[2013–14 Gib LR 9]

S. BUNYAN and E. BUNYAN v. CHURCH LANE TRUSTEES (GIBRALTAR) LIMITED and SEVEN OTHERS

SUPREME COURT (Prescott, J.): February 19th, 2013

Civil Procedure—pleading—striking out—may strike out as failing to disclose cause of action pleading that foreign matrimonial and/or succession laws bestow proprietary interest which fails to specify jurisdictions, periods of time and which law applies to which asset—"and/or" basis where all possibilities presented equally not equivalent to plea in alternative

Civil Procedure—pleading—striking out—may strike out as failing to disclose cause of action pleading of common intention constructive trust which fails to identify at least time span, location, and approximate content of words/conduct from which common intention to be inferred

The claimants applied for directions in respect of a trust of which they were beneficiaries.

The claimants were the widow and youngest son of the settlor of the Pilgrim Trusts. The defendants were the trustees, the son of the settlor from a previous marriage, the settlor's grandchildren and the trust protector. The first claimant married the settlor in 1990, and until his death in 2007 lived with him in England, Canada and Spain. She was aware that he was setting up a trust, into which would be settled assets belonging, she claimed, to her and the settlor jointly. She claimed to believe that the trust would be for the benefit of her, the settlor, and their son only, whereas it was actually also for the benefit of other children and remoter issue of the settlor.

In November 2008, the claimants commenced the present proceedings, seeking directions, *inter alia*, to determine whether the assets of the Pilgrim Trusts were held by the trustees upon the trusts of the Pilgrim Trusts or on some other trusts and if so which trusts; to rectify, set aside or rescind wholly or in part the Pilgrim Trusts or, alternatively, that such part of the assets of the trusts were held on resulting or constructive trust for the first claimant; for an account and inquiry in relation to the administration of the trust and full specific disclosure in respect of stated issues; and for damages and/or the restitution of distributions made from March to May 2008 to the trust, and an account of those distributions. The claim form was amended by leave of the court in 2009, adding more detail to the particulars. In 2011, she applied to further amend the particulars.

Her claim was premised on five main grounds: (1) the matrimonial and/or succession laws of British Columbia and/or Spain and/or England gave her an interest in certain movable property belonging to the settlor, and/or the first claimant and the settlor jointly, before it was settled into the trust, and the court had a discretion to divide such property equitably on her application; (2) there could be inferred, from words and conduct, a common intention on the part of the first claimant and the settlor to treat property belonging to each of them as property belonging to both of them jointly, and in reliance on that common intention, she acted to her detriment by failing otherwise to secure her interest, and by participating in and contributing fully to her marriage; (3) the settlor had represented to her that the trust would be for the benefit of the two of them and their son only, and family assets were settled into the trust without her knowledge or consent, to her detriment, so that the trustees held those assets on trust for the claimants and should be estopped from acting contrary to the settlor's representations; (4) the above circumstances constituted fraud and/or unconscionable conduct on the part of the settlor depriving her of her share of the matrimonial assets in which she had an interest; and (5) her belief that the trust would be only for her, the settlor and their son was a mistake induced by the settlor's representations.

The defendant applied to have the claim struck out, submitting, *inter alia,* that (i) the particulars, as pleaded, did not disclose any reasonable cause of action, or alternatively were an abuse of process, and that the proposed further amendments did not cure those defects; (ii) the first claimant failed to identify which foreign matrimonial laws she alleged applied in respect of which period or which assets, thereby failing to disclose the basis of a proprietary claim to any of the trust assets; in any event, she ought to have the appropriate foreign court determine those proprietary rights before trying to enforce them in Gibraltar; (iii) as regards her allegations of a common intention constructive trust, she had failed to identify any specific words, conversations or promises on which she could rely to establish a common intention between her and the settlor to hold any property jointly, the allegations that such a common intention existed between them were unfounded, she made no claim to have contributed to the purchase price of any property, her commitment to her

marriage to the settlor could not be classed as detrimental reliance, again therefore failing to make any proprietary claim to any trust asset; (iv) she failed to plead estoppel in the particulars yet advanced it at trial; (v) the allegations of fraud on the part of the settlor were unsupported, and in any event disclosed no cause of action against the defendants; (vi) the allegations of mistake on the first claimant's part did not make it clear what her mistake was; and (vii) all the grounds for strike-out advanced were included in the application notice and were therefore properly before the court.

The claimant submitted in reply, *inter alia*, that (i) the amendments should be allowed so her case could be better particularized; (ii) the court should not perceive her advancing three possible applicable foreign matrimonial laws in the alternative as a lack of clarity; (iii) as regards her allegations of a common intention constructive trust, whether her claim of a common intention was unfounded was a question to be decided at full trial, not on an application for strike-out, financial contributions were not determinative but only one of many factors to be considered, and detrimental reliance was not an absolute requirement; (iv) there was an important inter-relationship between common intention constructive trusts and estoppel, and though for estoppel detriment was necessary, it need not be financial; (v) fraud should be given a wide definition in keeping with the principles of equity, as opposed to the commercial sense—it was based on unconscionable conduct rather than actual dishonesty; (vi) by mistake she had believed, or been made to believe by the settlor, that the trust would be for the benefit of her, the settlor and their son Edward Bunyan, not the defendant beneficiaries; (vii) that some of the defendant's grounds, namely those concerning common intention constructive trusts and estoppel, were not included in the application notice and so were not properly before the court; (viii) that any deficiency in her pleadings was attributable to the defendant's failure to disclose a full list of the trust assets; (ix) that anything she had failed to particularize in her pleadings was in any event within the knowledge of the defendant; (x) the action was a CPR Part 64 claim and therefore full particulars were not needed; and (xi) the application for strike-out and summary judgment made by the defendant was made too late and should not be allowed.

Held, allowing the application:

(1) The paragraphs of the particulars of claim which disclosed no cause of action would be struck out. The effect of this was that the remaining paragraphs disclosed by themselves no reasonable grounds for bringing the claim, and would also be struck out (para. 73).

(2) Those paragraphs of the particulars relating to the law of matrimonial domicile would be struck out as they did not disclose a cause of action. The court could not determine from them which law applied, as the first claimant had not specified how any of the foreign laws identified established a proprietary interest in any asset forming part of the trust. She had not identified which country was the country of matrimonial domicile

in any given period, and it ought to be well within her personal knowledge with which country she had the closest connection. She had also failed to tie any particular asset to any particular jurisdiction. A proper plea in the alternative should have first preferred one jurisdiction and provided reasons for so doing, whereas the claimant presented all jurisdictions as equal possibilities and provided no reasons for preferring any of them. It was not for the court to particularize the claim, nor for the defendant to guess what it might be (para. 22; para. 24; paras. 28–29).

(3) Those paragraphs of the particulars relating to common intention constructive trusts and resulting trusts would be struck out as they did not disclose a cause of action. There was insufficient detail in the words and/or conduct from which the common intention could be inferred. Whilst it was understandably hard to be precise when detailing representations and assurances made years ago, the first claimant needed to at least specify a time span, a location, and attempt to reproduce what had been said. The pleadings contained no detail as to the basis for any proprietary claim over any specific property; she need only identify a particular property and a reason she had a proprietary claim to it but she had failed to do even this. Even having accepted that financial contributions were only one of many factors in establishing such a claim, the pleadings did not identify any other factors which ought to have been considered. Whether or not the first claimant's case was credible, the existence of a common intention, the relevant law and the question of detriment were all matters which would have been for the trial, not for an application for striking out (paras. 40–45).

(4) Those paragraphs of the particulars relating to estoppel would be struck out as they did not disclose a cause of action. The detriment which was necessary to establish estoppel and the assurance which gave rise to it should have been fully particularized in the pleadings. The references to the purpose of the trust having been "held out" to the first claimant and "understandings, statements and representations" being made were too vague and general (paras. 49–50).

(5) Those paragraphs of the particulars relating to fraud and mistake would be struck out as they did not disclose a cause of action. The references to assurances made were too vague and generalized. There were no details as to how, when, where or how often the representations were made. The lack of detail made it impossible for the defendants to answer the claim (para. 55).

(6) The fact the first claimant had not been provided with a full list of all the assets in the trust was not responsible for all the deficiencies in the pleadings. Matters such as the applicable foreign matrimonial law and the basis on which she asserted any beneficial interests should already have been well within her knowledge, and yet these matters were also insufficiently particularized. If the full list of trust assets had been as vital as she

contended, it was surprising that it had not been pursued more vigorously (paras. 59–62).

(7) The fact that the defendant knew what the assets in the trust were did not make it unnecessary for the first claimant to particularize her claim to them. It was for the claimant to plead the particulars with sufficient precision to substantiate her claim, regardless of whether those particulars were in the defendant's knowledge (para. 63).

(8) The particulars were required to be fully pleaded, regardless of the claimant having been given leave to bring any application under Part 64; the matter had continued as contentious Part 7 proceedings. The initiative to proceed by way of Part 7, in order to have a chance to plead more fully, came from the claimant, the original particulars were long, and had been twice amended to include even more detail. Having accepted the need to plead full particulars and attempting to do so, the claimant could not now escape the deficiency in her pleadings by submitting that this was a Part 64 action (para. 65).

(9) There may have been some delay in making the application for strike-out by the defendants, and the prompt making of such an application was important, but it was not rendered invalid by that delay. The courts had the power to strike out a claim once a trial had commenced, and the defendants had canvassed the possibility of such an application at an early stage, leaving it to the claimants to provide further particulars or rely on those already pleaded. The claimants were well aware of the possibility of an application for strike-out being made (paras. 68–69).

(10) It was clear from para. 6 of the defendants' application notice that they took issue with the claimant's alleged failure to establish a proprietary interest; this introduced the issue of proprietary trusts, which was expanded on in their skeleton argument (para. 71).

(11) The merits of the application for strike-out would be considered against the particulars of claim in their proposed re-amended form. In general, amendments should be allowed in order that the court could adjudicate upon the real dispute between the parties (para. 7).

(12) The application for strike-out on the basis of abuse of process did not succeed as the application had insufficient detail to support the allegation. Striking out a claim had serious consequences for the party making the claim, and in order that claimants might be able to defend a strike-out application, the category of abuse should be specified and properly supported. Consequently, the application was only considered on the basis of whether or not the claimant had failed to identify reasonable grounds for the claim in the particulars (para. 12).

Cases cited:

(1) *De Bruyne* v. *De Bruyne*, [2010] 2 FLR 1240; [2010] 2 F.C.R. 251; [2010] W.T.L.R. 1525; [2010] Fam. Law 805; [2010] EWCA Civ 519, considered.

(2) *G* v. *G*, [2006] 1 FLR 62; [2005] Fam. Law 764; [2005] EWHC 1560 (Fam), considered.

(3) *Gillett* v. *Holt*, [2001] Ch. 210; [2000] 3 W.L.R. 815; [2000] 2 All E.R. 289; [2000] 2 FLR 266; [2000] 1 F.C.R. 705; [2000] W.T.L.R. 195; [2000] Fam. Law 714, applied.

(4) *Gissing* v. *Gissing*, [1971] A.C. 886; [1970] 3 W.L.R. 255; [1970] 2 All E.R. 780, referred to.

(5) *Hess* v. *Line Trust Corp. Ltd.*, 1997–98 Gib LR 270, considered.

(6) *Jones* v. *Kernott*, [2012] 1 A.C. 776; [2011] 3 W.L.R. 1121; [2012] 1 All E.R. 1265; [2012] 1 FLR 45; [2011] UKSC 53, considered.

(7) *Lloyds Bank Plc* v. *Rosset*, [1991] 1 A.C. 107; [1990] 2 W.L.R. 867; [1990] 1 All E.R. 1111, applied.

(8) *Stack* v. *Dowden*, [2007] 2 A.C. 432; [2007] 2 W.L.R. 831; [2007] 2 All E.R. 929; [2007] 1 FLR 1858; [2007] B.P.I.R. 913; [2007] UKHL 17, considered.

(9) *Swain* v. *Hillman*, [2001] 1 All E.R. 91; [2001] C.P. Rep. 16; [1999] C.P.L.R. 779, considered.

(10) *Three Rivers D.C.* v. *Bank of England (No. 3)*, [2003] 2 A.C. 1; [2001] 2 All E.R. 513; [2001] Lloyd's Rep. Bank. 125; [2001] UKHL 16, applied.

(11) *Walsh* v. *Singh*, [2010] 1 FLR 1658; [2010] 1 F.C.R. 177; [2010] W.T.L.R. 1061; [2010] Fam. Law 247; [2009] EWHC 3219 (Ch), considered.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.3.4: The relevant terms of this rule are set out at para. 11.

r.24.2: The relevant terms of this rule are set out at para. 13.

K. Azopardi, *Q.C.* and *N. Bottino* for the claimants;
L.E.C. Baglietto and *C. Allan* for the first defendant;
A. Vasquez, *Q.C.* for the second to eighth defendant.

1 **PRESCOTT, J.:** Following the grant of *Beddoe* relief, a claim form was issued on November 3rd, 2008. The central issue contained therein concerns the administration of a trust which was settled in Gibraltar in 1999, under the name of the Pilgrim Trust. Abacus Trustees Ltd. are a Gibraltar licensed trust operator and were the original trustees of the Pilgrim Trust. Sometime after the creation of the trust, Abacus were substituted as trustees by Church Lane Trustees (the first defendants) who operate from the same address and form part of the same group of companies.

2 The first claimant is the widow of John Bunyan, the settlor of the trust. The parties entered into a relationship in 1988, and married in 1990. John Bunyan died on June 15th, 2007 and during their marriage the parties lived in England, Spain and Canada.

3 The second claimant is the son of the marriage, and he was born in 1997.

4 The second defendant is John Bunyan's son from a previous marriage. The third to seventh defendants are John Bunyan's grandchildren. The eighth defendant is the protector of the settlement.

5 The claimants seek directions from the court in its supervisory jurisdiction under the Civil Procedure Rules, Part 64, in relation, *inter alia*, to the following:

> "(1) to determine whether the assets of the Pilgrim Trusts are held by the trustees upon the trusts of the Pilgrim Trusts or on some other trusts and if so which trusts;
>
> (2) that the court give directions so as to rectify, set aside or rescind wholly or in part the Pilgrim Trust or, alternatively, that the court direct that such part of the assets of the trust are held on resulting or constructive trust for Mrs. Bunyan;
>
> (3) an account and inquiry in relation to the administration of the trust and full specific disclosure in respect of stated issues;
>
> (4) damages and/or restitution of the March–May 2008 distributions to the trust and an account of the said distributions."

6 On April 20th, 2009, the original particulars of claim were amended with leave of the court. The defence to the action was filed on September 20th, 2010, with the caveat that it was without prejudice to the trustee's right to apply to strike out the amended particulars of claim. On March 9th, 2011, the defendants filed an application notice seeking strike-out, and on September 14th, 2011, the claimants filed an application notice to re-amend their particulars of claim. On January 20th, 2012, the defendants filed an amended application notice seeking, in the alternative, summary judgment on the claim. It is these applications which now come before this court.

7 It is not in dispute that there is a substantial degree of overlap between the applications, and, in the event, common sense and expediency require that they be heard together. As a matter of good sense I turn first to consider the proposed re-amendment. Neither side appears to have spent much time advancing or opposing this application. Mr. Azopardi makes reference to it in the application notice, to the effect that they are intended to better particularize the claimant's case, and identifies the application as a live issue in his submissions in court. Mr. Baglietto makes reference to it

only to say that the re-amendments are opposed on the grounds that they do not cure the defects complained of. I do not propose to embark upon a detailed consideration of the general principles for the grant of permission to amend particulars under the provisions of Part 17, save to say that, based on the generally accepted proposition (which is of course open to qualification by various other factors) that in general amendments ought to be allowed so that the real dispute between the parties can be adjudicated upon, I shall consider the merits of the application for strike-out/summary judgment on the particulars of claim in their proposed re-amended form.

8 In so far as the second to eighth defendants are concerned, they support the application of the first defendant, and submit that the substantive claim by the claimants is misconceived and is "eating into the trust assets unnecessarily."

Background

9 It is not in dispute that during the course of their marriage, the parties lived in Portugal, England, Spain and Canada.

10 It is submitted for the claimants that—

(i) although Mrs. Bunyan was aware her husband was setting up a trust, she was told by him that it was for her benefit, and for the benefit of their mutual son;

(ii) the trust was settled using assets belonging to Mr. and Mrs. Bunyan, and in respect of which Mrs. Bunyan had a joint or some proprietary interest;

(iii) Mrs. Bunyan was unaware of the specific property settled into the trust;

(iv) Mr. and Mrs. Bunyan shared a common intention;

(v) that the respective property each brought into the marriage, and/or which was acquired by each after the marriage, belonged to both in common;

(vi) Mrs. Bunyan never sought or requested details of the trust;

(vii) by virtue of the terms of the trust, the beneficiaries are stated to be Mrs. Bunyan and the children and remoter issue of Mr. Bunyan;

(viii) after Mr. Bunyan's death, there came to light a number of letters of wishes in relation to the trust;

(ix) those letters of wishes indicated, *inter alia*, that Mrs. Bunyan should receive income but not capital from the trust;

(x) at the time of Mr. Bunyan's death, the trust had a value in excess of £3.8m., and

(xi) despite being put on notice of claims by Mrs. Bunyan, the trustees distributed capital sums to the second to seventh defendants in excess of £900,000.

Strike out/summary judgment

11 Provisions relating to strike-out of a statement of case are enshrined in the CPR, r.3.4. Although the precise provision relied upon by the first defendant is not specified in the application notice of January 20th, 2012, it is apparent from Part A thereof that the first defendant relies upon r.3.4(2)(a) and (b), which provides that—

> "the court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings . . ."

12 The matters prayed by the first defendant in support of his application to strike out centre on the alleged failure of the claimants, in both the particulars of claim and the amended particulars, to disclose any reasonable grounds for the claim. There appears to be an abuse of process argument raised as an alternative, but having raised the issue, no details are given of the nature of the abuse of process complained of. The category of abuse is not identified or defined. The consequences of strike-out for the party against whom it is ordered are serious and once made, an allegation of abuse of process must, to my mind, be specific, and properly supported if it is to be capable of proper consideration by the court. Is the abuse complained of in the nature of vexatious proceedings? Is it pointless and wasteful litigation? Is it delay? Is it pursuance of a claim for an improper collateral purpose? Or is it some other category of the very many recognized? In the absence of such detail, the substance of the application for strike-out must rest on whether reasonable grounds for the claim have been disclosed.

13 Provisions relating to summary judgment are enshrined in CPR, Part 24 which, at r.24.2, provides that—

> "the court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
>
> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; . . . and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

14 In considering the above applications, I remind myself that, in order to defeat the application for summary judgment, the claimants must show that the claim has some chance of success, and that the prospect must be real. That said, I also remind myself that this is not a summary trial, and that it is incumbent upon me to consider the merits of the claimants' case only to the extent that it is necessary to determine whether it has sufficient merit to proceed to trial. According to the commentary in the *White Book 2013*, at para. 24.2.3: "The proper disposal of an issue under Pt 24 does not involve the court conducting a mini-trial (*per* Lord Woolf, M.R. in *Swain* v. *Hillman* [(9)] [2001] 1 All E.R. 91)." In addition, I bear in mind the words of Lord Hobhouse of Woodborough in *Three Rivers D.C.* v. *Bank of England (No. 3)* (10), when he said ([2001] 2 All E.R. 513, at para. 158)—"The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality."

15 It is not in dispute that the present case falls both within the ambit of r.3.4 and Part 24, and that both applications can be considered together. This is reinforced by the *White Book 2013*, at para. 3.4.6 which states: "Indeed, the court may treat an application under r.3.4(2)(a) as if it was an application under Pt 24 . . ." However, the manner in which this application has been advanced is in the nature of a strike-out.

16 For the first defendant, it is submitted that the particulars of claim are founded on a number of bases, none of which disclose a cause of action, not least because the claimants fail to link any of the alleged claims to any assets held by the first defendant under the trust. The particulars of claim are criticized by the first defendant on five main grounds, which I shall deal with in turn.

Main grounds

(1) *Law of matrimonial domicile*

17 The first ground relates to rights under foreign matrimonial and/or succession laws. The first claimant alleges that foreign matrimonial and/or succession laws bestow upon her an ownership interest in certain movable property held by her, and/or by her and her husband, during their marriage, and before such property was settled into the trust. The first defendant submits that in order to establish that, it is necessary for the claimant to establish not only that she acquired an interest in certain assets of the marriage, but also that the trust assets were derived from those assets. The law of matrimonial domicile becomes relevant in order to clarify what rights had been acquired by Mrs. Bunyan in respect of

property in various countries, held in Mr. Bunyan's name, or indeed, in their joint names.

18 It is useful to highlight the relevant paragraphs of the particulars of claim:

(i) From paras. 1–3, it is apparent that it is alleged that the parties married in England in 1990. Whilst they were together as a couple, both before and after marriage, they lived in Portugal (1988–1990), England (1990–1999), Spain (1999–2006) and Canada (2006–2007). John Bunyan died domiciled in Canada in 2007, and Mrs. Bunyan holds dual Canadian and British citizenship.

(ii) Paragraph 6 states:

> "At all material times and in the premises the country of matrimonial domicile was Spain and/or England and/or Canada (British Colombia). The law of the matrimonial domicile governs the rights of Mr. and Mrs. Bunyan in each other's property as a result of the marriage."

(iii) Paragraph 7 claims Mrs. Bunyan has the right to "have a court exercise its judicial discretion to divide such property equitably on application."

(iv) Paragraphs 8 and 9 go into some detail about particulars of English, Spanish and British Columbian law.

(v) Paragraph 13 sets out the matrimonial property owned by both parties at the time of the marriage, and acquired by each or both during the course of the marriage.

19 It is said for the first defendant that whilst the particulars of claim set out where the parties lived and when, they make no averment about whether these were countries of domicile, residence or both, and that whilst it is alleged that the law of matrimonial domicile governs Mr. and Mrs. Bunyan's rights in each other's property, it is left to "the defendants and to the court to guess in respect of which period each of those countries was the matrimonial domicile."

20 In relation to para. 7, the criticism from the first defendant is that whilst the claimant asserts a right to have the court exercise its discretion to divide property equitably, no reference is made to what discretion is exercisable under which law, by which court, by reference to which factors or most importantly in respect of what property.

21 In relation to paras. 8–9, the first defendant goes into some considerable detail as to whether the laws of Spain, England, and/or British Columbia in fact can be said to be relevant or have any application to the claim, and concludes that the fundamental deficiency in this part of the

pleadings is that the application of foreign law is not properly pleaded and there is no link between foreign proprietary rights and the trust assets.

22 The claimants submitted that, where the parties were domiciled in different countries, "the applicable law is the one with which the parties and the marriage have the closest connection, equal weight being given to connections with either party" (*Dicey & Morris on The Conflict of Laws*, 13th ed., at para. 28–011 (1999)). I take no issue with that approach, my difficulty arises from the fact that the claimant fails to identify which is the applicable law of matrimonial domicile. Logic would dictate it would be within the knowledge of the first claimant to pinpoint the country with which she had the closest connection, yet the pleadings do not settle upon any country in particular, nor do they tie any particular asset to the law of any particular country.

23 Spanish, English and British Columbian law are all pleaded as the possible proper laws of matrimonial domicile, and the court is urged not to confuse this plea in the alternative with lack of clarity or incoherence. Counsel asserts that the reason for the three laws being presented in the alternative is—

> "because, although on proper reflection it may be more likely that English law is held to be the law of the matrimonial domicile, there is no certainty or agreement on the issue. We acknowledge that the prayer seeks a declaration that Spanish law be held to be that of the matrimonial domicile and, in the alternative, that the court determines the same. Having considered the matter further, we consider on balance that the law of the matrimonial domicile is probably English law"

24 The flaw in this submission is that to my mind, this is not a plea in the alternative in the ordinarily understood definition of the term. A proper plea in the alternative would ordinarily identify the law of matrimonial domicile which the claimant alleges is the correct one, and give reasons for that selection. Thereafter, in the event of that argument failing, other possible laws would be highlighted in the alternative. In the present case, the particulars fail to elect a competent jurisdiction and the substantive law underlying their claim. For the claimant it is submitted that "one of these must be the law of matrimonial domicile," and to my mind that is insufficient. If a party chooses to make a claim, it is incumbent upon him to make it with clarity. The particulars of claim must properly particularize the factual/legal basis upon which the claim is premised, so that the defendant can (if he so chooses) defend the action, and the court can, as it must, know the basis upon which the action is advanced and properly adjudicate on the issues. A party cannot, by a process of default, leave to the court the task of particularizing the claim with sufficient precision so that a cause of action is revealed, nor can he expect a defendant to guess

the premise upon which the claim is made. In my view, there is a demonstrable lack of clarity in this part of the pleadings evidenced by a failure to identify which law applies in this case and in respect of which assets. It is of note that although the prayer seeks a declaration that Spanish law is the law of matrimonial domicile, as aforesaid, at the hearing counsel seemed to contradict that by submitting that upon further reflection the law of matrimonial domicile was "probably" English law. Even at this late stage, the claimants seem unable to identify with any certainty which basket to put their eggs into.

25 The importance of precision of pleadings, identification of the relevant law and its correlation to the relevant assets was recognized in Fentiman, *Foreign Law in English Courts*, at 65 (1998):

> "How foreign law is pleaded is regulated by the normal rules of pleading. No technical rules govern such pleadings specifically although a recognized practice has developed based upon general principles and on what is required to give effect to the purpose of pleadings generally. Any pleading must be full and precise thereby serving three important purposes. The other party is not taken by surprise by matters raised at trial. A court is fully acquainted with the nature of the dispute, an increasingly important matter as courts adopt a more pro-active role in case management. And the dispute's foundations are exposed such that the parties are able to judge their respective strengths and weaknesses and perhaps settle their differences on that basis. Where a party wishes to allege that foreign law governs a given issue both the relevant foreign law and the issue to which it applies must be identified in the statement of claim or defence. Full particulars of its content must be given and the relevant foreign authorities—typically statutory provisions or judicial decisions—must be specified. It is fundamental that only facts are pleaded and not the evidence by which those facts are to be proved. It may be appropriate, however, to elaborate on foreign law by referring in the pleading to an affidavit or an expert's report, thereby incorporating such sources in the pleadings by reference."

26 The first defendant further submits that it is for the foreign court with competent jurisdiction to determine any foreign rights Mrs. Bunyan might have under any foreign law, before such rights can be invoked or enforced in proceedings in Gibraltar. Mr. Baglietto draws an analogy with the case of *Hess* v. *Line Trust Corp. Ltd.* (5). In that case, the appellant sought to challenge the validity of a trust created by her husband, the settlor. The settlor was a Swiss citizen resident in the United Kingdom. The appellant was a United States citizen residing in New Mexico. The settlor created a discretionary trust in Gibraltar into which he transferred the majority of his shares in a Swiss company, registered in Switzerland. Shortly after, he commenced divorce proceeding in New Mexico which the appellant

contested, claiming the trust was void. The New Mexico court held that the previously acquired property of the settlor was not available to satisfy the appellant's alimony claim either under New Mexico law or a Swiss pre-marital agreement. The appellant then instituted proceedings in Gibraltar seeking a declaration that the trust created by her husband was invalid on the ground of fraud. The Court of Appeal, in striking out the statement of claim, held that the proceedings in Gibraltar were fundamentally flawed because the appellant was in the wrong forum, and she first had to establish her rights to certain property against her estranged husband in the relevant foreign court before seeking to enforce those rights in the Gibraltar courts.

27 Mr. Azopardi submits that determination of which law applies is a Gibraltar law question. The Gibraltar court has first to make a decision on which foreign law applies, and only then assess what the scope of that law is on the rights of the parties.

28 If Mr. Baglietto is right, and it is the foreign court which has to decide on any rights the claimant may have in relation to property, the claimant has no cause of action in the Gibraltar forum until the foreign court has done so. If Mr. Azopardi is right, and it is the Gibraltar court which has to identify which foreign law applies, then in my view, it is unable to do so because the claim fails to show how any of the foreign laws identified establish for the claimant a proprietary interest in any asset forming part of the trust. The pleadings are silent as to which foreign law applies to which asset, and as to how any particular asset in respect of which the claimant asserts an interest can be traced into the trust.

29 It is evident from a careful consideration of the proposed re-amendments that they do nothing to cure the defects highlighted, and for the reasons given, I find that those paragraphs in the pleadings which relate to the issues discussed above have no prospect of success and disclose no reasonable grounds for bringing the claim.

(2) ***Common intention constructive trusts/resulting trusts***

30 The second ground relates to Mrs. Bunyan's claim set out at paras. 10, 11 and 12 of the particulars of claim:

> "10. Further, it was the intention of the parties that each should treat the respective property that each brought into the marriage, and property acquired by each after the marriage, as property belonging jointly to both of them in common.
>
> 11. Mrs. Bunyan acted on that common intention to her detriment, by accepting and acting on the representations of the deceased, to that effect referred to below, and not securing her interest in the property in a more tangible way.

> 12. In reliance on the common intention of the parties to the marriage that can be inferred by words and conduct, and in reliance on the representations made detailed below, Mrs. Bunyan did not consider that she need have any concerns as to the fact that she and her son would be cared and provided for fully by Mr. Bunyan and in turn, she fully participated and contributed to the marriage and cared for her husband and family at all times."

31 It is not in dispute that if a property is held in joint names, the *prima facie* presumption is that both parties share the legal and beneficial interest. Similarly, if the property is in the sole name of one of the parties, that party is assumed to have the legal and beneficial interest. In order for that presumption to be displaced, in both cases the onus of proof lies with the party opposing that presumption to establish, according to the principles of equity, that there was either evidence of an express agreement between the parties or, in the absence of that evidence, that there was conduct from which a common intention could be inferred. The doctrine on common intention constructive trust ("CICT") is succinctly set out in *Lewin on Trusts*, 18th ed., at para. 9–66 (2012):

> "A trust arises in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny to another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest and (ii) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The requisite intention may be shown by virtue of an express agreement between the parties, or such an agreement may, in certain circumstances, be imputed to them. Some element of bargain, promise or tacit common intention must be shown in order to establish such a trust. The trust comes into existence at the time of the conduct relied on, not when the court declares its existence . . . These principles apply equally whether the property is held or registered in the name of one or more parties, and take into account the starting point that the beneficial ownership of property will follow the legal ownership, and that the onus is on the party alleging that the beneficial ownership is different to show why."

32 I can find no reference in the particulars of claim as to details of an express agreement, rather, reference is made to "the common intention of the parties to the marriage that can be inferred by words and conduct."

33 For the first defendant, it is said that there are absent from the particulars of claim any details identifying any words, conversations, promises or agreements between Mr. and Mrs. Bunyan such as would

evidence their common intention to hold a particular property, or properties, jointly. Having had the benefit of closely examining the particulars of claim for such evidence of common intention, I can find none. Counsel for the claimants have highlighted none.

34 It is said for the first defendant that there are insufficient particulars pleaded in relation to conduct such as would justify drawing the inference of common intention because—

(i) Mrs. Bunyan's claim that it was the intention of Mr. and Mrs. Bunyan that all property brought into the marriage would be held jointly by them in common is remarkable, because as far back as 2007, when Mrs. Bunyan wrote her "letter of discontent" to the trustees, she never stated that the trust comprised assets which were jointly owned by her and Mr. Bunyan. Further, it is unbelievable that Mr. Bunyan would only want to provide for Mrs. Bunyan and their son to the exclusion of his other children and grandchildren.

(ii) "No plea is made that the first claimant made any contribution to the purchase price of any particular property." Mr. Baglietto points to the importance that contributions to the purchase price may have in evidencing intention by conduct, and relies on the words of Lord Bridge in *Lloyds Bank Plc* v. *Rosset* (7), where he said ([1991] 1 A.C. at 133) that contributions may justify an inference, but "it is at least extremely doubtful whether anything less will do."

(iii) The claimants, having acknowledged at para. 9(3) of the particulars of claim that detrimental reliance on the part of the party seeking to rely on a CICT is necessary as a matter of law, have not properly pleaded detrimental reliance. The detriment relied on in the particulars of claim is, at paras. 11 and 12, as follows:

> "11. Mrs. Bunyan acted on that common intention to her detriment, by accepting and acting on the representations of the deceased, to that effect referred to below, and not securing her interest in the property in a more tangible way.
>
> 12. In reliance on the common intention of the parties to the marriage that can be inferred by words and conduct, and in reliance on the representations made detailed below, Mrs. Bunyan did not consider that she need have any concerns as to the fact that she and her son would be cared and provided for fully by Mr. Bunyan. and in turn, she fully participated and contributed to the marriage and cared for her husband and family at all times."

Mr. Baglietto submits that emotional commitment, contribution to, and participation in a marriage does not constitute detriment, and that as in *G* v. *G* (2) ([2006] 1 FLR 62, at para. 94 *per* Burton, J.), ". . . detriment must truly 'hurt'." Further, he submits that, as is apparent from *Walsh* v. *Singh*

(11), it is necessary to demonstrate that Mrs. Bunyan based her action on a belief that she would acquire a beneficial interest in the properties, and there is no evidence of that in the particulars of claim.

(iv) In order for a constructive trust to arise, Mrs. Bunyan would have had to be induced to act to her detriment in the reasonable belief that by so acting she was acquiring an interest in the property (see *Gissing* v. *Gissing* (4)) and there is no indication in the pleadings of such an inducement.

(v) In any event, the particulars of claim disclose no cause of action because the claimant fails to identify any specific property which she asserts has been transferred into the trust, and in which she asserts she has a beneficial interest.

35 In relation to (i) above, Mr. Azopardi submits that whether the claim brought by the claimants is in fact remarkable or indeed unbelievable is a matter for the court to determine in due course, having heard the parties give evidence. I agree with Mr. Azopardi. It matters not what the first defendant (or indeed any of the parties) thinks of the veracity of the claimants' claim, or the basis upon which it is advanced, so long as it is made within the confines of the law. For the purposes of the strike-out application, whether it is remarkable, unbelievable or indeed entirely credible is a matter for the court to determine at trial having considered all the evidence.

36 In relation to (ii), (iii), (iv), it is submitted for the claimants that divination of the common intention of the parties is wide ranging and is as much concerned with achieving an overall fair result as it is with considering specific conduct. If the court cannot deduce exactly what the parties intended then it "may have no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time" (*Jones* v. *Kernott* (6) ([2012] 1 A.C. 776, at para. 47)).

37 Mr. Azopardi submits that the very essence of CICT is concerned with doing "justice in situations where it would be unconscionable not to give effect to a common intention." Mr. Azopardi relies on the words of Baroness Hale in *Stack* v. *Dowden* (8) ([2007] 2 A.C. 432, at para. 60): "The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in light of their whole course of conduct in relation to it."

38 It is further submitted for the claimants that whilst financial contributions are relevant, they are only one of a number of relevant factors, as was recognized by Baroness Hale in *Stack* v. *Dowden* when she said (*ibid*., at para. 69):

> "In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant

> to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay."

39 In so far as the question of detriment is concerned, for the claimant it is said that, in fact, detrimental reliance is not an absolute requirement: see *De Bruyne* v. *De Bruyne* (1) ([2010] EWCA Civ 519, at para. 51, *per* Patten, L.J.):

> "There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills . . ."

40 There is little I find controversial in the submissions advanced for the claimants on the issue of CICTs. Conceptually, the submissions are sound. The extent of their applicability to the case in question, however, is a different matter and, to my mind, that would have to be determined upon full and substantive submissions after the evidence is heard. It is impossible to rule on the existence/applicability of a CICT at a hearing such as this, and indeed I should not do so. Issues such as determination of the intention of the parties, the law governing the same, whether there was a CICT, or a resulting trust, whether and to what extent there has been detriment, indeed whether detriment is necessary at all, are all matters

quite properly left for trial. The issue which is relevant at this stage is determination of whether the pleadings disclose a cause of action capable of establishing a proprietary interest for the claimant in respect of a particular property or properties. In my view, here is where the pleadings are indeed deficient, and the reason they are deficient can be summarized in one sentence. The first claimant fails to say how and why she has a beneficial interest in any specific property.

41 It is true, as the first claimant alleges, that para. 13 of the particulars of claim sets out "the matrimonial property owned by both parties at the time of the marriage and acquired by each or both during the course of the same," but there is a conspicuous failure to identify the basis upon which the first claimant alleges that she has a beneficial interest in any of the properties listed. The general contention is that by words or conduct such a beneficial interest was created, but particulars are scant. On what basis does Mrs. Bunyan maintain she has a beneficial interest? Was it promised to her upon purchase? Did she contribute financially? Did she contribute to expenses? Were there discussions as to entitlement? What was said to her, when and on how many occasions? Questions such as these are not addressed, the most that is pleaded is that "it was the intention of the parties that each should treat the respective property that each brought into the marriage, and property acquired by each after the marriage, as property belonging jointly to both in common" (para. 10 of the particulars of claim); and that there were "understandings, statements and representations" made by Mr. Bunyan to Mrs. Bunyan as to the basis upon which the trustees held the assets (para. 26 of the particulars of claim).

42 It is apparent from the commentary of Baroness Hale that various factors will be relevant to the issue of common intention, but if the defendants are to be given an opportunity to answer them, and if the court is to rule on them, needs must they should be set out in the pleadings. I do not ignore the obvious difficulty that must be encountered by a spouse in remembering what was said to her during the course of a marriage regarding a particular property, years before the husband passed away, but it is vital to set out the particulars of the agreement, "however imperfectly remembered and however imprecise their terms may have been" (as in *Lloyds Bank Plc* v. *Rosset* (7) ([1991] A.C. at 132, *per* Lord Bridge)). This was the case in *Gillett* v. *Holt* (3), where the pleadings reflected various references to conversations and statements which it was alleged evidenced a common intention. I highlight three, by way of illustrative example:

(i) "*Christmas 1973*. According to the statement of claim (para. 32) Mr. Holt held a dinner for Mr. and Mrs. Gillett at which he 'repeated once again that he would bequeath all his assets' to Mr. Gillett, and 'specifically stated' that he believed that his non-farming assets would be sufficient to pay the tax liability on the estate 'leaving (at the least) the entirety of his

farming business to be passed to the plaintiff free of liability to tax'. . ." ([2001] Ch. at 218)

(ii) "*1974 Golf Hotel dinner*. According to the statement of claim (para. 34) Mr. Holt told Mr. Gillett that he had appointed him executor of his will, and showed him some papers which 'appeared to . . . indicate' that he had 'bequeathed his entire estate' to Mr. Gillett. Again Mr. Gillett's evidence is less specific. His statement says that at a dinner at the Golf Hotel, Mr. Holt said that 'he had now made his will in our favour', with him as one of the executors."

(iii) "*1975 discussion of The Beeches*. Mr. Gillett says that he asked Ken for something in writing to confirm that The Beeches Farm would be theirs. He was told 'that was not necessary as it was all going to be ours anyway'. Mr. Gillett was disappointed but after discussing it with his wife and parents decided 'that Ken was a man of his word so I accepted his assurances'."

43 It is evident from the above that details are not abundant. There is reference to the year when the conversations took place, but not the date, and there is reference to the general gist of the conversations. Importantly however, details—meagre though they may be—are nonetheless pleaded. Conversations are placed within a time span, and given a location, and there is an attempt to reproduce at least the essence of what was said on these specific occasions, if not the precise words. Such details, meagre or otherwise, are notable by their absence in these particulars of claim.

44 It is said for the claimants that they have pleaded the best case possible based upon the information available to them, given that Mr. Bunyan operated sole control of the family finances, and Mrs. Bunyan was never informed about the assets that were settled into the trust. This cannot be an explanation as to why Mrs. Bunyan has failed to particularize the basis upon which she claims to have acquired a beneficial interest in any particular property. She need do no more than identify a property and explain why she has a claim to it. It is to be presumed that that would be directly within her knowledge; she does not need to know what precise assets were placed into the trust to explain why she claims a beneficial interest in any given property. I find there is an insufficiency of pleadings on this point.

45 Finally on this point, there has been some criticism from the first defendant that the claimants have not specified whether the first claimant holds any property on CICT or resulting trust. In my view, that does not impact negatively upon the pleadings. Whether (if it is found to exist) the common intention gives rise to a constructive trust or a resulting trust is a matter for full submissions on the law. What is imperative, at this stage, is that particulars of the common intention be sufficiently particularized so

that in due course the factual matrix upon which the law needs to be applied can properly be determined.

(3) ***Estoppel***

46 The third ground relates to the issue of proprietary estoppel. For the claimants it is said that Mr. Bunyan represented to Mrs. Bunyan that the purpose of the trust was only for the benefit of themselves (*i.e*. Mr. and Mrs. Bunyan) and their mutual son, Edward; that family assets were settled into the trust without her knowledge or consent, to her detriment; that as a result, the trust assets are held on trust for the claimants; and that the trustees should be estopped from acting in contravention of the representations made by Mr. Bunyan to Mrs. Bunyan, and in contravention of the agreement between them.

47 The first point raised by the first defendant, and which does not appear to be disputed by the claimants, is that estoppel has not been expressly pleaded. It is also not in dispute that whilst there are important distinctions between proprietary estoppel and CICT/resulting trusts, there is also an important interrelationship between them. The doctrine of proprietary estoppel is usefully set out in *Lewin on Trusts*, 18th ed., at para. 9–79 (2012):

> "A person may also acquire an interest, or an enlarged interest, in property by virtue of an equity arising through proprietary estoppel. This doctrine applies where one person encourages, or acquiesces in the reasonable belief of, another that the other person will acquire some right over his property, where the other person acts to his detriment in reliance on that belief. The estoppel is premised on the doctrine that equity is concerned to prevent unconscionable conduct, and it is that factor which determines whether an award should be made."

48 The claimants (distinguishing estoppel from CICT/resulting trusts), accepted that detriment is a necessary requisite in the doctrine of estoppel, but they submit detriment—

> ". . . need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances . . . The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded—that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved." (relying on *Gillett* v. *Holt* (3))

49 If detriment is a requirement, logic would dictate that not only the detriment but the assurance which gives rise to it should be particularized in the pleadings. Certainly, it is apparent from the passage above that one cannot assess whether the detriment is substantial unless details of the assurance are known. Even accepting that the assessment of detriment is a matter for full submissions at trial, the factual basis underpinning it must be pleaded.

50 There are various general references in the pleadings to representations made to Mrs. Bunyan, for example, that the purpose of the trust was "held out" to Mrs. Bunyan (para. 17 of the particulars of claim), that "understandings, statements and representations" were made by Mr. Bunyan to Mrs. Bunyan (para. 26 of the particulars of claim), that "representations and assurances" were made by Mr. Bunyan to Mrs. Bunyan (para. 37(3) of the particulars of claim), but no particularization is provided as to the nature of these representations. When were they made? Where were they made? How specific were they? In what context were they made? They are general and vague allegations devoid of details. To this end the particulars of claim in so far as they relate to the issue of estoppel, are deficient.

(4) & (5) ***Fraud and mistake***

51 The fourth ground relates to an allegation of fraud on the part of Mr. Bunyan, as pleaded at para. 40 of the particulars of claim, which states:

> "Mrs. Bunyan avers that the circumstances described herein amount to a fraud on her by John Bunyan, and/or unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement or representations to hold and settle the property for the benefit of the claimants, by which she has been deprived of her share of matrimonial property assets or monies or her interest in that property assets or monies."

52 The fifth ground relates to a mistake on the part of Mrs. Bunyan, as pleaded at para. 41 of the particulars of claim, which states:

> "Further/alternatively, Mrs. Bunyan avers that, by mistake, she believed, and was made to believe by the assurances and representations made to her by John Bunyan, that the establishment of the Pilgrim Trust was to be for the sole benefit of the deceased and the first and second claimants. Mrs. Bunyan had no participation in the establishment of the trust."

53 For the first defendants it is said that the allegations of fraud are unsupported, and even if made out, result in no cause of action against the first defendant. In relation to mistake, it is said that it is unclear what the mistake is. For the claimants it is said that fraud should be given a wide

definition, in keeping with the principles of equity, as opposed to the commercial sense. It is not based on dishonesty but on unconscionable conduct.

54 Paragraphs 41(1)–(3) of the particulars of claim list the particulars of fraud and mistake, which appear to stem from representations made by Mr. Bunyan to Mrs. Bunyan. Paragraph 41(1) states that—

> "John Bunyan held out to Mrs. Bunyan that the establishment of the trust would be for the sole benefit of the deceased, the first and second claimants, and to protect Mrs. Bunyan and the second claimant from a possible future claim by Michael Bunyan."

Paragraph 41(2) states that based on "those representations and understandings," Mr. Bunyan then placed family assets on trust. Paragraph 41(3) states that Mr. Bunyan established trusts and issued letters of wishes in contravention of what was "held out to his wife."

55 Much the same as with CICT/resulting trusts and estoppel, there is reference to representations made, but the reference is generalized. No details are preferred as to how the representations were made, the form they took, where they were made, when they were made, whether they were made once or whether they were repeated. In my view, this results in a deficiency of detail which makes it impossible for the defendants to answer the claim.

56 In addition, the first defendant takes further issue with various specific paragraphs in the particulars of claim on an item-by-item basis. Given the nature of my ruling, it is unnecessary for me to address those submissions, and in any event they do little to advance the first defendant's substantive submissions.

Discovery

57 An underlying reason advanced by the claimants for not being more specific throughout the particulars of claim, in terms of identification of property in respect of which Mrs. Bunyan claims a beneficial interest, which can be traced as having been transferred into the trust, is that it was impossible—

> ". . . to specifically plead what property went into the trust, as she was not in possession of that information. That factual contention runs through the entire pleading. In fact, the prayer to the claim issued in 2008 sought an account and inquiry and full disclosure of all assets settled into the trust, all letters of wishes issued, payments and distributions made since Mr. Bunyan's death and an account of the assets and liabilities of the trust. As will be clear from this skeleton, what has happened since is that the trustees have dragged

> their feet on disclosure, and this has meant that Mrs. Bunyan is still unaware of the full picture. This is not a situation of her making . . ."

and the trustees have blocked disclosure requests by the claimants, and refuse to provide information as to which specific assets were settled on trust.

58 In light of this allegation, it becomes relevant to examine the history of disclosure, albeit not in detail. For the purposes of these applications, it can be summarized as follows:

(1) Disclosure was first sought by Mrs. Bunyan before litigation commenced, and there are various letters from and/or on behalf of Mrs. Bunyan in the bundle evidencing requests for disclosure, specifically:

(a) December 5th, 2007—a request for disclosure of "trust assets that have been settled."

(b) January 18th, 2008—a request for disclosure of the trust deed and letter of wishes. On the same date, Abacus, the administrators of the trust, disclosed the following:

- declaration of trust, dated August 16th, 1999;
- deed of retirement and appointment of new trustees, dated October 15th, 2001;
- deed of exclusion, dated March 6th, 2006;
- deed of addition to the trust fund, dated October 5th, 2006; and
- deed of retirement and appointment of protector, dated October 23rd, 2006.

Abacus indicated that they would disclose accounts of the trust once they had been finalized. They further indicated that the disclosure made was in full satisfaction of Mrs. Bunyan's entitlement to information.

(c) May 15th, 2008—a request for disclosure of the letter of wishes, valuation of the trust assets at the date of Mr. Bunyan's death, a detailed list of all assets settled into the trust by Mr. Bunyan, a current valuation of the trust assets and the available accounts of the trust. On May 23rd, 2008, Church Lane Trustees, the new administrators of the trust, disclosed the following:

- the last letter of wishes of Mr. Bunyan;
- a spreadsheet detailing actions taken by the trustees in relation to administration of the trust; and

- a valuation of the trust as at date of Mr. Bunyan's death.

Church Lane indicated that that trust accounts for the period ending June 15th, 2007 were in the process of being prepared, as was a current valuation of the trust assets.

(d) May 29th, 2008—a reminder on behalf of Mrs. Bunyan that she was awaiting receipt of a list of assets, a record of distributions and accounts for period ending June 15th, 2007, as well as a record of activity/distributions from trust funds since that date.

(e) August 14th, 2008—draft particulars of claim sent to the solicitors for the trustees (Hassans), which included a general claim for disclosure and an account and inquiry, together with an invitation to release the information voluntarily.

(f) September 11th, 2008—a request for disclosure of details of payments made by the trustees to beneficiaries, as well as for information about the current holdings of the trust.

(g) September 19th, 2008—a follow-up request for the information requested on September 11th. On September 22nd, 2008, Hassans replied to the effect that they were considering the request.

(h) September 25th, 2008—a request for full disclosure.

(i) November 6th, 2008—a request for disclosure of distributions made since Mr. Bunyan's death which, if forthcoming, would "obviate the need to make an application for disclosure." On November 17th, 2008, Hassans supplied details of distributions made since Mr. Bunyan's death.

(j) November 19th, 2008—a request for an up-to-date statement of account and confirmation of the current value of the assets of the trust.

(k) December 12th, 2008—a request for a current valuation of the assets held by the trust.

(l) January 21st, 2009—a request for the current state of assets of the trust, a valuation of the trust, payments, receipts or other movements into and out of the trust from January 2007, and receipts from Greatheart Underwriting Ltd. from January 2007. On January 26th, Hassans replied on the following terms:

> "Your client has commenced proceedings by means of a Part 8 claim form. In due course, a case management conference will be heard and directions will be given

> which will include disclosure of all relevant documents. At that stage, our clients would consider what documents are relevant to the issues in the case and make such disclosure as is necessary. Any applications for specific disclosure would normally follow after standard disclosure.
>
> An important part of the disclosure exercise is a consideration of your client's case against the various defendants. In your letter dated December 12th, 2008 you indicated that you were in the process of amending your client's particulars of claim. We have not yet received this, and are therefore not in a position to assess precisely what case our clients have to meet and, consequently, what documents are relevant and disclosable."

(m) February 5th, 2009—a request for disclosure of information requested, on the basis that Mrs. Bunyan was entitled to the information "whether or not an action subsists."

(2) On June 11th, 2009, the court refused an application by the claimants for disclosure; it found that much of the information had been provided, ". . . but not all. The accounts, in particular, were not ready. The court was told at the hearing that they would be soon after the hearing and would be handed over when finalized. The claimants have been furnished with information as to the March–May distributions" (see the ruling of Pitto, J., on June 11th, 2009). Also on June 11th, 2009, the trustees indicated to the court that, in light of its ruling, they would await the disclosure stage of the proceedings before deciding what material to disclose.

(3) The claimants were granted leave to appeal. On July 8th, 2009, the trustees disclosed a set of financial statements for the period 1999–2008 (all dated June 19th, 2009). It is said for the claimant that "even so, this did not deal with all the issues for disclosure and further disclosure was sought." I cannot tell whether further disclosure was sought by further application to the court, or by request; I find evidence of neither in the bundle provided and have been referred to neither. In any event, I am told by Mr. Azopardi that "further limited disclosure was provided in September 2009, just days before the appeal. The appeal was pursued in respect of the ruling by Mr. Justice Pitto, that the action was no longer a Part 64 action. This was rectified in the Court of Appeal."

(4) It is apparent, therefore, that the appeal in respect of the issue of disclosure was not pursued, one would presume, because the requests had been met. Notwithstanding this, the claimants maintain that requests for disclosure remain outstanding, and I am referred to a letter dated September 14th, 2011 from the claimants' solicitors to Hassans. It requested:

"1. A list of the assets (and their value at the time) which were settled into the trust;

2. The source of the aforementioned assets and/or funds;

3. The date of settlement of the aforementioned assets and/or funds; and

4. Any withdrawals/payments out from the trust since the trust was established, which have not already been disclosed."

This letter concluded with a note that ". . . if our client is not provided with the information requested by the time set for standard disclosure, we are instructed to make an application for disclosure."

59 From the history of disclosure set out above, it is evident that there have indeed been numerous requests for disclosure of various documents. It is also evident that there has been a substantial amount of disclosure. The main complaint at this hearing from the claimants in relation to disclosure is that if there has been inability to plead with specificity, it is because they do not know and have never known what assets were settled into the trust, this information has not been disclosed, and is vital.

60 It seems to me that the letter of wishes dated May 20th, 2007, and the document headed "Abacus The Pilgrim Trust" discloses various details about the funds and assets held by the trust. Nevertheless, if the claimants require further and better particulars in the form of a list of assets that were settled into the trust, and that is all that is lacking to make the particulars of claim good, then the question arises: Why has that information not been more vigorously pursued? So far as I can tell from the various requests for disclosure set out at (1)(a)–(m) above, only three make a specific request for disclosure of the assets settled into the trust. The majority of the requests for disclosure centre on requests for valuation of the trust assets, and details of movements in and out of the trust. Indeed, on February 24th, 2009, an application was made for an order for disclosure which sought information in relation to "the current state of assets'" of the trust, a valuation of the trust, an account of movements into and out of the trust from January 2007 "to date," an account of the March–May 2008 distributions, receipts, and general disclosure of accounts. The request did not specifically seek a list of all assets settled into the trust by Mr. Bunyan, and it is not clear to me why not, perhaps because the disclosure requested would yield that information. In any event, despite reliance being placed upon the importance of that information, so far as I am aware, it is not currently the subject of an application for disclosure.

61 It is of interest that the particulars of claim were amended once in April 2009, and now they are the subject of another application for

amendment. In a letter of September 14th, 2011 to the solicitors for the second to eighth defendants, counsel for the claimants states:

> "We refer to previous assertions made on behalf of your respective clients that our clients have not sufficiently pleaded their case. While our clients do not accept that their case has not been evident or sufficiently pleaded from the outset, we enclose herewith our clients' proposed re-amended particulars of claim by way of service upon you."

Whilst not accepting insufficiency of pleadings, the claimants nevertheless appear to be proposing amendments in response to the defendants' assertions that the pleadings are insufficient. They are seeking to introduce further particulars in support of their claim, yet none of the proposed re-amendments cure the deficiencies highlighted. By way of example:

(i) Paragraph 55 makes the assertion that the trustees are holding the assets on constructive or resulting trust for Mrs. Bunyan, but they are silent as to the basis upon which Mrs. Bunyan claims she has a beneficial interest in any given asset (whether settled into the trust or not).

(ii) The proposed re-amendments introduce particulars of foreign law, but they are silent as to what country Mrs. Bunyan claims as her country of matrimonial domicile or residence, and in respect of what period, and are silent as to which foreign law applies to which asset.

(iii) The new amendments are silent as to those assets which have been placed into the trust and in respect of which Mrs. Bunyan claims an interest.

62 Whilst I bear in mind the claimants' contention that disclosure will allow them to identify those assets which were settled into the trust, I cannot ignore that much of the detail absent from the pleadings in relation to proprietary claims based on foreign matrimonial laws, and in relation to the creation of a proprietary trust, appears not to be dependent upon information that would be revealed upon disclosure, but rather consists of matters which one would expect to be within the first claimant's knowledge, yet despite one amendment of pleadings and a second proposed in this application, I find the pleadings still deficient in this respect.

63 Aside from the issue of discovery, Mr. Azopardi relies on four further grounds in opposition to the application for strike-out. The first is that in any event, the trustees are perfectly aware of the assets that were settled on trust, so that even if specific assets have not been pleaded, the first defendant is aware of them. I have been provided with no authority to suggest that if a claimant can show that the particulars of his claim are within the knowledge of the defendant, he need not plead them. In the absence of such, I support the traditional approach that it is for a claimant to make out his claim and plead particulars with sufficient precision to

substantiate his claim regardless of what may or may not be within the defendant's knowledge.

64 The second is that the action being a Part 64 action, the pleadings need not be as detailed as they would otherwise have been, and in fact are more detailed than other more complex claims issued under Part 64, and the Valmore/Summit trust litigation is relied upon as an example. This action issued on November 3rd, 2008, and, given that it was a trust action, was quite properly begun as a Part 8 claim, pursuant to the requirements of Part 64. It is said for the claimants that, in the circumstances, no particulars are necessary, only brief details of the claim, but that—

> "it was only to assist the court and parties that the claimant suggested [before the issue of the claim] that in due course the claim should proceed by way of Part 7, giving the claimants a chance to plead more specifically and the defendants to see more detail."

My understanding is that, in December 2008, the claimant made an application to the court that the matter proceed by way of Part 7, and the court so ordered on February 16th, 2009. Thereafter, it appears that on June 11th, 2009, the court ruled that this action no longer came "within the scope" of Part 64. That decision was appealed and on September 18th, 2009, and the Court of Appeal ruled that—

> "notwithstanding the terms of the ruling of Mr. Justice Pitto, dated June 11th, 2009, and the orders made on February 16th, 2009 and July 22nd, 2009, the appellants shall be at liberty in Action 2008 B No. 163 to bring any application under Part 64 of the Civil Procedure Rules and the Supreme Court may exercise any powers vested in it contained in Part 64 in determining the action."

65 Notwithstanding that particulars had been pleaded fully as required under Part 7, the claimants were given leave to bring any application under Part 64, but availability of that option does not detract from the nature of the particulars already pleaded, or from the fact that these continue to be contentious Part 7 proceedings. The initial particulars of claim were not insubstantial, and by leave of the court were amended, in April 2009, to include more details. By their current application to amend the particulars of claim, the claimants seek to adduce even more details, in fact, their particulars of claim will run into some 30 pages. It is evident, therefore, that detailed particulars form an intrinsic part of the particulars of claim, and that the initiative to have the "chance to plead more specifically" came from the claimants, no doubt because there were factual disputes to be resolved. Having accepted the need to plead particulars in full and having done so, the claimants cannot now escape the requirement to plead full particulars, by submitting that this is a Part 64 action.

66 The third is that in any event, the applications for strike-out and summary judgment should fail because they were not made expeditiously, given that they were made some 3½ years after the action was commenced. In considering this submission, it is interesting to examine a little of the background to this litigation.

67 In December 2008, the trustees filed an application for an extension of time within which to file a defence pending a *Beddoe* application (which was in fact filed in May 2009). In April 2009, the claimants sought to amend their pleadings and the defendants consented to the proposed amendments. In their defence, which the first defendants filed on September 20th, 2010, they state at paras. 1 and 2:

> "1. Church Lane Trustees Ltd. pleads in this defence without prejudice to its right to strike out the claimants' amended particulars of claim, or part thereof, on the grounds that the same disclose no cause of action, are embarrassing, are an abuse of the process, are inadequately particularized, or on any other grounds.
>
> 2. The amended particulars of claim contain a series of vague, confused, incoherent and contradictory assertions making it impossible for Church Lane to plead to many of the facts asserted in any meaningful way. Church Lane reserves the right to amend or expand on this defence, following any strikeout application or a request for further information."

68 Albeit there may have been some delay, and the rules place importance upon prompt application for strike-out, it is also apparent (from commentary in the *White Book 2013*, at para. 3.4.1) that an application for a strike-out can be made at any time, even after trial has commenced.

69 The reservations contained in paras. 1 and 2 of the defence canvassed the possibility, at an early stage, of a future application to strike out. Thereafter, it was a matter for the claimants whether they responded to such a prospect by providing further particulars, or whether they relied on the particulars of claim without amendments but, in any event, absent the element of a surprise application. It may well be that this application could have been made sooner, but in my view the timing does not render it invalid.

70 The fourth is that some of the grounds relied on by the first defendant, in support of their application to strike out, are—

> ". . . entirely new, and not even reflected in their application notice. To that extent, it is submitted that they are not properly before the court. For example, the trustees' application notice raises no issues in relation to constructive trust or estoppel, even though this so dominates their skeleton. The trustees cannot put forward grounds for a strike-out that do not form part of their application."

For the first defendant, it is said that these issues are reflected in their application notice, specifically at para. 6, which states: "The amended particulars of claim disclose no basis upon which the first claimant can establish any proprietary interest in the assets of the Pilgrim Trust, and therefore discloses no cause of action against the first defendant."

71 In my view, it is apparent from para. 6 that issue was being taken in relation to the claimants' alleged failure to establish a proprietary interest. The issue of proprietary trusts is thus introduced in the application notice, and later expanded upon by way of skeleton arguments; it is properly before the court.

72 There is one last matter raised by the first defendant, which is the submission that the first claimant has failed to properly appoint herself as the second claimant's litigation friend because the requirements of CPR, rr. 21.4 and 21.5 have not been complied with. Given the terms of my ruling, it is unnecessary for me to consider this.

73 For the reasons given, I am of the view that the proposed re-amendments do not cure the defects inherent in the particulars of claim, and I do not grant the claimants permission to re-amend. I order that the following paragraphs be struck from the particulars of claim: 6–15, 17, 18, 26–28, 38–43 and 48–51, because they disclose no cause of action. The effect of this is that the remaining particulars by themselves disclose no reasonable grounds for bringing the claim and should also be struck out.

Orders accordingly.