IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD NO. 206 OF 2018 (IKJ)

AND FSD NO. 53 OF 2019

BETWEEN:	**WILLIAM GAYHART AND DEBRA BUCHANAN** **As personal representatives of the estate of Myong-He M. Gayhart (deceased)**	**PLAINTIFFS/JUDGMENT CREDITORS**
AND:	**JOHN G. SCHANCK**	**DEFENDANT/JUDGMENT DEBTOR**

IN CHAMBERS-VIA ZOOM

Appearances:

Mr Harry Shaw of Campbells for the Plaintiffs

Mr Anthony Akiwumi of Etienne Blake for the Zhavorsa Glass Trust ("ZGT"), a Proposed Intervenor

Ms Alice Carver, Nelson & Co., for Cayman Management Ltd. ("CML") and Wheels Up, Ltd ("Wheels Up")

Before: **The Hon. Justice Kawaley**

Heard: **23 July 2020**

Draft Ruling Circulated: **11 August 2020**

Ruling Delivered: **14 August 2020**

HEADNOTE

Enforcement of domesticated foreign judgment - freezing order-default judgments - receivership order - determination of whether assets held by company owned and controlled by judgment debtor are available for execution - piercing the corporate veil - effect of resettlement of Florida revocable trust as an irrevocable Cook Islands trust on title to assets frozen by freezing order - application by foreign trustee for adjournment to intervene to assert claim to local assets - whether rights attached to shares capable of being assigned or delegated to receivers

RULING

Background

1. The Judgment Creditors are administrators of the estate of the late former wife of the Judgment Debtor. They divorced on July 16, 2015, and the Judgment Debtor was ordered to pay the Deceased US$2.5 million. Following her death on July 31, 2016, the Judgment Debtor ceased making the payments ordered by the Circuit Court, Fourth Judicial Circuit, Duval County (the "Florida Court"). On October 30, 2018, I granted a freezing order against the Judgment Debtor ("Freezing Order") and on the same date the Writ which formally commenced the present proceedings was filed. The Freezing Order was continued on the Return Date until January 13, 2021.

2. In an ex tempore Ruling dated February 7, 2019, I dismissed the Judgment Debtor's jurisdictional challenge which was supported by his sworn assertion that he owned no assets in the Cayman Islands at that time. That decision was not appealed and on February 20, 2019, the Judgment Creditors were granted judgment in default of acknowledgement of service in the principal amount of US$558,828.82, plus interest. On September 6, 2019, a further judgment in default was obtained for the principal amount of US239, 416.82. On July 18, 2019, the Judgment Creditors obtained a *Norwich Pharmacal* Order against RBC which was believed to hold accounts linked to the Judgment Debtor.

3. On October 16, 2019, the Judgment Creditors applied by Summons to appoint receivers in aid of execution. Richard Lewis and Andrew Childe of FFP Limited were appointed as receivers on January 13, 2020 (the "Receivers"). Their investigations revealed that a St Kitts & Nevis company, JG Wheels Up LLC., beneficially owned by the Judgment Debtor had (through his interest in the John G Schanck Revocable Living Trust (the "JGS Trust")) opened an investment account with RBC in the Cayman Islands in August 2016. The Judgment Debtor had deposited cash and securities in this account, acting either personally or through entities he controlled. In August 2017, this account was replaced with a new account held by a Cayman Islands company, Wheels Up, Ltd.

4. On November 6, 2018, the Receivers further told the Court, RBC Dominion Securities Global Limited ("RBC"), which had recently been served with the Freezing Order made

by me roughly a week before, was requested by Wheels Up to transfer US$250,000 to an account in the name of the Judgment Debtor. This request was very properly refused by RBC. It is noteworthy that emails revealed that the request was made less than an hour after the Judgment Creditors' Florida attorneys had notified the Judgment Debtor's Florida attorneys of the Freezing Order. On June 18, 2019, the Judgment Debtor executed a Deed of Resettlement purportedly resettling the JGS Trust as a Cook Islands trust, Zhavorsa Glass Trust ("ZGT"). On or about September 13, 2019, the Judgment Debtor was served with the second Default Judgment. On September 16, 2019, he executed a Wheels Up Share Transfer instrument as Trustee of the JGS Trust purporting to transfer the 1000 shares in Wheels Up (the "Shares") to the Nevis-based Zhauorsa Vorsa Trust, registered in Nevis on June 27, 2019 ("ZVT"). On September 24, 2019, the Nevisian Trustee of ZVT requested G.P. Limited ("GP") as Director and CML as Secretary of Wheels Up to register the September 16, 2019 share transfer. This request was denied, not (ostensibly) because of the Freezing Order, but for customer due diligence reasons.

5. It was against this background that the Judgment Creditors applied by Summons dated June 3, 2020 for an Order (in summary):

(1) transferring the 1000 shares in Wheels Up to the Receivers, on the basis that these assets are covered by the Receivership Order;

(2) transferring all assets in the RBC account to the Receivers, on the basis that these assets are covered by the Receivership Order, with any assets that cannot be transferred to be liquidated by RBC;

(3) empowering the Receivers, at their sole discretion, to become signatories to any relevant accounts at RBC;

(4) assigning and/or delegating to the Receivers all powers enjoyed by the Judgment Debtor under the JGS Trust in relation to the assets for the purposes of enforcing the Judgments;

(5) authorising the Receivers to settle any liabilities owed to or claims made by CML;

(6) ordering the Judgment Debtor to pay the costs of the application to be taxed on the indemnity basis.

6. It appeared on the eve of the hearing that the application would not be opposed by the Judgment Debtor. It seemed that CML and Wheels Up would simply be appearing to address the Court (a) on the form of order to be made and (b) to seek an immediate costs award in their favour. On June 13, 2020, the Trustee of ZVT confirmed that it would not be participating in the hearing of the June 3, 2020 Summons. However, in the Third Affidavit of Andrew Childe sworn on the last working day before the hearing, it was deposed that Jackson Russell, a New Zealand law firm, had on July 15, 2020 written to CML on behalf of Ora Trustees Limited ("Ora"). Ora was said to be the Trustee of ZGT.

ZGT had apparently been registered as a Cook Islands Trust on June 18, 2019, which is the same date that the Judgment Debtor purportedly resettled the JGS Trust as ZGT. Ora asserted that "*ZGT regards itself as the legal owner of the Wheels Up shares*", by virtue of the Resettlement of the JGS Trust as ZGT on June 18, 2019. Campbells by letter dated July 16, 2020 to Jackson Russell warned that the ZGT claim was misconceived in light of the Freezing Order and the Receivership Order and that the July 23, 2020 hearing would proceed. Nelsons, on behalf of CML, responded (on July 17, 2020) that the Judgment Debtor had in September 19, 2019 given contrary instructions about the same shares.

7. It was against this further background that Mr Akiwumi made a dramatic late entrance to the stage, not instructed to rescue a delinquent debtor in distress, but rather to seek an oral adjournment on behalf ZGT, a party whose connections with the present application seemed at first blush to be very tenuous indeed. The application was advanced with such calm conviction that I was persuaded, despite my strong provisional view that the application to adjourn should be summarily dismissed, to reserve judgment on both the merits of the Judgment Creditors' Summons and ZGT's adjournment application. The instinctive feeling that ZGT lacked sufficient standing to intervene was not anchored to a solid understanding of what the underlying ownership rights actually were.

8. I also reserved judgment because I lacked an intuitive grasp of the principles governing the precise form of relief which was sought. The controversy between the Judgment Creditors and CML/Wheels Up as to what form of order was appropriate turned in large part on whether the Judgment Debtor should be found to own the Wheels Up assets or whether piercing the corporate veil was an available alternative remedy. The ownership question was complicated by the unexpected ZGT claim. Finally, Ms Carver's submissions in relation to the costs and expenses of CML/Wheels were not easy to summarily resolve.

Findings: the terms and effect of the Freezing Order and the validity of the purported transfer of the Shares

9. The Freezing Order most importantly for present purposes provided as follows:

> "*A PROHIBITION AGAINST DISPOSAL OF ASSETS*
>
> *3 The Defendant must not remove from the Cayman Islands any of the assets referred to in Paragraph 5 below which are in the Cayman Islands, whether in his own name or not and whether solely or jointly owned.*
>
> *4 Paragraph 3 above applies to all the Defendant's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Defendant's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Defendant is to be regarded as having such power if a third party holds or controls the assets in accordance with his direct or indirect instructions.*

5 This prohibition includes the following assets in particular..."

10. The drafting is (in hindsight) mildly askew; the reference in paragraph 3 to paragraph 5 is anomalous. But paragraphs 3 and 4 the Freezing Order clearly prohibited the then Defendant from removing any of his assets from the Cayman Islands "*whether or not they are in his own name*". Paragraph 5 identified particular assets, all securities, which the then Plaintiffs were aware of at that stage had been transferred to a Cayman Islands account. This "extended definition of assets"[1] is only engaged in relation to assets over which the Defendant "*has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Defendant is to be regarded as having such power if a third party holds or controls the assets in accordance with his direct or indirect instructions*".

11. Mr Shaw argued that it was clear that the Judgment Debtor exercised the requisite control over the RBC accounts in the name of Wheels Up. In the Plaintiffs' Skeleton Argument, it was submitted that:

> "25.*When reviewing the historical RBCDS account operation, it is clear that the Defendant regularly instructed RBCDS (either directly or by instructing Wheels Up, Ltd) to liquidate securities in the Wheels Up, Ltd account and transfer the proceeds to his personal bank accounts. Wheels Up, Ltd and RBCDS consistently actioned the Defendant's requests without question. These transactions have no doubt been facilitated by the exercise of the Defendant's unfettered Settlor Powers in his own self-interest under Articles V and VII. The assignment and delegation of the Settlor Powers to the Receivers (which are tantamount to ownership) will assist in giving effect to the Judgments of this Court.*"

12. The ownership and control position as regards the Shares appeared quite clearly to be as follows:

(a) the JGS Trust according to its Sixth Restatement dated May 31, 2017 (still effective when the Freezing Order was made) was a revocable trust governed by Florida law and settled by the Judgment Debtor for his sole primary benefit and for the benefit of his estate. It is on its face directly controlled by the Judgment Debtor who as Settlor had the right to, *inter alia*, revoke the Trust (Article VA) and to receive "*so much of the income and principal as Settlor shall demand...*" (Article VII). The Judgment Debtor was also the Trustee (Article XXI);
(b) the Judgment Debtor as Trustee of JGS Trust was at the material time the legal owner of the Shares;
(c) the Judgment Debtor as shareholder indirectly controlled Wheels Up and its assets;

[1] The legal effect of this wording was recently considered in *Linden Capital LP and ORS-v-Luckin Coffee Inc*, FSD 82 of 2020 (IKJ). Judgment dated June 4, 2020 (unreported) at paragraphs 13, 30-42. However, the context in that case was pre-judgment and the focus was on the implications for ancillary discovery obligations.

(d) CML through GP, the company's director, directly controlled Wheels Up and its assets.

13. Ms Carver submitted that it was wrong to suggest that the Judgment Debtor had the ability to compel GP to mechanically do his bidding. GP as director would have regard to its fiduciary duty to act in the best interests of the company. Wheels Up filed the First Affidavit of Mr Johannes de Jager before the Court, which revealed that GP adopted a neutral position on the ownership of assets issue. A number of nuanced points were made about the form of the proposed Order. It was asserted that paragraph 1 of the Summons would afford sufficient relief and that paragraphs 2 and 3 would be problematic. The strategic goal appeared to be for CML to extricate itself from a sticky situation and for the Receivers to take control of the company by having the Shares transferred to them, rather than for CML to transfer the assets to the Receivers. It was also deposed that as the Judgment Debtor was not a signatory on the RBC account, the Court could not properly direct that the Receivers become signatories. The deponent also sought an Order that Wheels Up's legal costs be immediately paid.

14. Mr de Jager framed his critique of the need for the relief sought under paragraphs 2 and 3 of the Summons by reference to what the best interests of Wheels Up were. However, he said nothing to undermine the starting assumption that although GP was the director of the company and provided signatories for the RBC account, it would in the ordinary course of events have dealt with the assets in accordance with the Judgment Debtor's instructions. There was no suggestion that GP's role was anything other than to be the nominee for the sole shareholder of Wheels Up.

15. It is accordingly pellucidly clear that the Shares which were on any view controlled, either directly (if one ignores the status of Trustee asserted by Mr Schanck) or indirectly (if one views Mr Schanck as controlling the Trustee), by the Judgment Debtor were frozen by the Freezing Order and that the Judgment Debtor had no legal power to transfer the Shares as he attempted to do by executing the Share Transfer instrument dated September 16, 2019 in favour of the ZVT Trustee. Nor indeed could the Judgment Debtor on June 18, 2019 have resettled the JGS Trust assets, including the Shares, on ZGT as its Trustee suggested had occurred. This is not a situation where an arguably valid share transfer has not been registered, creating an enforceable right for the transferee to register the transfer instrument through rectifying the register. The transferee (the ZVT Trustee) cannot enforce the share transfer instrument for one or more of the following fundamental reasons:

(a) there was no enforceable contract for the sale or voluntary transfer of the Shares to ZVT. A trustee cannot at common law or in equity enforce a bare promise to settle assets on trust[2];

[2] Contrast the position under Swiss law where a written promise to make a charitable donation is enforceable: see e.g. *Stiftung Salle Modulable et al-v-Butterfield Trust* [2014] SC (Bda) 14 Com (21 February 2014) at paragraph 149.

(b) any contractual or other rights flowing from the share transfer instrument which executed by the Judgment Debtor in favour of ZVT is unenforceable because it was prohibited by the Freezing Order;

(c) ZVT, unsurprisingly, declined to appear at the present hearing and asserts no right to have the Shares transferred to it;

(d) ZGT did appear, but identified no potentially arguable basis for this Court finding that the Shares were not frozen by the Freezing Order when it was made in October 2018, long before ZGT was even formed.

16. I was invited by Mr Shaw for the Judgment Creditors to assume that it was obvious that the question of who owned shares in a Cayman Islands company was governed by Cayman Islands law. Having regard to the proposed intervention by ZGT, I was anxious about unquestioningly accepting this assumption, but the assumption ultimately appears to me to be justified. In the course of the hearing I queried where the share certificates were located and was told that CML was not sure whether share certificates had ever been issued. The factual position appears to be as follows:

(a) the Judgment Debtor executed a Share Transfer instrument in Vancouver on September 16, 2019;

(b) on September 24, 2019, the ZVT Trustee emailed GP and CML attaching a copy of the Share Transfer instrument and requesting registration of the transfer and asking them to "*prepare a Certificate No. 2 for Wheels Up*" evidencing its legal title to the Shares. No reference was made to the transferor surrendering an existing share certificate and the clear inference is that no share certificate was issued or can be found. The share register is located in the Cayman Islands. Indeed, the Companies Law (2020 Revision)appears to require the primary register to be kept within the Cayman Islands (sections 40-40A) ;

(c) there is no evidence of any other relevant purported transfer of legal or beneficial title to the Shares taking place at any material time abroad. For the reasons set below, I find that there is no arguable basis for contending that the Resettlement of the JGS Trust which seemingly occurred in June 2019 did or was intended to transfer legal or beneficial ownership in the Shares.

17. My own researches suggest that although conflict of law questions are rarely simple, it is safe to conclude in the context of a formally unopposed application to enforce judgments of this Court that questions to the title to shares in a local company are governed by Cayman Islands law. This is on the basis that shares will ordinarily be viewed as situated in the company's place of incorporation, although this assumption may be displaced by countervailing considerations in individual cases e.g. where share purchase agreements negotiated abroad and/or where share certificates are the primary indicator of ownership

and they are located abroad. In *MacMillan Inc-v-Bishopgate Investment Trust* [1995] EWCA Civ 55, Staughton LJ held:

> "*66. I conclude that an issue as to who has title to shares in a company should be decided by the law of the place where the shares are situated (lex situs). In the ordinary way, unless they are negotiable instruments by English law, and in this case, that is the law of the place where the company is incorporated. There may be cases where it is arguably the law of the place where the share register is kept, but that problem does not arise to-day. The reference is to the domestic law of the place in question; at one time there was an argument for renvoi, but mercifully (or sadly, as the case may be) that has been abandoned.*" [emphasis added]

Findings: should the Judgment Creditors' Summons be adjourned to permit ZGT to establish an entitlement to the Shares and underlying Wheels Up assets based on the Resettlement of the JGS Trust Deed dated June 18, 2019?

The effect of the Resettlement on Cayman Islands situated assets

18. It is a helpful starting point for assessing the arguability of ZGT's proposed claim to ask the following threshold question: what impact or potential impact did the Resettlement have, according to its terms, on Cayman Islands situated assets held in the name of a Cayman Islands company in an account with the Cayman Islands office of RBC? The short answer is that the mere resettlement of a Florida trust upon new Cook Islands trusts has no obvious connection with or impact upon the assets to which the present proceedings relate. Any potential impact would depend upon the extent to which the relevant instrument purported by its terms to transfer the title to assets situated in the Cayman Islands.

19. In my judgment, the Resettlement did not on its face purport to do anything other than to amend the terms of the JSG Trust and to appoint a new Trustee with an initial settlement in a nominal cash amount. The Resettlement Deed purports to restate the JGS Trust on the terms of a new irrevocable trust (ZGT). ZGT has more of the features recognisable as a 'proper' trust under Cayman Islands law. It appears that the assets of the JGS Trust would, even under Florida law, be treated as available to meet the claims of Judgment Debtor's creditors. The ZGT has two beneficiaries in addition to the Judgment Debtor. It has a corporate Nevisian Protector and a Cook Islands corporate Trustee. The Judgment Debtor is the Settlor. The Settlor is, however, given this significant controlling power over ZGT assets by clause 22:

> "*The Settlor specifically reserves the right to unilaterally, and without the consent of the Trustee, the Beneficiaries or any other person, to substitute property of equal or greater value, for all or some of the Trust Fund.*"

20. If the assets of the JGS Trust before this purported Resettlement belonged to the Judgment Debtor legally, beneficially and/or under the extended definition of assets in the Freezing Order, on its face the Resettlement did not change the position having regard

to either (a) the title to the JGS Trust assets, or (b) whether or not the Shares and/or the Wheels Up assets were caught by the Freezing Order. It is unarguably clear that any assets within the jurisdiction of this Court which were caught by the Freezing Order could not validly be transferred out of the legal and/or beneficial ownership of the Judgment Debtor simply by settling those assets upon the terms of a new trust, as a matter of Cayman Islands law. But this is not what the Resettlement even purported to achieve in any event on the face of the relevant Deed.

21. To the extent that the Resettlement Deed does not by its terms purport to resettle the JGS Trust Fund upon the new trusts, no such settlement could take place without a separate transfer of assets from John G Schanck Jr. as Trustee and/or Settlor of the JSG Trust to Ora as Trustee of the ZGT. As Settlor of the JSG Trust, the Judgment Debtor had the power to revoke the Trust, amend the Trust, remove and replace the Trustee and "*withdraw any or all of the Trust property*" (clause V.D). However, it is impossible to see on what legal basis merely amending the terms of the Trust and appointing a new Trustee could, without more, be effective to transfer property legally owned by the Judgment Debtor (as Trustee and/or Settlor of the JSG Trust) to an entirely new Trustee.

22. On its face, the Resettlement did not purport to do more than to evidence an intention on the part of the Settlor at some future date to add unspecified assets to the "*Initial Trust Fund*" of U.S.10.00 (Second Schedule). It had no realistically arguable impact on the ownership of the assets owned by the Judgment Debtor and situated here under Cayman Islands law. In transforming the old trust into a new one, like a caterpillar becoming a butterfly, the assets of the old trust (like a cocoon) were left behind when the newly constituted trust emerged. Assuming for present purposes that there is any legal distinction between the Judgment Debtor in his personal capacity and the Judgment Debtor as Trustee of the JGS Trust, since a trust has no separate legal personality, title to the assets in the 'old trust' would have to be transferred from the former Trustee to the new Trustee (Ora) through some form of legal transfer mechanism. The simplest mechanism (Freezing Order apart) would have been for the Judgment Debtor when resettling the JGS Trust to resettle its assets as well. But Mt Schanck clearly elected not to do so.

23. The most powerful evidence that the technical legal disconnection between ZGT and the JGS Trust assets also reflects substantive commercial reality may be found in the acts of the ZGT Settlor himself. On September 16, 2019, understandably (in light of the name in which the Shares were registered) still asserting to be the Trustee of JGS Trust, the Judgment Debtor purported to transfer the Shares to Prestige Trust Company as Trustee of ZVT. This attempted transaction can only have occurred because:

    (a) John G Schanck, Jr. as Trustee of the John G. Schanck, Jr. Revocable Living Trust was still the legal owner of the Shares;

    (b) the Judgment Debtor in September 2019 wished to transfer the Shares to ZVT, not (directly at any rate) to ZGT, to evade the Judgment Creditors enforcement actions and the Freezing Order; and

(c) the Judgment Debtor clearly did not consider that the Resettlement of the JGS Trust as ZGT with its Initial Trust Fund of US$100 had the effect of resettling the JGS Trust assets on the new trusts; and

(d) if the Judgment Debtor had intended to transfer the Shares to ZGT through an ancillary transfer process but had not got around to doing so, he would logically have executed the Share Transfer instrument in favour of Ora as Trustee of ZGT in September, 2019, rather than in favour of an entirely different trust entity.

ZGT's standing to oppose the relief sought by the Judgment Creditors (and the Receivers)

24. In ZGT's Written Submissions, the following main arguments were advanced:

> *"1.The Applicant is the Trustee of the ZGT Trust. By this intervention, it seeks this Court's permission to intervene in and if such permission is granted, an adjournment of the Receiver's application for the transfer of the shares in Wheels Up Ltd. (the "Company") on the grounds that the Company is a constituent component of the trust estate...*
>
> *3. It is acknowledged, that at all material times, the Company was a constituent part of a Florida Trust, of which the Defendant was Trustee, which trust was Amended and Restated as the ZGT Trust.*
>
> *4. The Receiver contends that by reason of this Honourable Court's Mareva Order of 30thOctober 2018 and the Court sanctioned appointment in January 2020, it is entitled to the relief claimed by Summons. The Receiver relies on the proviso on Third Parties in the Mareva Order to justify its claim and principally on the basis that the Defendant is in control of the Company.*
>
> *5. The Applicant contends, as a matter of law, that such a claim is both exorbitant and contrary to principle. If, as is accepted, the ZGT is a valid trust, the issue of control is disposed of in the Applicant's favour. The Receiver's proposition seeks to have it both ways, namely not challenging the validity of the Trust but nonetheless, on the grounds of apparent control by the Defendant, asserting a right to the transfer of the Company's shares.*
>
> *6. On the issue of validity, and subject to expert evidence on Florida and Cook Islands Law, the Trustee reiterates the Amendment and Restatement did not have a terminatory effect on the continuity of the trust estate with the result that the Trustee is in lawful control of the Company as part of the Trust estate"*

25. These submissions essentially contend that the effect of the Resettlement was, by implication or operation of law, to transfer whatever assets the JGS Trust held to the Trustee of the ZGT. It is plain and obvious that these assertions are, for the reasons set

out above, both legally and factually unsustainable. There is no suggestion that the Judgment Debtor even attempted to transfer the assets of the JGS Trust to ZGT by executing any legally cognizable instruments of transfer. On the contrary, there is clear evidence that less than three months after the Resettlement creating ZGT and appointing Ora as its Trustee occurred, the Judgment Debtor attempted to transfer the Shares to an entirely different Trust and an entirely different Trustee. Even if credible expert evidence could be obtained that under Florida and Cooks Islands law the Resettlement operated otherwise than in accordance with its terms to evade a Freezing Order made by this Court, this Court would likely refuse to recognise the legal effect of such foreign laws on public policy grounds. Apart from contravening the terms of the Freezing Order, a transfer designed to defeat the Judgment Creditors' claims would also very arguably be prohibited by statutory avoidance provisions including, most obviously, section 4 of the Fraudulent Dispositions Law (1996 Revision), which provides:

> "*4. (1) Subject to this Law, every disposition of property made with an intent to defraud and at an undervalue shall be voidable at the instance of a creditor thereby prejudiced.*
>
> *(2) The burden of establishing an intent to defraud for the purposes of this Law shall be upon the creditor seeking to set aside the disposition. (3) No action or proceedings shall be commenced under this Law unless commenced within six years of the date of the relevant disposition.*"

26. The Jackson Russell July 15, 2020 letter on behalf of Ora gives the distinct impression that prior to the Judgment Debtor being given notice of the present application, ZGT had no knowledge of its purported ownership of the Shares. Its main purport is that Mr Schanck's legal advisors have indicated that the effect of the Resettlement was to transfer ownership of the Shares under Florida law. Cook Islands law, including a provision of the International Trusts Act 1984 to the effect that trust assets are not available for creditor claims, is relied upon on the assumption that a transfer of ownership by operation of Florida law has occurred. No explanation is advanced in the letter as to why for more than a year, Ora took no steps to procure a transfer of legal title to the assets it was supposedly charged with safeguarding in June 2019.

27. The Judgment Creditors in their Skeleton Argument responded to Ora's attempted intervention on behalf of ZGT as follows:

> "16 *The Receivers were surprised to receive this correspondence for a number of reasons:*
>
> > *16.1The Ora letter is the first mention of the alleged resettlement of the Revocable Trust despite it occurring in June 2019.The Defendant, who is the alleged settlor and original trustee of ZGT, has waited over a year to assert this position. The timing of the letter appears intentionally designed to obstruct the Plaintiffs' Summons a week before the hearing.*

16.2No transfer of Shares had been sought by the Defendant or ZGT until 15 July 2020, and the first that Cayman Management Ltd were notified of the existence of ZGT or asked to recognize ZGT as the alleged owner was also on 15 July 2020.The Register of Members for Wheels Up, Ltd still accurately records that the Defendant is the sole Shareholder.

16.3The alleged resettlement of the Revocable Trust in June 2019 pre-dates the attempted Share transfer by the Defendant to the Nevis Trust in September 2019.The Defendant's recent claims, and the position asserted by his attorneys Bedell Cristin in January [Appendix H, p20], indicate that the ZGT resettlement was not valid as it relates to the assets of Wheels Up, Ltd.

17 The Shares in Wheels Up, Ltd and the Securities beneficially owned by the Defendant remain subject to the Freezing Order and are not capable of being transferred. The Freezing Order pre-dates the alleged resettlement by eight months. For this reason alone, the ownership of the Shares clearly rests with the Defendant and this cannot change while the Freezing Order remains in place."

28. I accept these submissions. ZGT's application for an adjournment of the Judgment Creditors' Summons to enable it to intervene to assert a claim to the Shares must be refused. ZGT has had over a year (since June 18, 2019) to assert a claim to the Shares and has offered no excuse for its delay in doing so. Any claim which it might assert would be liable to be summarily struck out on the grounds that it fails to disclose a reasonable cause of action and/or on the grounds that was an abuse of process because it was bound to fail.

Findings: the ownership of the Shares and paragraph 1 of the draft Order

29. I find that the Shares registered in the name of the Judgment Debtor in his capacity as Trustee of the JGS Trust are legally and beneficially owned by him. This is on the straightforward basis that his purportedly separate capacity of Trustee of a revocable trust which he completely controlled (as at the date when the Freezing Order was made) is not in a legal sense a separate capacity at all. This is not because only a corporate trustee or another individual could assert different legal capacities. It is because having regard to the structure of the JGS Trust there was no substantive distinction between the Judgment Debtor in his personal capacity and the Judgment Debtor as Trustee of the JGS Trust. As Trustee, Settlor and primary beneficiary of that Trust, Mr Schanck was not in reality wearing 'separate hats'. He was effectively wearing one hat with different name tags attached to it. Critically:

(a) as Settlor, the Judgment Debtor was empowered to transfer the Trust Property to himself as Trustee (Article III);

(b) as Settlor, the Judgment Debtor retained the right to revoke the Trust and direct to whom the Trust estate should be distributed, as well as the power to withdraw any and all of the Trust Property (Article V); and

(c) the income and capital of the Trust were to be applied for the welfare of the Judgment Debtor as Settlor (and his dependents) during his lifetime (Article VII).

30. I find no need to formally consider the Florida law position which should, in the absence of contrary expert evidence, be presumed to be the same as Cayman Islands law. The actual United States legal position, considered by Lord Collins at paragraphs 47 to 50 of the *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and Five Others* [2011 (1) CILR 467] ("*TMSF*") case, appears to be consistent with the presumption in several U.S. States (and in fact Florida), either as a matter of common law or statute law[3]. No further authority is needed to support the finding that the Judgment Debtor should be regarded as the legal and beneficial owner of the Shares, and that the fact that he asserted the capacity of Trustee of the JGS Trust in acquiring the Shares in ownership terms means nothing. However, the legal position is helpfully illustrated by the recent decision of the Privy Council in *Webb-v-Webb* [2020] UKPC 22 (3 August, 2020) (in relation to a more 'robust' trust deed than the one in this case), in which *TMSF* was referred to with apparent approval. The decision confirms that finding that assets purportedly held by a trust belong to the settlor for judgment enforcement purposes does not require a finding that the trust is a sham and wholly ineffective. Lord Kitchen opined as follows:

> "*87. There is, however, no inconsistency between the finding by Potter J, upheld by the Court of Appeal, that the trusts are not shams and a conclusion that Mr Webb's attempts to create the trusts have failed or are defeasible. Acceptance that Mr Webb intended to create trusts does not in any way preclude a finding that he reserved such broad powers to himself as settlor and beneficiary that he failed to make an effective disposition of the relevant property. Moreover, and as I have explained, the powers of clause 10 are conferred on Mr Webb as settlor, not in his capacity as Trustee or Consultant. These powers were therefore amply sufficient for Mr Webb to arrange matters in such a way that he alone would hold the trust property on trust for himself and no-one else, with the consequence that the legal and beneficial interest in all of that property would vest in him.*"

31. The Judgment Creditors are in principle entitled to an Order transferring the Shares to the Receivers. But that relief is no longer sought because of conflict of interest concerns flowing from becoming a shareholder of Wheels Up. There is no useful purpose in

[3] The Judgment Creditors' counsel pointed out that Florida Trust Code in force in 2019 provides: in Chapter 736 Section 736.0505 (1) (a): "*The property of a revocable trust is subject to the claims of the settlor's creditors during the settlor's lifetime to the extent that the property would not otherwise be exempt by law if owned directly by the settlor.*"

appointing Receivers to assist with executing this Court's judgments if the Judge does not pay heed to the specific enforcement powers the Receivers think they need. However, the finding that the Receivers are entitled to have the Shares transferred to them provides an important legal platform for the Judgment Creditors to seek less intrusive relief.

32. I accordingly reject the submission of CML that an Order in terms of paragraph 1 of the proposed draft Order is all the Judgment Creditors need. The Judgment Creditors and the Receivers are in my judgment the best judges of what the best tailor-made enforcement remedies are. CML is a third party, primarily concerned with recovering its costs and expenses and avoiding being left to potentially liquidate the company.

Findings: the availability of the Wheels Up assets in the RBC account and paragraphs 2-4 of the draft Order

The Receivership Order

33. The Receivership Order materially provides as follows:

> *"THE COURT HEREBY APPOINTS Richard Lewis and Andrew Childe of FFP Limited, without giving security, to collect, get in and receive the debts now due and owing and other assets, property and effects of the Defendant John G. Schanck, whether owned by him personally or beneficially, including any shares held on his behalf or for his benefit at RBC Dominion Securities Global Ltd and any interest held by or for the benefit of the Defendant in Wheels Up, Ltd, for the purpose of enforcing the Judgments of this Court.*
>
> *AND IT IS ORDERED:*
>
> *1 That the Defendant and his agents, including Cayman Management Ltd and RBC Dominion Securities Global Ltd in the Cayman Islands, do forthwith deliver to the said Richard Lewis and Andrew Childe all securities and assets in their hands for such outstanding estate together with all books and papers relating thereto, including any and all documentation relating to the Defendant's ownership or interest in such securities or assets, whether personally or beneficially, including any interest which he may have in Wheels Up, Ltd.*
>
> *2 That the Defendant does assign and/or delegate to the said Richard Lewis and Andrew Childe any and all powers that he may hold which may need to be exercised for the purpose s of receiving and realising the value of such securities and assets..."*

34. The Receivership Order was served on the Judgment Debtor's local attorneys on January 16, 2020. He neither complied with the asset disclosure obligations in paragraph 3 of the Order nor applied to set it aside. It appears that CML and RBC provided the information sought under paragraph 1 of the Receivership Order and that the Judgment Debtor failed

to comply with paragraphs 1 and 2 altogether. He has been ordered to transfer all assets in the RBC account and/or to assign or delegate any necessary ancillary powers to the Receivers and does not oppose the present application, made in more specific terms, for just such relief.

Paragraphs 2-4 of the Draft Order

35. Paragraph 2 of proposed draft Order (seeking declaratory and consequential enforcement relief) provides as follows:

> "*2.All securities and other assets, including cash, held in Wheels Up, Ltd account with RBC...are securities and assets which are subject to the Order of this Court dated 13 January 2020. Those capable of being transferred and delivered to the Receivers shall be so transferred and delivered without any deduction or set-off. Any securities and/or assets that may not be capable shall be paid to Richard Lewis and Andrew Childe of transfer shall be liquidated by RBC... and the proceeds of such liquidation (net of any fees or commissions payable in respect of their liquidation) shall be paid to Richard Lewis and Andrew Childe as Receivers for all purposes of enforcing the Judgments of this Court against the Defendant.*
>
> *3. Richard Lewis and Andrew Childe be added as signatories on the RBC...accounts in the names of Wheels Up, Ltd in place of the current signatories.*
>
> *4. The powers granted to the Defendant pursuant to the Sixth Amendment to the Revocable Living Trust of John G. Schanck, insofar as they may be exercised in relation to the abovementioned assets and securities, are powers which fall within paragraph [2] of the Order of this Court dated 13 January 2020 and are hereby assigned and/or delated to Richard Lewis and Andrew Childe as Receivers for the purposes of enforcing the Judgments of this Court."*

Governing legal principles

36. The Judgment Creditors advanced the following important submissions about the Court's jurisdiction in their Skeleton Argument:

> "26. *Pursuant to s 37(1) of the Senior Courts Act 1981 (England and Wales), which applies in this jurisdiction by operation of s 11(1) of the Grand Court Law (2015 Revision), the Grand Court has jurisdiction to '...grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and equitable to do so.' Section 37(2) also confirms that 'any such order may be made either unconditionally or on such terms and conditions as the court thinks just' (emphasis added. The Grand Court's jurisdiction to grant the relief sought in the*

Summons as ancillary to the appointment of receivers or the imposition of the freezing order is clear.

27. Beyond the statute, the Court's wide jurisdiction to appoint a receiver by way of equitable execution was confirmed by the Judicial Committee of the Privy Council in the leading Cayman Islands decision of Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and Five Others[2011 (1) CILR 467] ("TMSF")where receivers were appointed over the judgment debtor's power to revoke a revocable discretionary trust on the basis such bare powers were tantamount to ownership of property. The Privy Council, following the UK Court of Appeal in Masri v. Consolidated Contractors Intl. Co. SAL, confirmed that the overriding consideration for the Court was the 'demands of justice', and that a receiver by way of equitable execution could be appointed over any asset regardless of whether it was presently amenable to execution.

28. These principles were relied upon when granting the Receivership Order. As regards the orders now sought, the Privy Council confirmed the Court's ability to also make ancillary orders in aid of relief. The Privy Council observed in TMSF at paragraphs [61]-[62]:

> *'61. In the present case the appropriate order would be that Mr Demirel should delegate his powers of revocation to the receivers, so that they can exercise them. There is no impediment to the court making such an order. The court may make an ancillary mandatory order: see Derby & Co. Ltd. v. Weldon (No. 6) (10) (power to order transfer of assets from one jurisdiction to another in aid of Mareva injunction).*
>
> *62. In the present case, the power of revocation cannot be regarded in any sense as a fiduciary power, and the respondents do not suggest otherwise. The only discretion which Mr. Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership.'*

29. The paragraph [2] relief is of a similar nature to the ancillary relief granted in Derby & Co Ltd v Weldon, albeit less onerous. No transfer of assets across jurisdictions is sought, only the transfer of assets within the same bank, in recognition of the Judgments already entered and the unchallenged determination by the Receivers that the Wheels Up, Ltd's assets are beneficially owned by the Defendant for the purposes of the Receivership Order.

30. Section 37(2) of the Senior Courts Act 1981, and the decision in TMSF, also supports the specific delegation and assignment to the Receivers of the Settlor Powers under the Trust Deed (particularly Articles V and VII). In particular, in TMSF the Privy Council held at [52] that '[a] power of appointment is capable of

being delegated where the holder of the power owes no duty of trust or confidence to another person'.

31. The Privy Council in TMSF also comments on the current view of revocable living trust in the United States, and provides clear support for an order to be made on the terms sought. At paragraph [47] of the judgment it is observed:

> *'47. There is an extensive jurisprudence in the United States to which the Board was referred, in which both creditors and trustees in bankruptcy have been able to reach trust assets which were subject to a power of revocation. As the leading textbook, Scott and Ascher, Trusts (5th ed 2007), says (vol 3, para15.4.2): "With the rise, primarily in the second half of the twentieth century, of the revocable inter vivos trust as a popular will substitute, the error of denying the settlor's creditors access to property held subject to a revocable trust has become widely apparent. The courts, as well as the legislatures, have concluded, in a variety of contexts, that the assets of a revocable trust are, in fact, subject to the claims of the settlor's creditors, both during the settlor's lifetime and after the settlor's death, precisely because the settlor of a revocable trust necessarily retains the functional equivalent of ownership of the trust assets.... The trend in the courts, as well, is to conclude that the settlor of a revocable trust should be treated as the virtual owner of the trust property, especially insofar as the rights of creditors are concerned..... The Restatement (Third) of Trusts succinctly puts it this way: a revocable inter vivos trust 'is ordinarily treated as though it were owned by the settlor.' [section 25(2) (2003)] Thus, property subject to a revocable trust 'is subject to the claims of creditors of the settlor or of the deceased settlor's estate if the same property belonging to the settlor or the estate would be subject to the claims of the creditors...'"*

37. These submissions seemed compelling in the course of the hearing, subject to the need to carefully consider the impact of the Resettlement on the analysis of what powers the Judgment Debtor now had over Wheels Up and its assets. I have now found (above) that the Resettlement had no arguable impact. It is comparatively straightforward to reject the notion that the Judgment Debtor could validly have disposed of all of his powers over the assets caught by the Freezing Order. It is less straightforward to accept that the powers that he retained were derived from his status as Settlor of the JGS Trust, as the Judgment Debtor's submissions implied, apparently seeking to marry the principles and facts in *TMSF* with the factual matrix of the present case. To my mind it is more appropriate (in the present judgment enforcement context) to view the powers the Judgment Debtor has *qua* Wheels Up shareholder as simply representing powers he always in substance held and exercised in his personal capacity. I have, for reasons set above, now found that Mr Schanck remained the legal and beneficial owner of the Shares despite purporting to control Wheels Up in a solely fiduciary capacity. It remains to consider whether analogy

between exercising trust powers in relation trust assets and controlling a company and its assets is in the present legal context a good one.

38. In the alternative, acknowledging that his primary point was not a "slam-dunk" one, Mr Shaw advanced in the Judgment Creditors' Skeleton Argument what appeared at first to me to be a more compelling submission that veil piercing was appropriate if delegating powers was not:

> "35. *If the Court is not prepared to grant the ancillary relief sought above by directing the transfer of the RBCDS securities to the Receivers, the Court is invited in the alternative to pierce the corporate veil of Wheels Up, Ltd for the singular purpose of depriving Mr Schanck of the advantage that he would otherwise obtain by the separate legal personality. The assets and securities beneficially owned by Mr Schanck would then become subject to the Receivership Order as if owned by him personally.36In the UK Supreme Court decision of Prest v Petrodel Resources Limited and others [2013] UKSC 34,27the leading decision on piercing the corporate veil which similarly arose in the matrimonial context and has been followed in the Cayman Islands Lord Sumption observed at [35]:*
>
> > *'I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.*
>
> *37. Earlier at [28], Lord Sumption highlighted the distinction between the evasion principle and the concealment principle, the latter being one which does not justify piercing the corporate veil. He observed:*
>
> > *'...The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the 'façade', but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard*

the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement.' ...

40. If the Court considers it is restricted from granting ancillary relief under s 37(2) of the Senior Court Act 1981, the evasion principle is applicable on the facts here and the Court has jurisdiction to pierce the corporate veil of Wheels Up, Ltd. When the corporate veil is lifted, the RBCDS securities and cash which belong beneficially to the Defendant would, without more, be subject to the Receivership Order and would be transferrable to the Receivers by RBCDS pursuant to the terms of the Receivership Order."

Findings: ownership and control over the assets in the RBC account/ assignment and/or delegation of powers

39. The Judgment Debtor was clearly the legal and beneficial owner of the Shares. On the face of it, though, Wheels Up legally owned the assets in the RBC account. On what basis can he be compelled to transfer those underlying assets to the Receivers by way of enforcement of the Judgments against himself? The evidence suggests that he funded the RBC account and that on any practical view the assets of Wheels Up were held for his sole benefit. There is no indication that Wheels Up had any business purpose other than to hold assets to the Judgment Debtor's order. The First Affidavit of Johannes de Jager sworn on behalf of GP, the company's director, describes the "*primary purpose*" of Wheels Up as being to "*manage marketable securities, properties and other assets*" (paragraph 12). It is clear that Wheels Up had a director provided by CML and that the Judgment Debtor himself had no direct signatory authority in relation to the RBC account. But there is no evidence of any other person whose directions the director (GP) would follow. On July 4, 2017, the Judgment Debtors opened an account with CML and agreed to indemnify CML in relation to the incorporation of a company and the provision of registered office services, management services, opening a bank account and acting as nominees.

40. When assessing the question of control, there is a fundamental distinction between widely held companies run by professional directors with limited shareholder input and a "one man shop" owned by a single shareholder where the shareholder appoints a nominee director. In the latter category of case, into which broad category Wheels Up falls, the Court is entitled to assume that the director is a nominee who will ordinarily follow the shareholder's general instructions. The notion that the sole owner of a company would empower a stranger to manage his company's assets otherwise than subject to the shareholder's instructions flies in the face of common sense. Neither Wheels Up nor CML claim to be regulated entities offering specialist brokerage services under contractual arrangements conferring primary decision-making authority with respect to asset management to an investment manager. It also is clear that the power to give

instructions to CML and/or GP (as the sole director of the company) is not in a direct sense a power derived from the JGS Trust as such. It is an incident of ownership of the Shares. Here, unlike in *TMSF*, the assets were legally owned by a company, not a trust.

41. Is the power to control the Wheels Up assets (which the Judgment Debtor undoubtedly retained as shareholder of Wheels Up) analogous to the sort of power conferred by an instrument which is delegable? *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and Five Others* [2011 (1) CILR 467] does not as a matter of first impression provide a crystal clear answer because the focus there was on a power conferred by a trust instrument to deal with trust assets. In principle, however, the analogy seems to me to be a good one. The critical question is a practical one: does the judgment debtor have the unilateral and unfettered power to direct that assets legally held by a third party should be paid to settle a judgment debt, a power which he could but is unwilling to exercise? If the answer to this question is yes, the relevant power should be capable of being delegated to receivers in aid of execution.

42. Apart from CML's assertion through Mr de Jager's Affidavit that GP as director would always act in the company's best interests, there is no evidence to contradict the natural assumption that a nominee director will deal with the assets of a solely owned investment holding company in accordance with its owner's instructions. I would accept Ms Carver's submission that GP was required to act in the best interests of Wheels Up as being entirely correct as a statement of legal principle. On the facts of the present case however, with no suggestion of insolvency, the interests of the company and its sole shareholder would be one and the same. There were, in the ordinary course of events with no doubts about Wheels Up's solvency, no other stakeholders whose interests a *bona fide* director would have to take into account. Mr de Jager merely deposed (as regards the control issue) as follows:

> "*11...Whilst it is acknowledged that payments have been made from the Company's assets to Mr Schanck at his request, this is not as of right and such payments are always at the discretion of the Director...*"

43. What is relevant in the present context is not abstract theory but practical reality. Less than 24 hours after the Freezing Injunction was emailed to Mr Schanck's Florida attorneys in October 2018, Wheels Up was requesting RBC to transfer US$250,000 to an account in the name of Mr Schanck. In the *TMSF* case, the critical test formulated by Lord Collins was as follows:

> "52. *A power of appointment is capable of being delegated where the holder of the power owes no duty of trust or confidence to another person. Sugden (Lord St Leonards), Powers (8th ed. 1861) states (at 179, 180–181, 195–196):*
>
> > *'... wherever a power is given, whether over real or personal] estate, and whether the execution of it will confer the legal or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own*

judgment and discretion, he cannot refer the power to the execution of another, for delegatus non potest delegare ...

Where the power is tantamount to an ownership, and does not involve any confidence or personal judgement, and no act personal to the donee is required to be performed, it may be executed by attorney in the same manner as a fee-simple may be conveyed by attorney...

... the rule that a power cannot be delegated, is not ... a general inflexible rule, but is simply a regulation, that a confidence reposed in one cannot by him be delegated to another. This rule, therefore, is inapplicable to the case [where] no confidence was reposed in A, but the estate was, merely for his own convenience, conveyed to such uses generally as he should appoint.'...

56. Masri (No 2) confirms or establishes the following principles: (1) the demands of justice are the overriding consideration in considering the scope of the jurisdiction under section 37(1); (2) the court has power to grant injunctions and appoint receivers in circumstances where no injunction would have been granted or receiver appointed before 1873; (3) a receiver by way of equitable execution may be appointed over an asset whether or not the asset is presently amenable to execution at law; and (4) the jurisdiction to appoint receivers by way of equitable execution can be developed incrementally to apply old principles to new situations...

62. In the present case the power of revocation cannot be regarded in any sense as a fiduciary power, and the respondents do not suggest otherwise. The only discretion which Mr Demirel has is whether to exercise the power in his own favour. He owes no fiduciary duties. As has been explained, the powers of revocation are tantamount to ownership..." [emphasis added]

44. These principles are not straightforward. In paragraph 55 of Lord Collins' typically trenchant judgment in the *TMSF* case, he confirmed (from a more elevated judicial plane) one of his earlier Court of Appeal decisions to the effect that half a dozen cases had, over almost 100 years, incorrectly limited the true scope of the receivership jurisdiction[4]. After due consideration, I find that the Judgment Debtor's rights attached to his sole ownership of the Shares, including the right to instruct his nominees in relation to the assets of Wheels Up, are indeed rights which are tantamount to ownership and capable of being delegated to the Receivers in aid of execution. The jurisdiction conferred by section 11 of the Grand Court Law as read with section 37 of the Senior Courts Act 1981 (the "UK Act") is, as Mr Shaw rightly submitted, a broad one. Section 37 (1) provides:

[4] *Masri-v-Consolidated Contractors Intl. Co. SAL* [2009] QB 450.

> "*(1) The* [Grand] *Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*
>
> *(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.*"

45. Irrespective of whether it is possible under the general law to assign rights attaching to shares separately from the shares themselves, I am ultimately satisfied that the statutory jurisdiction is sufficiently flexible to grant the Judgment Creditors most of the relief they seek. Assignment apart, a shareholder can clearly delegate powers ancillary to the exercise of his share rights to persons to execute on his behalf. If the Judgment Debtor can appoint a nominee director and approve nominee signatories for Wheels Up's account with RBC, this Court must be empowered by section 37(2) to require the Judgment Debtor to delegate similar powers to the Receivers for the limited purposes of the Receivership. The statute enables this Court, as part of its jurisdiction to impose terms and conditions on the powers of the Receivers, to empower the office holders to do what the Judgment Debtor himself could and should do to satisfy the judgment debts. CML/Wheels Up did not advance reasoned opposition to these broad legal principles. However, in the First de Jager Affidavit, it was deposed as follows:

> "*14. Finally, in relation to the relief sought at paragraph 3, Mr Schanck is not a signatory on the RBC account and is not entitled to be a signatory. As such, it seems to us that should the Receivers be granted the power to be added as signatories, they would be exceeding the powers currently granted to Mr Schanck or his estate.*"

46. As the judgment Creditors submitted in their Skeleton Argument that this relief might not be necessary if the relief under paragraph 2 is granted, this objection now has diminished significance. It would, however, be a surprising legal position if the sole shareholder of a company had no legal right to become a signatory on a company account. Any agreement waiving the shareholders rights would ordinarily be subject to termination at the shareholder's election.

47. The jurisdiction to Order the assets in the RBC account to be transferred to the Receivers is, in substance, an Order against RBC and Wheels Up and/or CML, to the extent that the latter entities have signing authority over the account. This jurisdiction arises from the finding that the Judgment Debtor qua shareholder of Wheels Up has the power to give such instructions in his sole discretion. Granting this relief on the application of the Judgment Creditors and (implicitly) the Receivers may be viewed as a form of delegation of the Judgment Debtor's power to the applicants for this relief. However, separate attention must be given to the question of whether the paragraph 2 Order should be supported by relief in terms of paragraph 4, declaring that the powers delegated derive from the JGS Trust.

48. The question of whether that declaratory relief should be granted, a difficult one, is also best considered together with the question of whether the discretion to grant such relief should be exercised. As in the case of paragraph 3, the Judgment Creditors submitted that the Trust delegation powers "*may not need to be exercised*" (Skeleton argument, paragraph 24).

Alternative findings: piercing the corporate veil on the grounds that the corporate structure was used to evade the Judgments

49. It is ultimately obvious that Wheels Up has been structured in such a way as to enable the Judgment Debtor to evade enforcement of the Judgments. The account funds were initially transferred to the Cayman Islands in 2016 shortly after the Judgment Debtor ceased meeting his obligations to the Florida Court. They were initially held by a Nevisian company. The Judgment Creditors filed a Motion with the Florida Court for failure to pay monthly instalments against the Judgment Debtor in March 2017. On July 11, 2017, the first of several money judgments were entered against Mr Schanck by the Florida Court. Wheels Up was incorporated one week later on July 18, 2017. The assets were transferred from the previous corporate vehicle to a new Wheels Up account with RBC, which had no overt links to the Judgment Debtor, in August 2017. The corporate structure was clearly used to evade the Florida judgments and subsequent enforcement proceedings filed this Court.

50. There is no other inference to be drawn, in these circumstances, from the fact that the Judgment Debtor placed assets in an account to which he was not a signatory and which was legally owned by a company of which he was not a director and which was managed by his nominees. On January 4, 2019 in support of his application to set aside service of the present proceedings, Mr Schanck swore: "*I do not own, solely or jointly, any assets in the Cayman Islands.*" This was misleading at best, and false at worst if (a) the extended definition in the Freezing Order was engaged, or (b) if (as I have now found) he should be viewed as owning the Shares. The separation of legal title in the assets achieved by the interposition of Wheels Up between himself and the assets he transferred to the Cayman Islands provided a colourable basis for denying owning local assets. In his Third Affidavit sworn in support of the same application, the Judgment Debtor deposed that he had written to RBC asking it to confirm that it held no account in his name nor did it hold any securities for his account. No such confirmation was produced. A clear basis for lifting the corporate veil has been made out. Is it necessary to exercise this jurisdiction?

51. The Receivers were expressly appointed to "*get in and receive...assets and property of the Defendant...whether owned by him personally or beneficially*". It ought not to be necessary to pierce the corporate veil to enforce against assets held by a company controlled and legally and beneficially owned by the Judgment Debtor. As Lord Sumption opined in *Prest-v-Prest* [2013] 2 AC 415 at 488, a case upon which the Judgment Creditors relied:

"35. *I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil. Like Munby J in Ben Hashem, I consider that if it is not necessary to pierce the corporate veil, it is not appropriate to do so, because on that footing there is no public policy imperative which justifies that course. I therefore disagree with the Court of Appeal in VTB Capital who suggested otherwise at para 79. For all of these reasons, the principle has been recognised far more often than it has been applied. But the recognition of a small residual category of cases where the abuse of the corporate veil to evade or frustrate the law can be addressed only by disregarding the legal personality of the company is, I believe, consistent with authority and with long-standing principles of legal policy.*" [emphasis added]

52. In the final analysis I find that Mr Shaw was right to primarily rely on this Court's jurisdiction to direct the Judgment Debtor to delegate his powers over the assets held by Wheels Up to the Receivers. There is no need to pierce the corporate veil, even though grounds for doing so have been made out.

Findings: should the discretion to grant relief be exercised?

Findings: the scope of the discretion

53. Although section 37 (1) of the UK Act only explicitly requires the Court to be satisfied that it is "*just and convenient*" to, *inter alia*, appoint a receiver, a corresponding discretion must surely be exercised when deciding whether or not to make Orders ancillary to the primary Receivership Order. In some cases but not all, the initial application will incorporate both the appointment of a receiver and a conferral of all powers necessary to fulfil the objects of the receivership. This was the position in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and Five Others* [2011 (1) CILR 467] where the jurisdictional question relating to the delegation of a power was inextricably linked to the question of whether the receiver should be appointed at all. The focus was on whether the power sought to be conferred should be conferred by the Grand Court at all. Lord Collins concluded as follows:

"*64. The final question is whether the discretion to make the order for delegation of the powers of revocation should be exercised. In the circumstances of the present case there is no doubt as to how the discretion to make the mandatory*

order should be exercised. No serious suggestion has been made on behalf of Mr Demirel that there would be any prejudice to any third party. The Court of Appeal thought that the appointment of a trustee in bankruptcy of Mr Demirel made it wrong for an order to be made in favour of TMSF as a single creditor. But the Board was informed that the power of revocation does not vest in the trustee under Turkish law. TMSF has undertaken to make the proceeds available to the creditors as a whole. In those circumstances there is no reason why the discretion should not be exercised in favour of TMSF." [emphasis added]

54. In the present case there is equally "*no doubt as to how the discretion to make the mandatory order should be exercised*" in general terms. Paragraph 1 of the Receivership Order directed that "*the Defendant and his agents, including Cayman Management Ltd and RBC Dominion Securities Global Ltd in the Cayman Islands, do forthwith deliver to the said Richard Lewis and Andrew Childe all securities and assets in their hands*", without specificity. It is necessary to consider each paragraph of the proposed draft Order in turn. In the judgment enforcement context, the Court is entitled to adopt a stance as a matter of legal policy which leans unequivocally in favour of vindicating the enforcement rights of the judgment creditor[5]. One must nevertheless be mindful of the risk, particularly in a case where the Judgment Debtor is absent, that an approach which overly delivers a form of "victor's justice" will unintentionally overlook basic legal principles and impair third party rights. Each limb of the proposed form of Order must be considered in turn.

Findings: should relief under paragraph 2 be granted?

55. Based on the Receivers' analysis of information obtained pursuant to the Receivership Order, they now seek an Order specifically providing as follows:

> "*2. All securities and other assets, including cash, held in Wheels Up, Ltd account with RBC...are securities and assets which are subject to the Order of this Court dated 13 January 2020. Those capable of being transferred and delivered to the Receivers shall be so transferred and delivered without any deduction or set-off... Any securities and/or assets that may not be capable of transfer shall be liquidated by RBC... and the proceeds of such liquidation (net of any fees or commissions payable in respect of their liquidation) shall be paid to the Receivers' account for the purposes of enforcing the Judgments of this Court against the Defendant.*"

56. Having found that the Wheels Up assets in the RBC account are assets of the Judgment Debtor available for execution of the Judgments, it follows that the assets or their proceeds should, in principle, be transferred to the Receivers for enforcement purposes. The Judgment Debtor himself does not oppose this relief. ZGT has not established any arguable and/or legally cognizable prejudice which it would suffer. CML (and GP),

[5] I have for this reason used the Judgments Creditors/Judgment Debtor labels in this judgment rather than Plaintiffs/Defendants because the stage of the proceedings informs the Court's entire approach.

however, complains that granting an Order in terms of draft paragraph 2 would prejudice Wheels Up's other creditors. Mr de Jager deposed as follows:

> "*11...It is considered the Director would be in breach of its duty to permit any such request for payment which, as with the present application, would leave the Company without the ability to pay annual fees, registered office fees, corporate services fees and would leave the Company vulnerable to strike off for non-payment of fees.*
>
> *12. If the relief sought under paragraph 2 is granted, the Company to the best of our knowledge will be left without any assets...It would not be possible to wind the Company up, without assets to settle any debts, pay the relevant fees and any ongoing costs payable to CML. We cannot see how this can be in the best interest of the Company, or how it is... necessary when the transfer of the shares in accordance with paragraph 1 would provide a complete remedy.* "

57. I have already rejected the proposition that the Receivers should be compelled against their and the Judgment Creditors' wishes to simply take control of the Shares. There would be no question of breach of duty by GP if it transferred assets in compliance with the Order I have found this Court has jurisdiction to make. However, CML's evidence does identify potential prejudice which cannot be ignored. The main third party creditors appear to be CML and/or its affiliates and the Cayman Islands Government, whose combined claims are modest compared to the judgment debts. Bearing in mind that such expenses would in the ordinary course in reality be the ultimate responsibility of the Judgment Debtor, it appears at first blush wholly inconsistent with the dominant purpose of the execution process for the Judgment Creditors to be, in effect, invited to pay the Judgment Debtor's other debts before they themselves have been paid. Nonetheless, at the practical level, it appears that CML/Wheels Up would ordinarily look to the RBC account to fund the company's expenses so it is entirely understandable that they should expect that outstanding expenses will be met in the usual way. It was not initially obvious to me that the assets in the RBC account were insufficient to satisfy the Judgments and any other obligations Wheels Up may have. But in CML's Costs Submissions, it was submitted that "*it is also apparent that the assets of the Company will not satisfy the Cayman Judgments owed to the Cayman Estate, or indeed the underlying foreign judgment*" (paragraph 17). It was submitted that it would be unfair if local creditors were left unpaid as the Judgment Creditors appeared to have the resources to pursue international asset recovery actions.

58. Viewed most broadly, the Receivers as officers of the Court will obviously have to ascertain, once in control of the assets in liquidated form, whether it is legally permissible for the Judgment Creditors to be paid in full taking into account the likely limited pool of local creditors Wheels Up has. A judgment creditor is not a secured creditor and is not entitled to be paid in priority to other unsecured creditors. The finding that the assets of Wheels Up are available to meet the Judgments does not extinguish the legal existence of Wheels Up as a company. It is premature for this Court to make any order in relation to how the operational expenses of Wheels Up should be met. However, the potential

prejudice to third parties which CML has properly identified may be effectively addressed by granting general liberty to apply in relation to any such matters which are not hereafter resolved between the Receivers and CML on a consensual basis. Hopefully a commercially sensible way can be found of sidestepping the need for an expensive and time consuming official liquidation of Wheels Up.

59. For these reasons, I find that there is no need to expressly limit the terms on which the transfer is ordered (in particular "*without any deduction or set-off*") and so an Order substantially in terms of paragraph 2 of the draft Order is granted in the exercise of my discretion.

Findings: should relief under paragraph 3 be granted?

60. My recollection is that Mr Shaw wished an opportunity to consider further whether, if the "critical" paragraph 2 relief was granted, an Order in terms of paragraph 3 would be needed, in modified form or at all. I believe he contemplated modifying the wording along the following lines, although it is possible this modification was proposed in relation to paragraph 4:

> "*3. Richard Lewis and Andrew Childe be added as signatories on the RBC...accounts in the names of Wheels Up, Ltd in place of the current signatories, at their sole discretion.*"

61. I would resolve any doubts about whether the Judgment Debtor has the power to instruct GP that he wishes to be a signatory on the Wheels Up account with RBC in favour of the Judgment Creditors. The jurisdiction conferred by section 11 of the Grand Court Law as read with section 37 of the UK Act in my judgment is sufficiently flexible to permit the Court to delegate to the Receivers powers which the Judgment Debtor could exercise through his ownership of the Shares. It makes no sense to find that he has the substantive power to direct the transfer of the assets but not, presumably because of present contractual arrangements, the subsidiary administrative power to seek to be a signatory on the account in which the assets are held.

62. Subject to hearing counsel further on any important considerations which have been overlooked, the Judgment Creditors are entitled in principle to an Order in terms of draft paragraph 3 on a 'as needed' basis.

Findings: should relief under paragraph 4 be granted?

63. CML adopted an entirely neutral position in relation to paragraph 4. It bears remembering that the following declaration was initially sought:

> "*4. The powers granted to the Defendant pursuant to the Sixth Amendment to the Revocable Living Trust of John G. Schanck, insofar as they may be exercised in relation to the abovementioned assets and securities, are powers which fall within*

paragraph [2] of the Order of this Court dated 13 January 2020 and are hereby assigned and/or delated to Richard Lewis and Andrew Childe as Receivers for the purposes of enforcing the Judgments of this Court."

64. As I have already noted above, it is more straightforward to find that the relief granted in terms of paragraph 2 of the draft Order derives from a combination of (a) the Judgment Debtor's status as registered shareholder of Wheels Up, and (b) the finding that despite claiming the status of Trustee of the JGS Trust, that trust is legally irrelevant for judgment enforcement purposes. I have rejected as unarguable the assertion that the assets in the RBC account were validly transferred from the Judgment Debtor to ZGT in June 2019, after the Freezing Order had been made. However no grounds have been advanced for rejecting the proposition that the Resettlement did in fact and in law occur under Florida law and Cooks Island law according to the terms of the Resettlement Deed. The Deed settled $100 on ZGT as the "*Initial Trust Fund*", and made no express mention of the JGS Trust assets.

65. I am not satisfied that it is just and convenient to grant this head of relief, to the extent it is still sought, at this stage. However I would be prepared to give liberty to apply to leave open the possibility of a renewed application in light of technical enforcement difficulties which cannot now be identified.

Findings: Costs

The Judgment Creditors' costs

66. The Judgment Creditors are clearly entitled to their costs as against the Judgment Debtor to be taxed if not agreed on an indemnity basis. The improper and/or unreasonable conduct relied upon includes the attempts to transfer assets in breach of the Freezing Order in October 2018 (a request to RBC to transfer US$250,000 made within an hour of being served with the Freezing Order) and September 2019 (the attempt to transfer the Shares to ZVT). While this information came to light through the Receivership, I do not consider it just to take it into account as regards Receivership costs. I regard the refusal to comply with the asset disclosure requirements of the Receivership Order as far more relevant, because although the Receivers have been able to identify the relevant assets in any event, it seems likely that this took more time and expense without the Judgment Debtor's cooperation. Because of the terms of the Receivership Order, the Judgment Debtor could not validly use his 'legal' defence of having no assets in the jurisdiction as an excuse for what amounts to a deliberate flouting of another Order of this Court. Reliance was also placed on the Judgment Debtor's "misleading" evidence, but that evidence was also filed in the pre-Receivership period. Indemnity basis costs are in my judgment most clearly appropriate in the present case because the Judgment Debtor has acted improperly and unreasonably in failing to satisfy the Judgments out of funds which are at his disposal and generally displaying propensity to undermine the efficacy and integrity of the processes of this Court.

CML's costs of complying with the Receivership Order

67. Ms Carver submitted that the Court should not make any costs order without making some provision for CML's costs of making an application under the Confidential Information Disclosure Law ("CIDL") and dealing with the present application. As I indicated in the course of the hearing, this Court should encourage compliance with its Orders by ensuring that third parties' costs of compliance are promptly paid. Mr Shaw advanced no or no coherent reason for the Court not to award CML its costs of complying with the Receivership Order (including the CIDL application), to be taxed if not agreed on the indemnity basis.

Conclusion

68. For the above reasons, the issues raised on the Judgment Creditors' Summons dated June 3, 2020 for supplementary relief further to the Receivership Order dated January 13, 2020 are resolved as follows:

(a) the oral application to adjourn the hearing of the Judgment Creditors' Summons made the Trustee of ZGT, a Cook Islands trust, is refused. The attempt to obtain the opportunity to assert a claim to assets supposedly transferred to it under the Resettlement Deed dated June 18, 2019 was inexcusably late, while the claim was obviously unsustainable;

(b) the Judgment Creditors are entitled to an Order transferring the assets held by Wheels Up to the Receivers for enforcement purposes on the grounds that the assets while legally held by a company wholly owned by the Judgment Debtor, the assets are in law his assets and available for enforcement purposes, substantially in terms of paragraph 2 of the draft Order;

(c) subject to hearing counsel if required, the Judgment Creditors are entitled to an Order that, at their sole discretion, they become signatories of the RBC account;

(d) subject to hearing counsel if required, the Judgment Creditors are not granted a declaration that the JGS Trust powers are delegated to the Receivers;

(e) there shall be general liberty to apply in relation to any issues which may arise in relation to the solvency of Wheels Up flowing from the transfer of all its local assets to the Receivers;

(f) the Judgment Debtor shall pay the Judgment Creditors' costs of the present action to be taxed if not agreed on the indemnity basis;

(g) CML and/or Wheels Up are awarded their costs of complying with the Receivership Order including the costs of the present Summons to be taxed if not agreed on the indemnity basis, which costs should be treated as costs of the Receivership;

(h) Counsel have liberty to apply in relation to any further matters arising from the present Ruling.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT