it is possible that such matters can wait until then if the parties so wish.