In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 36

IN THE MATTER OF AN APPLICATION UNDER ORDER 85 OF THE RULES OF THE SUPREME COURT 1985

AND IN THE MATTER OF THE TRUSTS (SPECIAL PROVISIONS) ACT 1989

AND IN THE MATTER OF THE TRUSTEE ACT 1975

AND IN THE MATTER OF THE TRUSTS IDENTIFIED IN APPENDICES A AND B TO THE ORIGINATING SUMMONS DATED 30 JANUARY 2023

BETWEEN:

(1) A

(2) B

(3) C

Plaintiffs

and

(1) D

and others

Defendants

JUDGMENT

Date of Hearing: 24 March 2023
Date of Ruling: 28 April 2023

Appearances:

Nicholas Le Poidevin KC (Instructed by Conyers Dill & Pearman Limited), Judith Roche, Conyers Dill & Pearman Limited, for the Plaintiffs

Keith Robinson, Carey Olsen Bermuda Limited, for 1st and 2nd Defendants

Lilla Zuill, Harneys (Bermuda) Limited, for 3rd, 5th, 8th to 13th and 17th Defendants

Brian Green KC (Instructed by Cox Hallett Wilkinson Limited), David Kessaram and Matthew Watson, Cox Hallett Wilkinson Limited, for 4th Defendant

Remaining Defendants (6th, 7th, 14th, 15th, 16th, 18th) - Unrepresented

JUDGMENT of Mussenden J

Introduction

1. On 24 March 2023 I heard extensive submissions from the parties in respect of this matter. I was satisfied that I should grant the relief sought and I made an order to that effect with a written Judgment to be issued in due course. I herein set out the reasons for my Judgment.

2. There are numerous settlements referred to as the Z Trusts (the "**Trusts**"), including a number of active Bermuda Trusts and some trusts which are presently dormant and without assets but were still covered by the present application. The Trusts with a Bermuda trustee have been called the Bermuda Trusts and the remaining Trusts have been called the Jersey Trusts, irrespective of the proper law. It is the Bermuda Trusts which are the subject of this Judgment.

3. The Plaintiffs are trustees of a number of Bermuda Trusts. All but one of the Trusts have a single trustee as follows:
    a. Most of the Trusts have as trustee either P1 or P2, both Bermuda corporations;
    b. One has P3, a Jersey corporation, as trustee in conjunction with P2; and
    c. Six of the Trusts have as trustee either P3 or another Jersey corporation.

4. The Defendants, D1 and D2, are the protectors of the Trusts. All but one of the Trusts have protectors, either D1 or D2, both Jersey corporations. The protectors have the same directors as each other and in the past the boards also have overlapped with those of the trustees.

5. The Defendants, D3 to D18 are beneficiaries of the Trusts.

6. The Defendants, D19 to D46, are investment-holding companies which are wholly owned by certain of the Bermuda Trusts, one company per Trust. Not all the Trusts hold companies and there are 28 companies in all. The Companies seek no relief but they may have acquired assets directly or indirectly from a party to various transactions. They are included in this matter in order to be bound by the Judgment.

7. HM Revenue & Customs confirmed in advance of the hearing that they did not wish to participate in the proceedings.

Background

8. The Plaintiffs caused an Originating Summons to be issued 30 January 2023 seeking relief in relation to past transactions between the trustees of the Trusts and/or their underlying companies, including and in particular:
    a. Declarations from the Court confirming that under the law applicable to the validity of those transactions the two-party rule does not render them void in law or equity;
    b. An order confirming any of those transactions that may be voidable so that they are not liable to be set aside;
    c. A declaration that no person has any claim to moneys or other property in the hands of another person as a result of those transactions; and
    d. An order confirming that the Plaintiffs or other trustees of the Trusts be entitled to administer them on the footing that none of those transactions is void for want of compliance with section 53(1)(c) of the English Law of Property Act 1925 and on such other footing as to the Court seems fit.

9. The various parties in this matter support the application and there is no opposition to it. Although I make detailed references to the submissions of counsel for the trustees throughout, counsel for the other parties did make submissions noting their support for the trustees' positions as well as addressing various issues as they saw fit.

10. In a related matter, on 15 July 2022 the Court made an order ("**the Bermuda 2022 Order**") by which it affirmed large numbers of transactions which involved the Trusts and were vulnerable to challenge under the rule against self-dealing, so that they could no longer be upset. But certain transactions also fell foul of the two-party rule (described below). They were excepted from the Bermuda 2022 Order because they raised different legal points. The current application before the Court deals with those transactions.

11. The Bermuda 2022 Order was made conditional on the grant by the Royal Court of Jersey of similar relief in respect of transactions to which any of the Jersey Trusts (or companies they owned or controlled) were party. That Court considered an application and on 16 December 2022 made such an order (the "**Jersey 2022 Act of Court**").

Two-party rule transactions

12. Certain transactions were excluded from the relief granted by this Court and the Royal Court of Jersey. They comprised transactions between two Trusts where the two Trusts had the very same trustee, so that there was only one party to the transaction. Thus, it is those one-party transactions alone which are the subject of the application before this Court. The number of such transactions so far identified is some 145.

13. The two-party rule is that to be fully valid a contract or a transfer of an asset requires two parties. The rule is common to what the trustees contend are the only relevant systems of law, namely those of Bermuda, England and Jersey.

14. The trustees submitted that the importance of the two-party rule is that it has been suggested that a transaction in breach of the rule is void. If so, there could be serious consequences for

the Trusts involved making it necessary to unravel transactions and any subsequent dealings with the shares or cash transferred, causing further prejudice to companies they owned and controlled and to the beneficiaries personally, and tax would have been paid on an incorrect assumption, in both cases over many years.

15. Thus, the trustees' principal submission in this application was that where there is only one party to a transfer but that party is acting in two different capacities, the transaction is not in law void but, because of the self-dealing rule, at most only voidable.

Jurisdiction

16. In respect of the Bermuda Trusts, the proper law of 21 of the Trusts is that of Bermuda, the proper law of one Trust is that of Jersey and the proper law of the remaining Trusts is English Law. All have Bermuda-based trustees.

17. Section 9(1) and (2) of the Trusts (Special Provisions) Act 1989 (the "**1989 Act**") provides:

> "(1) The Supreme Court has jurisdiction to hear and determine any claim concerning the validity, construction, effects or administration (including in respect of any of the matters referred to in section 7(a) – (j)) of—
>
> (a) a Bermuda trust; or
>
> (b) a foreign trust to which subsection (2) applies.
>
> (2) A foreign trust referred to in subsection (1)(b), is a trust where—
>
> (a) the trust instrument contains a clause conferring jurisdiction on the courts of Bermuda;
>
> (b) all or part of the administration of the trust is carried on in Bermuda;
>
> (c) a trustee is incorporated or resident in Bermuda; or …"

18. I am satisfied that the Court has jurisdiction over all the Bermuda Trusts under the 1989 Act either under section 9(1)(a) or under section 9(2)(c). The Court has a discretion not to exercise jurisdiction if there is a more appropriate forum. However, I am satisfied that Bermuda is the

appropriate forum for all the Bermuda Trusts, including those governed by English Law for the following reasons:

a. As P1 and P2 are based in Bermuda, this Court is the natural court to supervise them as trustees;
b. Avoiding a parallel application in England will save substantial costs; and
c. The Court has already accepted jurisdiction over the Bermuda Trusts when it made the Bermuda 2022 Order.

19. Certain of the Trusts contain exclusive jurisdiction clauses in favour of the English Court or clauses that might be contended to be jurisdiction clauses. In *Crociani* v. *Crociani* [2014] UKPC 40, the Privy Council held that such clauses do not require the court in a different forum to decline jurisdiction where proceedings are brought there: the court retains a discretion to entertain the proceedings. I am satisfied that the reasons making Bermuda the appropriate forum for all the Bermuda Trusts outweigh the jurisdiction clause.

Transactions Concerned

20. The trustees' evidence is that the number of transactions involving the Bermuda Trusts potentially in breach of the two-party rule which have been identified is 145, as follows:
    a. P1 was the trustee on both sides in 113 transactions;
    b. P2 was the trustee on both sides in 18 transactions; and
    c. Some predecessor trustee was trustee on both sides in 14 transactions.

21. It is possible that there were further such transactions which have yet to be identified because records were not available. Relief is sought in respect of them also.

22. The transactions were sales of shares or other investments and market value was always paid. The reasons for the sales included (a) the raising of cash to permit distributions to beneficiaries or the payment of tax and (b) the re-balancing of investment portfolios.

23. The sole party to each transaction was the same company, P1 or P2, acting as trustee of two different Trusts, or a predecessor trustee so acting. Since their incorporations, P1 and P2 have had the same directors as each other.

24. The trustees' evidence was that neither any of the trustees nor any of their directors have received any personal benefit from the transactions.

Two-Party Rule - General

25. The two-party rule has been expressed in Lewin on Trusts as follows:

> *"A purchase or other similar transaction will generally have two aspects, namely contract and transfer of title. It takes two to make a contract. A purported purchase by a person from himself is ineffective because there is no contract. ... At common law the rule applies where a person contracted with himself and others, but that has been reversed by statute. ... So far as transfer of title is concerned, generally property may be transferred by a person to himself jointly with another. However, a person may convey land to himself[1] .... The two-party rule nonetheless prevents a trustee from purchasing beneficially land which he holds as trustee. ..."*

26. The two-party rule is in origin a rule of English law. But here the Trusts and their assets are connected with other jurisdictions, principally Bermuda and Jersey. It is therefore necessary to identify which system of domestic law applies to a given transaction and then, if it is not English, to see whether that system of law has a two-party rule and, if so, how far it extends.

Two-Party Rule in English Law

27. The trustees submitted that, as mentioned in *Lewin*, an ordinary transaction of sale between two parties involves a contract and a transfer of property. That is, it involves an agreement to sell an asset and then performance of the agreement by an assignment of the asset from one party and payment of the price by the other.

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[1] That is by statute: English Law of Property Act 1925, s. 72(3)

28. The trustees submitted that in the one-party transactions the subject of this matter, the sale was not void but was effective to transfer the beneficial interest in the assets, that is, in the shares or other investments to the beneficiaries of the buying Trust and in the money price to the beneficiaries of the selling Trust.

Contract

29. The trustees made clear that they were not submitting that a trustee of two different trusts can enter into a binding agreement with itself in those two capacities capable of giving rise to contractual remedies. That was for the following reasons:
    a. A contractual right can be enforced only by action and the notion that a trustee can sue itself is incoherent;
    b. Despite a single English decision to the contrary, the weight of authority is contrary to that proposition; and
    c. What mattered here was not the existence of contractual remedies but whether a trustee of two trusts may pass the beneficial interest in shares or other investments (on one side) and money (on the other side) between the two trusts. Thus, what mattered was not contract but the ability to transfer property.

30. The trustees helpfully summarised English law for the convenience of the Court but submitted that what was said was not part of the trustees' case. They addressed the issues in terms of the general rule, different capacities, at law and in equity.

Transfer of Property

31. The trustees submitted that the question of whether a one-party transaction is capable of changing property rights is completely different. After all, a transfer might be preceded by no contract at all, as in the case of a gift. What had to be addressed is whether a one-party transaction is void when the sole party is acting as trustee of two different trusts. They submitted that it is not but is effective to transfer the beneficial interest in the asset being dealt with, although whether it may be voidable for self-dealing is another matter.

32. The trustees helpfully summarised the English law for the convenience of the Court. Again, they addressed the issues in terms of the general rule, different capacities, at law and in equity.

General rule

33. It was submitted that the general rule in English law is that a conveyance, unlike a contract, is essentially a unilateral act. At common law a conveyance by A to himself, whether of realty or personalty, was ineffective. A conveyance by A to A and B was not altogether ineffective but passed the whole to B[2]. The rule was modified in 1925, more radically as to land than to personalty:

    (1) Section 72(3) of the Law of Property Act 1925 now permits A to convey land to himself alone or to A and B. That abolishes the rule as to land.

    (2) As to personalty, the rule has been modified in two ways:

        (a) Section 72(1) of the Law of Property Act 1925 permits A to convey personalty to A and B.

        (b) Section 72(4) of the 1925 Act also now permits A and B to convey any property to 'one or more of themselves'.

34. The trustees submitted that as the present case concerns only personalty, the modifications in 1925 do not apply since they do not touch on a conveyance from A to A.

At law

35. The trustees submitted that at law, it has been assumed that the general law applies when A purports to convey to himself in a different capacity. In *Rye v Rye* [1962] A.C. 496 it was said that the function of section 72(3) was to permit a conveyance of land in a different capacity, implying that but for section 72(3) such a conveyance would not have been possible. Since there is no equivalent of section 72(3) for personalty, a conveyance of personalty in a different capacity appears to remain ineffective.

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2 Williams, *Principles of the Law of Real Property* (20th ed., 1901), 204, citing *Perkins' Profitable Book*, s. 203.

In Equity

36. The trustees submitted that in equity there is a critical difference. The question may be framed as whether A as trustee may unilaterally alter the beneficial interests in personalty he holds. They answered the question that plainly he may and cited several cases illustrating the point as follows:
    a. *Pilkington v I.R.C.* [1964] A.C. 612
    b. *Hart* v. *Briscoe* [1979] Ch. 1
    c. *Space Investments Ltd* v. *Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.* [1986] 1 W.L.R. 1072
    d. *Suncorp Insurance and Finance* v. *Commissioner of Stamp Duties* [1998] 2 Qd. R. 285

37. The trustees submitted that those cases are all in which a trustee does not part with legal title to personalty that it holds but nonetheless is able unilaterally to alter the beneficial interests in it. That is exactly what a sale by a trustee to itself as trustee of another trust is meant to do. Therefore there is no reason why such a sale should be regarded as ineffective to pass the beneficial interest solely because of the identity of buyer and seller.

38. The trustees submitted that the distinction is expressly drawn in an Australian appellate decision, *Minister Administering National Parks & Wildlife Act 1974* v. *Halloran* [2004] NSWCA 118 at [54]; on appeal (2006) 224 A.L.R. 79 which is an acknowledgment that such a transaction is perfectly possible in law:

    "A trustee cannot contractually deal with itself so as to sell trust property to itself in some capacity other than as trustee; the closest approximation to such a transaction which conceptually can take place is that a trustee can discharge itself from a trust obligation in respect of a property, but only if it has authority under the constitution of the trust or in some other way to do so."

39. The trustees submitted that the common feature of the cases is that what was done was authorised by the trust instrument. In the present case it was not, as some Trusts had no provision authorising self-dealing, whilst some did but the sale did not comply with them. The trustees submitted that that makes no difference to the analysis. Self-dealing, if unauthorised

by the trust instrument, makes the transaction voidable at most. The trustees have powers of making and transposing investments under all the Trusts. On a sale from Trustee A to Trustee B, the two having the same directors, the sale can be challenged for self-dealing (absent a power to self-deal); but it is quite clear that until it is both challenged and set aside it passes the beneficial interest. Further, if a sale from Trustee A to itself as trustee of two different trusts pursuant to a specific power to self-deal would pass the beneficial interest, as the cases show, there is no good reason why such a sale without a specific power should be treated differently; the sale might be open to challenge for self-dealing but, like a sale from Trustee A to Trustee B, it should not be void.

Conclusion

The trustees' conclusion, which I accepted, was that the two-party rule does not operate to make void any of the transactions within the application so far as they are governed by English law.

Two-Party Rule in Other Systems of Law

40. The trustees submitted that the Court, applying the Bermuda rules of the conflict of laws, should apply the proper law of the trust to transfers of property, specifically shares, when the effect of a one-party transaction is in question. The only possible alternative seemed to be the law of the situs of the property at the time of the transfer (or putative transfer), a possibility that the trustees submitted was inapplicable here.

41. The trustees made submissions on the transfer of property only. They did not make submissions in this section about contract for the reasons they already stated. They submitted that no decision has been found directly on point but they mentioned mostly English authorities because it was assumed that the Court will follow English authority where Bermuda authority was lacking.

Proper Approach

42. The trustees submitted that in any case involving a foreign element, the general approach to identifying the applicable law (the *lex causae*) was laid down by Staughton L.J. in *Macmillan Inc. v Bishopsgate Investment Trust plc* (No. 3) [1996] 1 W.L.R. 387 (C.A.) at 391 which has been repeatedly cited since. The approach is as follows:

> *"In finding the lex causae there are three stages. First, it is necessary to characterize the issue that is before the court. Is it for example about the formal validity of a marriage? Or intestate succession to movable property? Or interpretation of a contract?*
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> *The second stage is to select the rule of Conflict of Laws which lays down a connecting factor for the issue in question. Thus the formal validity of a marriage is to be determined, for the most part, by the law of the place where it is celebrated; intestate succession to movables, by the law of the place where the deceased was domiciled when he died; and the interpretation of a contract, by what is described as its proper law.*
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> *Thirdly, it is necessary to identify the system of law which is tied by the connecting factor found in stage 2 to the issue characterised in stage 1. Sometimes this will present little difficulty, though I suppose that even a marriage may now be celebrated on an international video link. The choice of the proper law of a contract, on the other hand, may be controversial."*

43. The trustees pointed out that *Macmillan* was itself a decision about shares. The issue was one of priority between an original holder and transferees: the question was whether the defendants took free of the plaintiff's beneficial title to the shares when a nominee for the plaintiff used them as security for lending to others, the lenders (who acted bona fide) becoming registered as holders of the shares. Applying the three-stage approach, the court held as follows.

    (1) The issue before the court was to be characterised as about rights of property, specifically whether in law the defendants were purchasers for value in good faith without notice, so as to obtain a good title to the shares.[3]

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3 [1996] 1 W.L.R. 387 at 399C-D, 409A-B, 418C-D.

(2) The relevant rule of the conflict of laws was that issues as to rights of property are generally determined by the law of the situs of the property.[4]

(3) In that case the situs was obviously New York.[5]

Stages 1 and 2 – Characterisation and relevant rule of conflict of laws

44. The trustees submitted that *Macmillan* was approved in *Akers v Samba Financial Group* [2017] A.C. 424, where the decision that a wrongful transfer of the legal interest in shares by a trustee had the effect of extinguishing a beneficial interest under a trust was attributed to the law of the situs. In *Wong v Grand View Private Trust Co. Ltd* [2022] SC (Bda) 44 Com the Court applied the law of the situs to a question whether a transfer of shares should be set aside for mistake. However, *Macmillan* does not require the law of the situs to be applied to every question arising out of an assignment. In *JSC VTB Bank v Skurikhin* [2019] EWHC 1407 (Comm) the law of the situs was not applied where the question was the validity of an assignment by a beneficiary of his beneficial interest. In *VTB*, following the three-stage approach of *Macmillan*, it was held that the issue was to be characterised as a matter of trust law specifically, not as a matter of property law in general (which would have called for the law of the situs), and hence that the governing law was the proper law of the trust.

45. The trustees relied on the fact that in the present case, the trustees have held the relevant assets throughout. The question was whether the one-party transactions were or were not effective to transfer the beneficial interest in those assets from one Trust to another. Thus, it was to be characterised as a question of trust law. In support of that conclusion, the trustees relied on the following:

    a. In cases such as *Macmillan* and *Akers* it is logical to leave it to the law of the situs to determine whether a transfer of the legal interest by the trustee has the effect of making the transferee the absolute owner, so extinguishing the beneficial interest.

    b. But in a case such as *VTB* or the present case, it is not obvious why the law of the situs should have any bearing, since no change in the register is in issue and the nature of

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4 [1996] 1 W.L.R. 387 at 399F-G, 411E-H, 421B and 424F-G.

5 [1996] 1 W.L.R.387 at 405C-D, 412B-C, 425F.

the ownership recognised by the law of the situs is unaffected. Where the law of the situs does not recognise trusts at all, it would be odd first to hold (as required by *Akers*) that a beneficial interest could nonetheless be created but then to submit every question arising out of an assignment or alteration in the beneficial interest to the law of the situs.

c. Trusts routinely hold assets sited in multiple jurisdictions.

d. Practicality points in the same direction. The transactions extend to investments in at least ten different jurisdictions. If the law of the situs was applied, it would be necessary to investigate the domestic law of all ten – meaning the law of the place of incorporation of the entity in which shares or other investments were held and also, if different, the law of the place of any register maintained – to see whether they had a two-party rule and, if so, what it said.

46. The trustees submitted that the issue here is therefore to be characterised as a matter of trust law and, when so characterised, the proper law of the trust obviously applies to it. That is, it is for the proper law of the trust, not the law of the situs of the investments, to determine whether there is a two-party rule at all and, if so, what its effect is.

Stage 3 – Proper law of the trust

47. The trustees submitted that Stage 3 of the *Macmillan* analysis requires identifying the system of law pointed out by the relevant rule of the conflict of laws, namely the proper law of the trust. There is no difficulty in identifying the proper law of each of the Trusts. Accordingly, the Court accepts that the only relevant systems of law are those of England, Bermuda and Jersey.

English

48. The trustees submitted that under the two-party rule under English law the subject transactions are not void but were effective to pass the beneficial interest in the assets being dealt with.

Bermuda

49. The trustees submitted that the scope of the two-party rule in Bermuda law as to transfers is similar but not quite identical to that under English law, though the difference is academic. The Conveyance Act 1983, section 14 is in substantially the same terms as the English Law of Property Act 1925, section 72(3) and (4). It validates conveyances from A and B to A, and it is retrospective; but it does not validate conveyances from A to A and B, or from A to A. The legislation evidently assumes that the English common-law rule applies in other cases. If so, transfers of personalty from A to A alone or from A to A and B remain within the common-law rule. Nonetheless, if a sale by a trustee to itself as trustees of another trust is not void under English law, the same applies under Bermuda law. Sales from one of the Trusts with a Bermuda proper law to another with the same trustee will be effective to pass the beneficial interest (though potentially voidable). Older sales when there may have been an overlap but not an identity of trustees on each side would be treated similarly.

Jersey

50. The trustees submitted that the sole Bermuda Trust having Jersey law was party to two transactions only. Save for these transactions and the possibility that some additional untraced transaction exists, Jersey law should otherwise be irrelevant. For completeness the trustees made submissions on the position under Jersey law.

51. The trustees submitted that there is no authority in Jersey on the two-party rule. Advice received was as follows:

    a. The basic rule requiring two parties to a contract forms part of Jersey customary law. It may be that a version of the two-party rule, similar to the English common-law rule, exists in Jersey.
    b. In Jersey there have been no legislative inroads on the rule equivalent to those in England and Bermuda, so that if the English common-law rule is followed, a contract between A on the one side and A and B on the other is likely to be caught.
    c. A trustee has a single legal personality, so that the rule does not permit the trustee to contract with itself as trustee of another trust.

d. But an exception has been introduced by article 31(3), (effective from 2 November 2012) of the Trusts (Jersey) Law 1984 which reads as follows:

"Subject to this Law (including in particular Articles 21 and 23), but despite any other enactment or rule of law to the contrary, a person may in the capacity of a trustee of one trust enter into a contract or other arrangement with himself or herself in the person's capacity as a trustee of one or more other trusts."

52. Thus, the trustees submitted that if a transaction within the English rule is not void, the same should be true in Jersey, since the Jersey rule, if any, derives from the English common-law rule. That is, on the 'void or voidable' point, Jersey law should be the same as English and Bermuda law.

Consideration and Conclusion

53. I considered the submissions of counsel for the trustees. In deciding the legal effect of a one-party transaction consisting of a sale of shares or other investments between a trustee of one of the Bermuda Trusts and itself as trustee of another, I was satisfied as follows:
    a. That in applying the Bermuda rules of the conflict of laws, I should and did characterise the issue as a matter of the law of trusts;
    b. Having done so, I should and did apply the proper law of the Trust;
    c. The relevant proper laws are those of England, Bermuda and possibly Jersey; and
    d. In each case, those laws do not treat the transaction as void.

Further Relief

Heads of Further Relief

54. Having reached the conclusions as set out above, the one-party transactions remained in the same position as those caught solely by the self-dealing rule before the Bermuda 2022 Order and the Jersey 2022 Act of Court. Though they were not void, they remained potentially liable to be set aside as acts of self-dealing.

55. Thus, the Court was asked to consider the further relief sought in respect of the one-party transactions, which matched that previously granted in 2022:
    a. An affirmation of each of those transactions, so that they cease to be liable to be set aside or otherwise impugned, whether because of:
        i. The one-party rule or the self-dealing rule; or
        ii. A failure on the part of the relevant trustee or a protector to take into account the possibility that the transaction might be void or voidable under those rules or under section 53(1)(c) of the English Law of Property Act 1925; and
    b. An order that every trustee of the Bermuda Trusts, now and in future, should be able to administer them on the footing that those transactions were and are not liable to be set aside on any of those grounds.

Grounds of Further Relief

No setting-aside

56. The Court was asked to order that the self-dealing transactions should not be liable to be set aside under the self-dealing rule (even though not all the self-dealing transactions could be identified, let alone analysed). The trustees submitted as follows:
    a. The exercise of reviewing every self-dealing transaction would be extremely expensive and imperfect;
    b. Setting-aside could not stop at one transaction, or at a few only, and if carried out on a large scale would itself be expensive and imperfect; and
    c. It was improbable that any beneficiary had been prejudiced by the transactions in the aggregate and no beneficiary was in fact seeking a setting aide.

English Law of Property Act 1925, section 53(1)(c)

57. The trustees submitted that English law, in the form of section 53(1)(c) of the 1925 Act required (and requires) a disposition of any equitable property to be in writing, Neither Bermuda nor Jersey law had or has a similar provision. The section was possibly relevant because certain shares and other securities were not registered in the name of the relevant

trustee but in the name of a nominee, so that the trust property of a given Trust was the beneficial interest in those share and securities.

Hastings-Bass – inadequate deliberation

58. As a belt and braces exercise, the Court was asked in 2022 to dispose of any possibility of challenge on the slightly different ground that either a trustee or a protector had failed to take into account relevant considerations in the form of a possibility that a given transaction might be void for self-dealing or for want of compliance with section 53(1)(c). Such a failure would be within the *Hastings-Bass* principle, described in *Lewin on Trusts, Twentieth Ed*, at 30-040 as follows:

> *"A principle has been developed dependent on the duty of trustees (or, seemingly, other fiduciary donees) to have regard to relevant considerations, and only relevant considerations, when exercising powers vested in them. The duty extends to considering the consequences of a proposed exercise of a power in a particular way and not merely its nature or legal effect. If the exercise has effects or consequences not apprehended by the trustees, when they ought to have been, it may be vitiated. This is the so-called principle in Re Hastings-Bass [1975] Ch. 25, CA; and though, as will appear, the name has become inapposite it is likely to continue in use."*

59. Having considered the grounds for further relief, I was satisfied that I should grant such further relief. Consequently, I made the order in terms of the draft order to which I was referred at the hearing.

Dated 28 April 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT