



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 83 OF 2020 (IKJ)

IN THE MATTER OF a settlement made by deed dated 27 December 2017 (the “Trust”)

AND IN THE MATTER OF THE TRUSTS ACT (2021 Revision)

IN CAMERA-VIA VIDEO CONFERENCE

Appearances: Mr John Machell QC instructed by Mr Adam Huckle of Maples and Calder (Cayman) LLP for the Plaintiff (the “Trustee”)

Mr Neil McLarnon of Travers Thorp Alberga on behalf of the Defendant (the “Enforcer”)

Ms Sue Prevezer QC instructed by Mr Andrew Peedom of Collas Crill for three beneficiaries (the “Beneficiaries”)

Mr Duncan Matthews QC instructed by Mr William Jones of Ogier for the Protector

Before: The Hon. Justice Kawaley

Heard: 14 July 2021

Date of decision: 14 July 2021

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REASONS FOR BEDDOE ORDER

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Application by trustee for Beddoe relief in respect of prospective personal claims against it in English proceedings against beneficiaries-whether permission should be given to challenge jurisdiction of English Court over prospective claims and/or commence local proceedings for declaratory relief in relation to the validity of the Trust-whether Trustee’s costs of defending claims can be recovered from trust assets-governing legal principles.



Introductory

1. By an Originating Summons dated May 19, 2020, the Trustee sought the following principal relief under section 48 of the Trust Act (As Revised):
 - “1 *A declaration that the Trustee is the trustee of the Trust, which is a trust governed by a deed dated 27 December 2017 (as amended) (the ‘Trust Deed’) and Cayman Islands law, and that it holds the assets listed in the Schedule hereto as assets of the Trust for the beneficiaries and on the terms set out in the Trust Deed, and not on bare trust for Boris Mints. Alternatively, a direction that the Trustee issue and pursue a separate Originating Summons, joining the Banks, as defined below, and the Enforcer as defendants, seeking such a declaration.*
 - 2 *An order that the Trustee continue to administer the Trust in accordance with the Trust Deed and Cayman Islands law, and to that end be at liberty to apply the assets of the Trust to:*
 - 2.1 *Discharge the expenses and liabilities of the Trust, including legal expenses;*
 - 2.2 *Pay its fees for acting as Trustee; and*
 - 2.3 *Make distributions and loans to beneficiaries of the Trust provided that such payments are permitted by the terms of the undertakings given by Boris Mints, Dmitry Mints, Alexander Mints and Igor Mints to the English High Court in the order dated 11 July 2019 in the English Litigation (for so long as those undertakings remain in force).*
 - 3 *Directions as to whether the Trustee should adopt a neutral stance or oppose the threatened application in the High Court of England and Wales by PJSC National Bank Trust and PJSC Bank Otkritie (the “Banks”) for permission to serve the Trustee out of the jurisdiction so as to make certain claims more particularly set out in draft amended particulars of claim exhibited to the Second Affidavit of Peter Goddard herein, and, if such permission is granted to the Banks, whether the Trustee should adopt a neutral stance or defend the claims; and directions as to whether the Trustee shall be entitled to be indemnified as to its costs and expenses of doing so out of the assets of the Trust.”*
2. By the time the Originating Summons was issued, an application was threatened before the English Court in the “English Proceedings” to join the Trustee in respect of claims (a) challenging the validity of the Trust and (b) seeking to recover the assets transferred by the Settlor to the Trust through statutory avoidance claims. Ultimately, the threatened joinder application was made on July 16, 2021, two days after the Originating Summons was heard on July 14, 2021, and is due to be shortly heard by the English Court. As the claims potentially affected the entirety of the Trust assets, the application was made on notice to the claimants in the English proceedings (the “Banks”) who did not, in the event, participate.



3. The Trustee formally adopted a neutral stance but explained why it might be considered appropriate for it to contest the threatened claims against it or (in the first instance at least) challenge the jurisdiction of the English Court. An active response was positively endorsed by the Beneficiaries, including by way of evidence. The Enforcer took no position. Having considered the evidence and submissions placed before the Court and heard oral argument from Mr Machell QC for the Trustee, I declined to grant the declaratory relief sought under paragraph 1 of the Originating Summons but directed that:

- “1. *The Trustee be at liberty to issue and pursue a separate Originating Summons (joining the Banks and the Enforcer of the Trust as Defendants) seeking a declaration that the Trustee is the trustee of the Trust, which is a trust governed by a deed dated 27 December 2017 (as amended and restated by a Deed of Amendment and Restatement dated 13 December 2018) (the ‘Trust Deed’) and Cayman Islands law, and that it holds the trust assets as assets of the Trust for the beneficiaries and on the terms set out in the Trust Deed, and not on bare trust for Boris Mints.*
2. *The Trustee do continue to administer the Trust in accordance with the Trust Deed and Cayman Islands law until further order of the Court, and to that end be at liberty to apply the assets of the Trust to (amongst other things):*
 - 2.1 *Discharge the expenses and liabilities of the Trust, including legal expenses;*
 - 2.2 *Pay its fees for acting as Trustee; and*
 - 2.3 *Make distributions and loans to beneficiaries of the Trust provided that such payments are permitted by the terms of the undertakings given by the Beneficiaries to the High Court of England and Wales in Pjsc National Bank Trust & Pjsc Bank Otkritie Financial Corporation v Boris Mints & Ors (CL-2019-000412) (the ‘English Litigation’) (for so long as those undertakings remain in force).*
3. *If served with the proceedings in the English Litigation, the Trustee be at liberty to file an acknowledgment of service indicating an intention to dispute jurisdiction and to issue and pursue an application seeking an order discharging or setting aside any permission to serve out on the Trustee and/or for an order staying the English Litigation as against the Trustee.*
4. *The Trustee’s costs and expenses of and occasioned by the actions it takes under paragraphs 1 and 3 above (including any adverse costs orders) be raised and paid on an indemnity basis out of the assets of the Trust.*
5. *The Originating Summons do stand adjourned with liberty to restore for further directions.*



6. *The Trustee's, the Defendant's and the Beneficiaries' costs of and occasioned by the Originating Summons be raised and paid on an indemnity basis out of the assets of the Trust.*
7. *The Trustee, the Defendant and the Beneficiaries (and any other person who attended the hearing on 14 July 2021) be prohibited pending further order from the Court from publishing, communicating or disclosing the content of the hearing on 14 July 2021 (including, for the avoidance of doubt, any transcript of the aforesaid hearing and/or the judgment intended to be given by the Judge), save that:*
 - 7.1 *The Trustee and/or the Beneficiaries may provide a copy of this Order and a note of the decision given at the hearing approved by the Judge to the Claimants and the Court in the English Litigation;*
 - 7.2 *The Trustee and/or the Beneficiaries may provide a copy of the judgment intended to be given by the Judge with such redactions (if any) as may be suggested by the Trustee and/or the Beneficiaries and approved by the Judge to the Claimants and the Court in the English Litigation;*
 - 7.3 *Nothing in this Order shall prevent publication, communication or disclosure of any information that is already in, or thereafter comes into, the public domain in the Cayman Islands (other than as a result of a breach of this Order or the Confidentiality Order)."*

Factual matrix

4. The Trust is a Cayman Islands STAR Trust settled for the benefit of the Settlor and his family on December 27, 2017. It is an irrevocable life interest and discretionary trust. Clause 19 of the Fifteenth Schedule of the Deed of Amendment and Restatement dated 13 December 2018 provides:

“19 *Governing law, forum and place of administration*

- 19.1 *The governing law of this settlement shall be Cayman Islands law and all rights under this settlement and its construction and effect shall be subject to the jurisdiction of the courts, and construed according to the laws of, the Cayman Islands.*
- 19.2 *The courts of the Cayman Islands shall be the forum for the administration of the trusts, powers and provisions of this settlement.*
- 19.3 *Notwithstanding the provisions of paragraphs 19.1 and 19.2 of this Schedule, the Trustee may carry on the general administration of the trusts of this settlement in any jurisdiction in the world whether or not any trustee or trustees of this settlement are for the time being resident or domiciled in, or otherwise connected with, that jurisdiction.”*



5. The Trustee is administering the Trust in the only designated forum for administration. On June 27, 2019, a Worldwide Freezing Order (“WFO”) was granted against four of the Beneficiaries in the English Proceedings (“Family Defendants”). The central allegations made against the Family Defendants was that they had, acting in concert with former directors of the Banks, replaced valuable security for substantial loans with worthless security (the “Replacement Transactions”). The WFO was replaced by undertakings given by the Family Defendants on July 11, 2019 (the "Undertakings Order"). The Banks contend that the Trustee holds the assets on trust for the Settlor, who is content for the Trustee to continue to administer them.
6. The Undertakings Order does not prohibit the Family Defendants spending “*reasonable sums of legal advice and representation in connection with*” the English Proceedings. The Family Defendants' legal costs of the English Proceedings are being funded from the Trust. The Banks are aware of that and have not objected. The Banks’ claims against the Family Defendants exceed the estimated value of the Trust assets. The Family Defendants are vigorously defending these claims and the Settlor has filed a financially substantial counterclaim.
7. The Draft Amended Particulars of Claim in the English Proceedings assert the following principal proposed claims against the Trustee:
 - (a) It is alleged that on a true construction of the Trust, the Settlor retained beneficial ownership of the Trust assets he transferred to the Trust because, *inter alia*, his son as Protector was conferred with “*extraordinary powers*”. In reality, the Settlor retained control of the Trust assets;
 - (b) it is alleged that the purported settlements of assets on trust are invalid under the Fraudulent Dispositions Act section 4(1) and liable to be set aside at the instance of the Banks as creditors whom the transfers were intended to defraud;
 - (c) in the alternative to (b), it is alleged that the impugned transfers are liable to be set aside under section 423 of the Insolvency Act 1986 (UK) on the same grounds.
8. The “extraordinary powers” the Banks rely upon in respect of the proposed “illusory trust” claim include the following clause in the Fourteenth Schedule to the Trust Deed, reproduced in the Trustee’s Skeleton:



“Exercise of powers

8.1 *Without prejudice to all other indemnities, protections and exculpations conferred on the Protector by this settlement or by law:*

(a) *every power, authority or discretion conferred on the Protector is an absolute and uncontrolled power, authority or discretion and no Protector is liable for any loss or damage occurring as a result of his agreement or refusal or failure to agree to any exercise of that power, authority or discretion; and*

(b) *in relying in good faith on the opinion or advice of counsel as to the interpretation of this settlement in any respect or as to any other difficulty that may arise or in relying on the opinion or advice of any other professional person in a matter apparently falling within his professional expertise, each Protector is absolutely protected.*

8.2 *The Protector may either exercise or concur in exercising all powers and discretions conferred on the Protector by this settlement or by law even if that the Protector has a personal interest in the mode or result of any such exercise or abstain from exercising or concurring in exercising any such powers and discretions (except as a merely formal party) and allow the remaining members (being at least two in number or a company) to act alone in relation to that exercise of powers or discretions.’ (Emphasis added)*

[REDACTED]

Legal principles governing applications by trustees to defend proceedings against a trust at the trust fund’s expense

Procedure

10. The Trustee rightly submitted that where third party claims potentially threatened recovery of the entirety of a trust fund, the correct procedure (followed in the present case) was to give notice of the *Beddoe* proceedings to the third party claimant, in this case the Banks, and to offer to serve redacted copies of the evidence: *STG Valmet v Brennan* 4 ITEL R 337 (Gibraltar Court of Appeal); *Trustee N v AG* [2015] SC (Bda) 50 Com at [15] to [42] and [59] (Hellman J).

Continuing to administer the trust while claims are extant

11. *Trustee L v AG* [2015] SC (Bda) 41 Com (at [115]-[117]), an earlier *Beddoe* judgment of Hellman J in the same case where directions were given for the continued administration of a trust, was aptly cited in support of the contention that the Trustee could continue to administer the Trust despite the extant claims about the terms of the Trust.

Defending proceedings at the expense of the trust fund

12. A more difficult matter of principle was the basis on which it would be appropriate to authorise the Trustee to participate in the English Proceedings or take any active role in the dispute between the Banks and the Beneficiaries at the expense of the Trust assets. Mr Machell QC submitted:

“121. *Where a trustee is faced with an adverse claim by a third party to the whole of the trust fund (including by way of claims under the FDA and ss.423-425 IA), the starting point is that the trustee should adopt a neutral stance and allow the claim to be defended at the cost of the adult beneficiaries. The point being that, if the claim to the assets is successful and the claim is defended at the expense of the trust fund, then the third party will end up bearing the cost out of assets to which it has established title.*”

122. *However, the court does have power in exceptional circumstances to make a Beddoe order permitting the trustee to defend and to do so at the expense of the trust fund.*”

13. The following judicial authorities were relied upon: *Alsop Wilkinson v Neary* [1996] 1 WLR 1220; *STG Valmet Trustees Ltd v Brennan* 4 ITEL 337; *Re Hall* [1994–95] CILR 456 Smellie J (as he then was); *Re Holden* (1887) 20 Q.B.D. 43; *Ideal Bedding Co. Ltd v Holland* [1907] 157; *Re Dallaway* [1982] 1 W.L.R. 756 at 760A–B; *Re Evans*; *National Anti-Vivisection Society Ltd v Duddington* (1998) 12 Tru.L.I. 113; *Trustee L v AG* [2015] SC Bda 41 Com; *Trustee N v AG* [2015] SC (Bda) 50 Com. and *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch). I will set out below some of the most helpful passages from the judgments referred to by Mr Machell QC in oral argument.

14. In *Alsop Wilkinson-v-Neary* [1996] 1 WLR 1220 at 1226 F-H, Gavin Lightman J opined as follows:

“*The court has an exceptional jurisdiction in hostile litigation to make an order at an early stage in the proceedings regarding the ultimate incidence of costs.*”

*For the purpose of this application, all parties are agreed that the relevant principles are sufficiently set out in the judgment of Miss Mary Arden Q.C. (sitting as a deputy High Court judge in the Chancery Division) in *In re Biddencare Ltd.* [1994] 2 B.C.L.C. 160 and that the four relevant considerations for this purpose are (1) the strength of the party's case; (2) the likely order as to costs at the trial; (3) the justice of the application; and (4) any special circumstances. I would only add that since the decision of the Court of Appeal in *McDonald v. Horn* [1995] I.C.R. 685, the second requirement has been tightened up and (save the presently recognised exceptions namely derivative actions and actions relating to pension funds), it must appear that the judge at the trial could properly exercise his discretion only by ordering that the applicants costs be paid out of the trust estate.”*

Circumstances in which a trustee may be permitted to defend a third party claim at the expense of the trust fund

15. In *Trustee L v AG* [2015] SC (Bda) 41 Com, Hellman J enunciated and applied the following principles in the context of a not dissimilar *Beddoe* application:

“46. *The trustees’ application for an indemnity was treated as an application for a pre-emptive costs order in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 Ch. The plaintiff firm of solicitors had obtained judgment for more than £1 million against the first defendant, a former partner of the firm. The first defendant had settled two trusts, the principal beneficiaries of which were himself, his wife and their issue, into which he had transferred some shares in two private companies. The plaintiff sought a declaration pursuant to section 423 of the Insolvency Act 1986 that the transfers were void as against the plaintiffs as transactions entered into for the purpose of putting assets beyond the reach of the first defendant’s creditors...*

53. *Writing extra-judicially about his decision in *Alsop Wilkinson v Neary* in the journal *Trusts Law International* (2006) Tru LI 151, Lightman J offered a gloss as to the principles applicable to a trustee’s application for an indemnity in a trust dispute. The extra-judicial comments of a judge about one of his decisions carry no special weight merely because he is a judge but fall to be evaluated on their merits like those of any other academic commentator. Nonetheless I find Lightman J’s observations helpful. He stated at 153:*

‘Generally speaking if the validity of the settlement is to be defended, it should be left to the beneficiaries under the settlement to do so ... There is however no absolute rule. The merits of individual cases may require some other course being taken. The rule will generally be held applicable when the beneficiaries are all ascertained, of full age and capacity. Different considerations may apply if the beneficiaries are infants or unascertained and there are no other available sources for funding the defence. In such a situation a balancing exercise may be required of the court...’ ...

56. *The judgment of the Court¹ was given by Waite JA. The other members of the court were Neill P and Glidewell JA. In the section of his judgment dealing*

¹ The Gibraltar Court of Appeal in the *STG Valmet Trustees* case.

with the law, Waite JA began by considering pre-emptive costs orders generally. Having reviewed the statements of principle contained in *Re Biddencare Ltd, McDonald v Horn* and other cases, he summarised them at para 31 in similar terms to the summary of the relevant principles given in *Alsop Wilkinson v Neary*:

'In deciding whether to make a pre-emptive order for costs, the court should have regard to -

- (a) the prospect or success of the claim or defence sought to be made or resisted;*
- (b) the general reluctance of the court to make a prospective costs order unless satisfied that it is clear that the judge at trial would be bound to make an order in favour of the applicant;*
- (c) the degree of risk that such an order might work injustice; and*
- (d) the existence of any special circumstances.'*...

60. *The learned judge concluded at para 42:*

'Orders that the trustee is to have his costs paid out of the trust fund in any event should be made sparingly, and with due regard to the principles which apply to the analogous case of pre-emptive costs orders sought in the general jurisdiction.'

61. *I agree with Michael Furness QC, counsel for D2, that this is a most helpful overview of the principles applicable to the Beddoe jurisdiction. However what strikes me about the judgment, although this is not quite the emphasis that Mr Furness placed upon it, is its meticulous avoidance of absolutes. Beddoe applications are said to have much in common with pre-emptive costs applications, but are not the same; the Beddoe court is to have due regard to the pre-emptive costs principles, but not apply them slavishly; and whereas on a pre-emptive costs application the court will generally be reluctant to make a prospective costs order unless satisfied that the trial judge would be bound to make an order in favour of the applicant, that does not mean that there are no circumstances in which it would be appropriate for the court to do so...*

71. *The Respondents successfully appealed against Palmer J's order to the Court of Appeal. The Appellants appealed against that decision to the High Court, which approved both Palmer J's decision and his reasoning. In a passage which was cited by the plurality at para 84 and impliedly approved by them at para 88, and which Mr Boyle invites me to adopt as the right approach in the instant case, the learned judge set out his approach to the grant of a trustee's indemnity from the trust estate.*

'Where a trustee seeks an order that it is justified in defending a claim against the trust estate by recourse to the trust assets for the costs of the litigation, the question will be whether it is more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out among themselves, at their own risk as to costs and leaving the trustee as a necessary but inactive party in the proceedings, or whether it is more practical and fairer, that the trustee be the active litigant with recourse to the trust fund



for the costs of the litigation. What is '**practical and fair**' will depend on the particular circumstances of each case and will include:

- whether the beneficiaries of the trust estate have a substantial financial interest in defending the claim;
- what are the financial means of the beneficiaries to fund the defence;
- the merits and strengths of the claim against the trust estate;
- the extent to which recourse to the trust estate for defence costs would deprive the successful claimant of the fruits of the litigation;
- if the trust is a charitable trust rather than a private trust, what, if any, are the considerations of public interest.' [Emphasis added.]”

16. There are three points in particular which I extract from Hellman J’s instructive judgment in *Trustee L* (at paragraphs [60]-[61], [71] and [53]), one of which relates to the costs issue and the other two the preliminary question of whether the Trustee should intervene in the dispute at all. First, in the *Beddoe* context although granting what is analogous to a pre-emptive costs order should ordinarily only occur when the *Beddoe* judge is satisfied that the trial judge would be bound to indemnify the trustee at the end of the contentious litigation, “*that does not mean that there are no circumstances in which it would be appropriate for the court to do so*”. Second, it being well settled that the default position is that trustees ordinarily should leave the third party disputants to contest the litigation at their own expense, the Court must also consider what is “*practical and fair*”. This broader criterion may in appropriate cases have regard to “*considerations of public interest*”. Third, and ancillary to the second point, Hellman J suggests, citing the extra-judicial remarks of Sir Gavin Lightman, that “*a balancing exercise*” may be necessary to determine a trustee’s stance in relation to contentious litigation where “*there are no other available sources for funding the defence*”.

Key statutory provisions

17. Grand Court Rules (“GCR”) Order 85 and various provisions of the Trusts Act (2021 Revision) (the “Act”) were placed before the Court. The foundational jurisdictional provision is section 48 of the Act:

“Application to the Court for advice and directions

48. *Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or*



intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own responsibility, to have discharged that person's duty as such trustee or personal representative in the subject matter of the said application:

Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court."

18. GCR Order 85 rule 2 (2) provides that "an action may be brought for the determination of", *inter alia*, "any question arising in...the execution of a trust". Relevant to the application for permission to continue to administer the Trust, the application for permission to commence proceedings relating to the validity of the Trust and the application for permission to defend, or at least challenge the jurisdiction of the English Court over the Trustee were the following two provisions. First section 13 of the Act provides:

"(1) In construing the terms of any instrument stipulating the trusts and powers in and over the property, if the instrument is not expressed to be a will, testament or codicil and is not expressed to take effect only upon the death of the settlor, it shall be presumed that all such trusts (and in particular the duty of the trustees to the beneficiaries to administer the trust in accordance with its terms) and powers were intended by the settlor to take immediate effect upon the property being identified and vested in the trustee, save as otherwise expressly, or by necessary implication, provided in the instrument."

19. Second, pertinent to the validity question centred on the Protector's powers, alleged in the draft new claims as being improperly exercised in reality by the Settlor, are the following provisions of the Act. These expressly authorise the reservation of powers by the Settlor:

"14. (1) The reservation or grant by a settlor of a trust of any or all of the following —

- (a) any power to revoke, vary or amend the trust instrument or any trusts or powers arising thereunder in whole or in part;*
- (b) a general or special power to appoint either income or capital or both of the trust property;*
- (c) any limited beneficial interest in the trust property;*



- (d) *a power to act as a director or officer of any company wholly or partly owned by the trust;*
- (e) *a power to give binding directions to the trustee in connection with the purchase, holding or sale of the trust property;*
- (f) *a power to appoint, add or remove any trustee, protector or beneficiary;*
- (g) *a power to change the governing law and the forum for administration of the trust; or*
- (h) *a power to restrict the exercise of any powers or discretions of the trustee by requiring that they shall only be exercisable with the consent of the settlor or any other person specified in the trust instrument.*

shall not invalidate the trust or affect the presumption under section 13(1). [Emphasis added]

20. Of general relevance to the question of whether the Trustee should be permitted to commence proceedings in the forum for administration and/or dispute the jurisdiction of the English Court over it in relation to the threatened claims are the following provisions of the Act. Firstly, section 89:

- “89. (1) *In determining the governing law of a trust, regard is first to be had to the terms of the trust and to any evidence therein as to the intention of the parties; and the other circumstances of the trust are to be taken into account only if the terms of the trust fail to provide such evidence.*
- (2) *A term of the trust expressly selecting the laws of the Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances.*
- (3) *A term of the trust that the laws of the Islands are to govern a particular aspect of the trust or that the Islands or the courts of the Islands are the forum for the administration of the trust or any like provision is conclusive evidence, subject to any contrary term of the trust, that the parties intended the laws of the Islands to be the governing law of the trust and is valid and effective accordingly...* [Emphasis added]

21. Secondly, section 90:

- “90. *All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including questions as to -*



- (a) *the capacity of any settlor;*
- (b) *any aspect of the validity of the trust or disposition or the interpretation*
or effect thereof;
- (c) *the administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal; or*
- (d) *the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,*

are to be determined according to the laws of the Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected...” [Emphasis added]

22. The mandatory application of Cayman Islands law to trusts which are governed by this forum’s law (according to their terms and by virtue of section 89) to questions concerning, *inter alia*, “*any aspect of the validity of the trust or disposition or the interpretation or effect thereof*” has resulted in section 90 of the Act being viewed by this Court (*obiter*) as the equivalent of an exclusive jurisdiction clause. Those *obiter dicta* were considered in *Re Stingray Trust*, FSD 248 of 2017 (IKJ), Judgment dated December 21, 2020 (unreported), at paragraphs 38 to 50. I ultimately rejected the proposition that section 90 meant that no other Court could deal with section 90 issues even if they were going to apply Cayman Islands law. But, in considering which forum which was most appropriate to determine a validity dispute, I noted (at paragraph 83):

“...If the present application was being heard before or shortly after the Milan Proceedings were commenced in 2016, the scales might well have tipped decisively in favour of finding that the Cayman Islands was the most appropriate forum. This Court’s ability to deal with the validity issue under Cayman Islands law without the need for expert evidence and probably more quickly might well have been decisive...”

23. The provisions of Part VII of the Act (“**Trusts-Foreign Element**”) have often been described as “firewall provisions”. Not only does section 90 mandate the application of Cayman Islands law to certain questions relating to Cayman Islands trusts. Section 91 provides that no trust governed by Cayman Islands law shall be held to be invalid by reason of a foreign law which does not recognise trusts or by reason of claims based on a personal relationship with the settlor



or heirship rights, the latter which rights are further circumscribed by section 92. Section 93 provides that any foreign judgments which are inconsistent with sections 91-92 of the Act shall be unenforceable. These elements of legislative scheme are a manifestation of a legislative intention of ensuring that the validity of trusts governed by Cayman Islands law will be determined in accordance with Cayman Islands law, being a system of law which has explicitly been designed to encourage foreign settlors to establish trusts here. It is a notorious fact that financial services is a (if not the) major pillar of the economy and that trust services play a not insubstantial role. While much of Cayman Islands trusts law is indistinguishable from the corresponding English law position, Cayman Islands trusts law has important *sui generis* statutory rules. The most pertinent examples for present purposes are:

- (a) Part VIII (“*Special Trusts - Alternative Regime*”), which provide for what are colloquially known as “STAR” trusts, which can only be enforced by “enforcers”. The Trust is a STAR trust;
- (b) section 14 of the Act expressly provides that the fact that certain powers are reserved by the settlor or conferred on a protector “*shall not invalidate the trust*”.

24. As I observed in the course of the hearing, in my judgment this legislative scheme implicitly reflects a public policy imperative for this Court, whenever invited to do so, to determine questions relating to the validity of trusts which involve the construction of *sui generis* questions of Cayman Islands statutory law. Apart from the general consideration that this will ordinarily be the natural forum for claims against trustees who are resident and administering trusts here, it seems self-evident that this Court will normally be the appropriate court to develop Cayman Islands trusts law.

25. Not only will there be no need for expert evidence to be adduced, but this Court can draw on its experience of similar distinctive trusts instruments and its well documented and longstanding appreciation of the public interest requirement to balance the ‘local’ interests of professional service providers with the ‘international’ interests of third party creditors contending that a trust has been improperly founded in violation of their rights.

Why the Trustees should be permitted to intervene in the English Proceedings (if served)

26. Two considerations justified departing from the usual rule. The significance of the fact that the Family Defendants lacked resources was somewhat diminished by reason of the fact that the position is already that their costs are being funded from the Trust assets without objection from



the English plaintiffs. A more exceptional and pivotal consideration to my mind was that the Trustee was uniquely equipped to defend the validity limb of the proposed claims. That raises a point of statutory interpretation on a trust instrument prepared by a leading purveyor of trust administration services. How section 14 of the Act is construed and applied has implications for the validity of, potentially at least, countless other trusts which may well have similar protector provisions. The proposed validity claim is barely arguable in any event.

27. The Family Defendants who are accused of impropriety are not best suited to assist whatever court is adjudicating the validity of the Trust issue to resolve questions of Cayman Islands legislative policy in a fair and objective manner. Nor are those Defendants, for similar reasons, best placed to advance the jurisdictional challenge which I believe the Trustee should in the first place make. The Trustee, beyond its general duty to protect the Trust assets, it seemed obvious to me, has an independent professional interest in how an instrument it (or another member of its group) has presumably drafted is construed under the law of the administration forum.
28. The proposed avoidance claim is arguable, but I was satisfied that the potential defences are also arguable. Having decided that the Trustee should be able to intervene to challenge the jurisdiction of the English Court over the proposed validity claims, it makes no sense to adopt a different stance to the avoidance claims it is also proposed to assert against the Trustee. I considered it premature to approve the Trustee both (a) challenging the jurisdiction of the English Court and (b) defending the proposed claims on their merits. Step (a) was all which I considered it appropriate to approve at this stage.

Why the Trustee should be permitted to commence local proceedings in relation to the validity issue

29. The validity issue raises *par excellence*, for the reasons already adumbrated above, the sort of Cayman Islands legislative and public policy issues which should naturally and normally be adjudicated in this forum. Although this forum is not by statute the exclusive adjudication forum, the Trustee has indicated that will contend that the Trust Deed contains an exclusive jurisdiction clause in challenging the jurisdiction of the English Court. But (as at July 14, 2021) proceedings against the Trustee have merely been threatened, not yet commenced. The threatened claim appears to me not to be seriously arguable at all on a straightforward reading of section 14 of the Act. In my judgment this Court is best equipped to determine the issue more expeditiously and economically than any overseas court applying Cayman Islands law. For



these reasons, I directed that the Trustee should be at liberty to commence local proceedings in relation to this issue.

30. The same considerations did not apply in relation to the avoidance claims. Even assuming that Cayman Islands law must ultimately be applied to them, these claims are ultimately “fact-centric” and do not obviously engage any obvious ‘local’ public policy concerns. No sufficiently cogent basis existed for permitting the Trustee to pre-emptively commence proceedings in this regard before this Court at this stage.

Why the Trustee should be permitted to indemnify themselves out of the Trust assets

31. Mr Machell QC rightly submitted that the fact that the English plaintiffs had accepted (in the context of the WFO they obtained in the English Proceedings) the principle of the Family Defendants’ costs of those proceedings being funded by the Trust was dispositive as to the Trustee’s corresponding position. The Trustee’s counsel accepted that there should be no duplication of effort and fairly contended that the Trustee was more likely to conduct its defence of these claims in a proportionate manner.
32. The most important point was that it had been accepted that the Beneficiaries lacked the resources to be able to independently fund the defence of whatever claims might be brought against the Trustee in London. Equally important was that the merits of the case for the Trustee pursuing the validity claim here appeared strong while the case for challenging the jurisdiction of the English Court in respect of the threatened claims seemed to have reasonable prospects of success.
33. A subsidiary but not insignificant consideration was that there was no risk at all that the litigation costs would exhaust the Trust fund which the English plaintiffs contend should be available to enforce against should they succeed in their claims in the English Proceedings.
34. I ultimately accepted that making what is analogous to a pre-emptive costs order flowed logically from the conclusion that it was appropriate for the Trustee to challenge the jurisdiction of the English Court over the claims threatened against them, and that it was appropriate for the Trustee to initiate proceedings in relation to the validity issue here. I found that this result was, in overall terms, “*practical and fair*” (*Trustee L v AG* [2015] SC (Bda) 41 Com, Hellman J, at paragraph 71).

Summary

35. For these reasons I directed on July 14, 2021 at the hearing of the Trustee's Originating Summons seeking Beddoe relief that:

- (a) the Trustee should be at liberty to issue an Originating Summons joining the English Plaintiffs and seeking a declaration as to the validity of the Trust;
- (b) the Trustee shall in the interim continue to administer the Trust;
- (c) if served with the English Proceedings, the Trustee may challenge the jurisdiction of the English Court;
- (d) the Trustee's costs under (a) and (c) shall be paid out of the assets of the Trust.



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