

EASTERN CARIBBEAN SUPREME COURT
ANGUILLA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: AXAHCV2022/0022

IN THE MATTER OF SYRUS HOLDINGS
LIMITED, DYNAMO HOLDING COMPANY LTD,
SEA HAVEN DEVELOPMENT COMPANY
LIMITED & WENDORE LIMITED

BETWEEN:

[1] ALBERT RAOUL FLEMING
[2] MARIE DOMINIQUE FLEMING
(In their capacities as the court appointed guardians and
trustees of Raoul Albert Fleming)

Claimants

and

[1] EMILE VALENTIN DAVIS
[2] SYRUS HOLDINGS LIMITED
[3] DYNAMO HOLDING COMPANY LTD
[4] SEA HAVEN DEVELOPMENT COMPANY LIMITED
[5] WENDORE LIMITED

Defendants

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Ms. Jean M. Dyer of counsel for the Claimants
Mrs. Cora Richardson-Hodge for the 1st Defendant

2024: March 13; 14; 15;
December 4;
2025: November 3.

JUDGMENT

[1] **MOISE, J.:** This is a claim regarding the beneficial ownership of the 2nd to 5th defendant companies. The claimants are siblings and biological children of the late Raoul Albert Fleming (Mr. Fleming). At all material times Mr. Fleming was the beneficial owner of the 2nd to 5th defendants. The 1st defendant

(Mr. Valentine Davis) is referred to as the foster child of Mr. Fleming. Although no formal adoption or similar procedure was ever carried out, it is not disputed that Mr. Davis grew up in Mr. Fleming's household at one point and was referred to as a son. Mr. Davis has over the years worked in Mr. Fleming's various businesses in St. Martin and Anguilla. In summary, this claim seeks to set aside various transactions regarding the 2nd to 4th defendant companies, which the claimants assert were initiated by fraud on Mr. Davis's part. They therefore seek the following orders:

- (a) an order setting aside the transfer of the 2nd defendant's shares to the 1st defendant;
- (b) an order setting aside the transfer of the 125 shares of the 4th defendant to the 1st defendant;
- (c) a declaration that the 5th defendant is the sole director of the 2nd defendant;
- (d) an account of all money belonging to the 2nd and 3rd defendants received by the 1st defendant (including proceeds of sale of land in Cole Bay, Sint Maarten);
- (e) a declaration that the 1st defendant is disqualified from acting as a director in the 2nd through 5th Defendants; and
- (f) an order restraining the 1st defendant from excluding the 2nd claimant from participating in the management of the 2nd through 5th defendants.

The Facts

[2] Mr. Fleming died on 23rd June, 2023 after the filing of this claim. At the time of the filings, the court had appointed the claimants as guardians of his affairs in Anguilla. Prior to his death, sometime in November 2019, Mr. Fleming was diagnosed with Alzheimer's by Dr. Michael Gordon MD at Broward Medical Center in Florida. By that time, he was semi-retired and had granted general power of attorney dated 27th August, 2008 to the 1st claimant (Mr. Fleming Jr.). Mr. Fleming Jr. stated that from the date of his father's diagnosis he has handled all of his father's affairs primarily on the French side of St. Martin.

[3] Based on the facts presented in this case, it is apparent that Mr. Fleming was a rather successful businessman and politician in Saint Martin. He was the Mayor of the Commune Saint-Martin from 1982 until his retirement in 2007. Mr. Fleming also registered a number of companies as conduits through which his business affairs were handled. These companies included the 2nd to 5th defendants

in this case which were registered in Anguilla. The 2nd defendant was the registered owner of a number of parcels of land on the island. For the purposes of this judgment the 2nd to 5th defendants will be referred to as Syrus Holdings, Dynamo Holding, Sea Haven Development and Wendore Ltd. respectively.

Syrus Holdings

- [4] As it relates to Syrus Holdings, it is pleaded that Mr. Fleming was the sole ultimate beneficial owner of this company. The claimants assert that he held his shares in Syrus Holdings through his nominee, AGM International Ltd. This company was at all material times controlled by Mr. John Benjamin, who is also now deceased but was, at the time, an attorney at law practising in Anguilla. It is also pleaded that Mr. Fleming owned a number of parcels of land in Anguilla through Syrus Holdings. A number of registers from the Land Registry in Anguilla were exhibited in support of this assertion.
- [5] In his affidavit in support of this claim, Mr. Fleming Jr. asserts that in November 2020, after his father had already been diagnosed with Alzheimer's, he and the 2nd claimant (Ms. Fleming) enquired as to the status of the lands in Anguilla. He was surprised when Mr. Davis informed him that there was no land owned by Mr. Fleming in Anguilla. Mr. Davis informed them that the various parcels of land had in fact been transferred to him. It was stated that the claimants requested proof of Mr. Davis's assertions. On 1st December 2020, Mr. Davis sent an email to Ms. Fleming. Attached to this email was a letter of 3rd July 2015 which Mr. Davis presented as proof that Mr. Fleming was no longer the "indirect" owner of the lands in Anguilla. The letter was addressed to Mr. John Benjamin from Mr. Fleming and requested that the 2 shares held in Syrus Holdings by AGM International Limited be transferred to Island Assets Company Limited for the nominal price of US\$1.00. I understand Island Assets Company Limited to be a company owned by Mr. Davis.
- [6] Mr. Fleming Jr. stated in his evidence that the claimants became suspicious of the content of this letter for a number of reasons. Firstly, Mr. Fleming consistently expressed, over a number of years, that his nine (9) children, including Mr. Davis, would equally inherit the property he owned in Anguilla and in Sint Maarten. In addition to that, Mr. Fleming traveled to Anguilla sometime in May 2019, along with Mr. Davis, in relation to the sale of certain lands he owned in Anguilla. That would have been approximately 4 years after the date that Mr. Davis states that the lands had been transferred to him.

- [7] Further, it was the claimants' evidence that, sometime in December 2021, Ms. Fleming was contacted by Syrus Holdings' registered agent in Anguilla, a company by the name of Stott & Co., who informed her that Mr. Davis was attempting to remove Wendore Ltd. (an Anguillian international business company of which she and Mr Davis were the only directors) as sole director of Syrus Holdings. Mr. Davis was also attempting to sell one of the parcels of land owned by Syrus Holdings in Anguilla. Ms. Catherine Brookes, an employee of the registered agent, insisted that Ms. Fleming needed to sign the documents authorizing such actions as she was a co-director in Wendore Ltd. Ms. Fleming refused to sign the authorization and a meeting was arranged between herself and Mr. Davis in Sint Maarten on 16th December, 2021.
- [8] During the course of this meeting, Mr. Davis produced a resolution dated 1st October 2021. In that resolution it was stated that Wendore Ltd. would immediately resign as Syrus Holdings' sole director. It was stated in evidence that Mr. Davis also informed Ms. Fleming that Mr. Fleming's visit to Anguilla in May 2019 was because he needed money, and that Mr. Davis was selling his land in order to assist Mr. Fleming. Ms. Fleming was obviously not satisfied with this information and refused to sign the resolution. She did not believe that Mr. Davis was the owner of the lands in question. She also did not believe that Mr. Fleming was in need of any such financing. For his part, Mr. Fleming Jr. stated that, as his father's lawful attorney-in-fact, he was aware that he had significant financial means. He was not a man of 'straw'. Further, in Mr. Fleming's latter years, Mr. Fleming Jr, was present at all meetings concerning his affairs and privy to all such discussions.
- [9] A family meeting was convened in the last week of December 2021. Mr. Davis attended that meeting and presented a file from Mr. John Benjamin's office. Mr. Davis presented a letter dated 7th December 2021 to Stott & Company Limited. Again, in that letter he purported to, as President of Wendore Ltd., tender Wendore Ltd.'s resignation as director of Syrus Holdings. Mr. Davis also presented a resolution of Syrus Holdings dated 7th December, 2021 purporting to accept this resignation and appoint himself as the sole director of the company. It is contended that Ms. Fleming, as a co-director in Wendore Ltd, had to also authorize this resignation. She has insisted, in her own evidence, that she had not given any such authorisation.
- [10] Ms. Catherine Brookes, who was the compliance manager for Stott & Co., was summoned to appear in this trial. She corroborated what was stated about Mr. Davis's attempts to have Wendore Ltd.

removed as director of Syrus Holdings without authorization from both directors, as was required. In fact, Ms. Brookes goes on to state that Stott & Co. became so suspicious of Mr. Davis's actions that a report was made to the police that he was potentially engaged in fraud.

- [11] The family's suspicion regarding Mr. Davis's actions was further fueled by events which took place on 27th December 2021. On that date Mr. Davis presented two letters to Ms. Fleming. The letters were purporting to be from Mr. Fleming, addressed to Mr. John Benjamin and dated 14th May 2018 and 25th June 2018 respectively. The letter of 14th May, 2018 essentially instructed Mr. John Benjamin to transfer the 2 shares held by AGM International Limited on behalf of Mr. Fleming to Mr. Davis. The letter of 25th June, 2018 instructed Mr. Benjamin to transfer the 2 shares to a company named Skave Ltd. The claimants assert that this was suspicious because Mr. Davis provided no explanation as to the delay in presenting this information to them. This would have also had the effect of disinheriting the remainder of Mr. Fleming's children.
- [12] The claimants therefore arranged for the letters to be examined by a handwriting expert, Mr. Curt Baggett. Mr. Baggett examined the signature on the letters which were purportedly issued by Mr. Fleming in 2018 and compared them to his known signature on his passport and on the letter dated 3rd July 2015. Mr. Baggett concluded that *"a different person authored the name of R. Albert Fleming on the questioned documents. Someone did indeed forge the signatures of R. Albert Fleming on the questioned documents..."*
- [13] Mr. Baggett appeared as a witness in this matter and gave evidence of his findings. During cross examination he maintained that the 2 samples of the signature presented to him were sufficient for him to formulate an opinion on whether the signature on the 2 letters of 2018 were forgeries. He stated that, although he normally requests at least 6 sample signatures and that guidelines permit or recommend up to 25 specimens be utilized, he was satisfied that the 2 provided were sufficient for his examination in this case. It was put to Mr. Baggett that external and internal factors may affect the quality of an individual's signature. He accepted that this is true. Factors such as brain damage, hand injuries and intoxication can all affect the quality of the signature. He did not accept that advanced age on its own can affect the quality of a signature. Mr. Baggett stated that the age factor would have to be associated with some brain or hand damage for this to occur.

- [14] When pressed on the findings in his report, Mr. Baggett stated that he saw no signs of such factors in the specimen signatures provided to him. He stated specifically that “[t]he writing, it has fluidity, it has pressure, it doesn’t have abnormal shapes. For instance, you mentioned alcohol, after the third drink, your writing is distorted and spread out, and I saw nothing to indicate brain damage here excessively and or, or physical damages”. Mr. Baggett therefore stood by his findings. He also confirmed that the signature on the letter dated 3rd July, 2015 was that of Mr. Fleming.
- [15] The claimants asserted that Mr. John Benjamin may have acted pursuant to these allegedly forged letters, as the 2021 Annual Return for Syrus Holdings records Mr. Davis as its sole shareholder. Mr. Fleming Jr. states in his affidavit that the two issued shares in Syrus Holdings were purportedly transferred to Skave Holding Limited (a company owned by Mr. Davis) by way of share transfer dated 10th October, 2018. However, notwithstanding this, the 2021 Annual return records those shares as belonging personally to Mr. Davis.
- [16] Based on questions put to her in evidence at the trial, Ms. Catherine Brookes noted that although the share transfer of 18th October, 2018 sought to place the 2 shares in the name of Skave, Stott & Co. only recorded Mr. Davis as the shareholder in the annual returns of November 2021. Therefore, the recording in the annual returns would not have given effect to the substance of the share transfer as the returns reflect Mr. Davis as personally owning those shares. In addition to that, Ms. Brookes admitted that a request was indeed made to Mr. Davis to present a resolution to transfer the shares to him personally. Despite the fact that this resolution was not presented, Stott & Co. went ahead and placed Mr. Davis as the sole shareholder on the Annual Returns for that year. However, Ms. Brookes noted that a restated annual return was filed on 22nd December, 2021 seeking to correct this error.
- [17] There is evidence that Ms. Brookes engaged in various email exchanges with Mr. Davis between 10th December, 2021 and 18th January, 2022. She was of the view that, based on the share transfer in October 2018 and the directorship of the company, Mr. Davis did not have authority to make decisions for Syrus Holdings on his own. In addition to that, if the shares were actually to be owned by Skave, there was a problem given that Skave itself had been struck off the register of companies in Anguilla at the time. Mr. Davis appears to have been seeking to facilitate a transfer of the shares in Syrus Holdings to himself as well as the removal of Wendore Ltd. as director of Syrus Holdings.

- [18] Mr. Fleming Jr. states in this evidence that, despite all of this, Mr. Davis went on to remove Wendore Ltd. as Syrus Holdings' director and appointed himself in its stead. This was done without Ms. Fleming's knowledge on or about 8th March, 2022. He asserts that these documents were not registered by Stott & Company Limited. It is also asserted that on 8th March 2022, Mr. Davis, acting in his capacity as the sole shareholder of Syrus Holdings, altered its registered office from Stott & Company Limited to Meridian Corporate Services Ltd. I must note, however, that the evidence suggests that Stott & Co. gave up its agent license and therefore surrendered its agency in December 2021. This was therefore not done entirely at Mr. Davis's instance. However, it would also appear that Ms. Fleming, as one of two directors in Wendore Ltd., was not consulted on this issue.
- [19] Syrus Holdings has since been struck off the register of companies in Anguilla as it does not have a registered office/agent in the country. Mr. Fleming Jr. states that the claimants wish to take steps for the revival and restoration of Syrus Holdings to the Register at the Companies Registry in Anguilla.
- [20] Mr. Fleming Jr. was cross-examined during the course of the trial. He acknowledged that Mr. Davis had worked in his father's companies but denied that he served in a managerial position from age 17 as he asserted in his own evidence. When certain documents were put to him indicating that Mr. Fleming had in fact made that very representation during his lifetime, Mr. Fleming Jr. held on to his skepticism that Mr. Davis had served his father in a managerial capacity from such a young age. Mr. Fleming Jr. also maintained his position that the letter of 3rd July, 2015 was not authentic despite the findings of the handwriting expert that the signature was that of Mr. Fleming. He acknowledged that the letter was signed by his father but continued to be skeptical that he had authored the content of the letter himself. Despite being pressed about their content, Mr. Fleming Jr. also maintained that the letters of May and June 2018 were fraudulent, not merely because of the fraudulent signatures but other irregularities, such as the telephone number on the letter which he states belonged to him and not his father. It was put to him that a notarized letter of 19th July, 2018 contained the same content as the June 2018 letter. Mr. Fleming Jr. acknowledged this but nonetheless maintained his position on the matter. It must be noted, however, that this notarized letter emerged after the initial pleadings were filed in this case. It was not initially referred to in Mr. Davis's defence.
- [21] As it relates to the visit to Anguilla in 2019 regarding the potential sale of the lands on the island, the claimants presented evidence from Mr. David Marcell Francillette. Mr. Francillette stated that he had

known Mr. Fleming for a long time, and he confirmed that he had travelled with him to Anguilla with a view to purchasing land from him. Mr. Francillette could not recall the exact date of the visit but stated that it had to have been before the covid pandemic started. He also stated that there was one other person who travelled to Anguilla with himself and Mr. Fleming. Whilst he was not introduced to that person, he was of the view that this was Mr. Fleming's son, who he understood resided in Anguilla. At no point during that visit did Mr. Fleming indicate that the property was owned by anybody else but himself. Mr. Francillette was led to believe that the property was owned by Mr. Fleming.

[22] In the end, Mr. Francillette indicated that he did not commit to purchasing the property because the boundaries had not been identified during that visit. He stated that the gentleman who was present at the meeting was supposed to have contacted him once the boundary markers were put in place. He never received that phone call. Mr. Francillette confirmed in cross-examination that at no point during the visit to Anguilla did he speak to the gentleman who was with Mr. Fleming. Mr. Fleming also spoke to him in French at all times. I find as a matter of fact that this gentleman was Mr. Davis.

[23] Mr. Francillette's evidence was corroborated by that of Tiana Marie Songha, who claims to have encountered Mr. Davis (who she refers to as "Val") during her visits to the Fleming home in St. Martin. She knows the claimants and Mr. Fleming. as she grew up as a close friend of Ms. Fleming. Ms. Songha states that on 21st May, 2019, she saw Mr. Fleming and Mr. Davis on the ferry travelling from St. Martin to Anguilla. That was in the morning. She also claims that something seemed off about what she saw. Later that day she also saw Mr. Fleming, Mr. Davis and "the Francillette guy" looking at property in West End, Anguilla. It was stated in evidence that Ms. Songha sent a WhatsApp message to Ms. Fleming about what she observed at the time. Ms. Fleming corroborated this and exhibited the WhatsApp exchange.

[24] Ms. Fleming also asserts in her own evidence that on 29th April, 2019, she visited Anguilla with Mr. Fleming and Mr. Davis and that upon arrival in Anguilla Mr. Fleming requested that Mr. Davis take him to "see his land". It was her evidence that Mr. Fleming was still of the view that the land in Anguilla belonged to him as late as April 2019. In fact, she states that Mr. Fleming complained about there being no sign placed on the land indicating that it was for sale. Her evidence was that this appeared to have been an instruction previously given to Mr. Davis. Ms. Fleming also asserted at trial that during the April 2019 visit, she, along with Mr. Fleming and Mr. Davis, visited the offices of Stott and

Co. I understand that it was at this meeting that Ms. Fleming was appointed as Managing Director in all of Mr. Fleming's companies in Anguilla. She states that Mr. Fleming became aware that the shares in Wendore Ltd. were transferred to all of his children without his consent. He sought to correct this and directed that all of the shares be returned to him.

Mr. Davis's Response

[25] Mr. Davis, in his response to the allegations relating to Syrus Holdings, states that sometime in early 2015, after returning from a foreign trip¹, Mr. Fleming approached him at a family gathering and expressed a desire to transfer the land in Anguilla to him. Mr. Davis said that he was surprised at this and asked whether Mr. Fleming was sure of this intention. He states that Mr. Fleming confirmed that desire. Mr. Davis stated that he explained to Mr. Fleming that the land was registered in the name of Syrus Holdings and that, in order to effect a transfer of the properties, the shares of the company would have to be transferred to Mr. Davis. Mr. Davis asserts that Mr. Fleming instructed him to get the papers prepared in order to facilitate this request. It was asserted that on that basis the letter dated 3rd July 2015 was written to Mr. John Benjamin. Mr. Davis insists that this letter is legitimate and that even the handwriting expert affirms that it was Mr. Fleming's signature on the document. It is to be noted, however, that Mr. John Benjamin never acted on this letter and this transaction did not formally take place in 2015. The court has also not been presented with any evidence to suggest that this letter was in fact ever served on Mr. Benjamin.

[26] Mr. Davis goes on to state that on 29th February 2016, Mr. Fleming executed another letter to Mr. Benjamin. This letter was notarized in St. Martin and instructed Mr. Benjamin to sell and transfer the 2 shares in AGM to Island Assets Company Limited. Mr. Davis states that, notwithstanding Mr. Fleming's letters, Mr. Benjamin did not effect the transfer. He states that this was only discovered in 2018, and two further letters were written to Mr. Benjamin on 14th May and 25th June 2018. The last of these two letters requested a transfer of the shares to a company known as Skave Holding Limited. This company is beneficially owned by Mr. Davis. However, the letters of May and June 2018 are those which the handwriting expert has deemed to be forgeries of Mr. Fleming's signature. However, Mr. Davis subsequently presented a letter dated 19th July, 2018 which was allegedly signed by Mr.

¹ I note here that Mr. Fleming Jr. states that he examined Mr. Fleming's passport and saw no evidence of this foreign trip.

Fleming and notarized. The content of this letter was the same as the one dated 25th June, 2018. This was presented only after the pleadings were closed in this case.

- [27] Mr. Davis asserts that Mr. Fleming was aware that he owned Island Assets and Skave and that it was his clear intention to transfer ownership of the lands in Anguilla to him, through those companies, as a gift for his hard work in Mr. Fleming's companies.
- [28] Mr. Davis goes on to state that on 4th June, 2018², he travelled to Anguilla along with Mr. Fleming. The purpose of this visit was to attend a meeting with Mr. John Benjamin, Mrs. Jacinth Jeffers and Ms. Latoya Richardson. This meeting took place at the law offices of Mr. Benjamin. Mr. Davis asserts that Mr. Benjamin and Mrs. Jeffers were able to confirm Mr. Fleming's instructions regarding the transfer of the shares to him. Mr. Davis also references a letter of 21st June, 2018, in which Mrs. Jeffers confirms the instructions given at the meeting on 4th June 2018. The letter also requested written confirmation of Mr. Fleming's instructions to remove Wendore Limited as director for Syrus Holdings. Mr. Davis asserts that this confirmation was contained in the letter dated 25th June, 2018.
- [29] It is perhaps important to outline the substance of the various letters referred to by Mr. Davis in order to place this dispute into context. In the letter dated 14th May, 2018 Mr. Fleming is alleged to have directed the following instructions to Mr. Benjamin:

I understand that you want me to come to Anguilla, to discuss a matter surrounding the above-mentioned company. However, the best person to discuss this with is my son, Valentin Davis, who actually is the one that set the company and has been dealing with Syrus Holding matters since its inception of April 25, 1990.

As I also understand, that your office unknowingly to either of us, made Wendore Limited, the director of Syrus Holding. As it is now, we would like to have the company revived with the correction that Wendore not be the director and that Emile Valentin Davis be made the sole director. Considering that all the necessary payments and documents are up to date, I

² There is some discrepancy in the evidence as to the date of this meeting, but it appears clear that the correct date is 4th June, 2018.

personally do not see any reasons to hold up the revival of the company, with him as its director.

Notwithstanding that the instructions I gave about share transfer in 2006, which were never officiated, I have subsequently given other instructions concerning the shares, which is herewith attached for the 2 shares held by AGM International Limited be transferred to Valentin Davis or as he may direct your office.

I trust that you will work with Valentin to rectify whatever matters surrounding the director's situation and revival of the company.

Do feel welcome to call me at the above number, for any further clarification on the above.

- [30] It is worth repeating that the signature on this letter was alleged to have been forged by a handwriting expert. However, subsequent to this letter, Mr. Fleming and Mr. Davis attended the meeting at Mr. John Benjamin's office on 4th June, 2018. Following that meeting, Mrs. Jacinth Jeffers from Mr. Benjamin's chambers wrote to Mr. Fleming by way of letter dated 21st June, 2018. This letter requested various information from Mr. Fleming as part of the due diligence process. In addition to that, Mrs. Jeffers wrote the following:

Upon restoration of the company should it be your request that Wendore Limited is removed as director of Syrus Holdings Limited, please provide written instructions to effect the same. Please be advised that Benamine Company Services Limited in so doing makes no admission to any act of error, omission and or negligence and accepts no liability for the registration of Wendore Limited as the Director of Syrus Holdings Limited.

Please sign below if you are in agreement with the aforementioned

- [31] It would appear from the content of this letter that there was some concern on the part of Mr. Benjamin's office regarding the removal of Wendore Ltd as director of Syrus Holdings. The content of Mrs. Jeffers' letter appears to address some dispute regarding the manner in which Wendore Ltd was appointed as director in the first place. The court was provided with a copy of a resolution of

Wendore Ltd. dated 21st December, 2017 in which that company purported to appoint Mr. Davis as managing director of Syrus Holdings. The signature on this resolution appears to be similar to Mr. Davis's signature in other documents submitted in this trial. Therefore, it seems clear that there was some connection between the two companies and Mr. Benjamin's office was apparently denying any error or negligence in Wendore's appointment as director in Syrus Holdings.

[32] In addition to that, there is nothing in Mrs. Jeffers' letter which addressed the question of whether Mr. Benjamin had received instructions to transfer the shares in Syrus Holdings to Mr. Davis or any one of his companies. Mrs. Jeffers requested that Mr. Fleming indicate his agreement with the content of this letter by signing below. There is no evidence that the letter was ever signed by Mr. Fleming. Instead, the letter of 25th June, 2018 was allegedly written to Mr. Benjamin by Mr. Fleming and stated as follows:

On your request, I attended a meeting pertaining to the reinstatement of Syrus Holding Limited, at your office. As per the records, it could not be substantiated that any resolution or instructions were given from my part nor that of my son, to change the director of Syrus Holding Limited to Wendore Limited.

However, in order to move forward, as beneficial owner of Syrus Holding, I herewith have decided and request the following:

- 1. That the sums paid to update the fees due at your office be applied accordingly and that you advise me of any further fees due to Benjamin Company Services.*
- 2. That you arrange for the sale and transfer of the 2 shares held by A.G.M. international to be Issued and transferred to Skave Holding Limited for the sum of US\$1.00.*
- 3. That you bill us whatever required fees to transfer Syrus Holding Limited to another registered management company In Anguilla.*

4. *That you make the necessary arrangements to transfer, Syrus Holding Limited file to Stott & Co., as its new registered office.*

5. *That you recognize, Emile Valentin Davis, as the authorized person, on my behalf to coordinate and process the above listed Items.*

Should you require any verification on these Instruction, you may contact me directly on the above mentioned telephone number or email address.

[33] I pause here to note that nowhere in this letter purported to be written by Mr. Fleming does it reference the letters of 3rd July, 2015, the notarized letter in 2016 or the more recent instructions given to Mr. Benjamin in May 2018. The letter also did not give any instructions to Mr. Benjamin to remove Wendore Limited as director of Syrus Holdings. A notarized letter of 19th July, 2018 was written in similar terms. In addition, Mr. Fleming continued to refer to himself as the ultimate beneficial owner of the company and sought to empower Mr. Davis to act on his behalf in completing the listed transactions.

[34] Following on from this, Mr. Benjamin executed a share transfer on 10th October, 2018. However, the specific content of this share transfer is worth noting. Mr. Benjamin attests in this document to a transfer of the shares which AGM held in Syrus Holdings to Skave Limited in consideration of the sum of \$1.00. Very importantly, however, the transfer document states that Skave was to hold the shares in Syrus Holdings subject to the conditions on which they were held immediately before the execution of the transfer. It is not in dispute that AGM was never the ultimate beneficial owner of the shares. The shares were held in trust, and it is more than merely arguable that Skave was to have acquired those shares on the same conditions in which they were previously held by AGM. It is also worth noting that there was no indication in any of these documents that Mr. Fleming's ultimate intention was to gift these properties in Anguilla outright to Mr. Davis. Although he had allegedly requested a sale transfer of the shares at what can only be described as an undervalue, he made no reference to a desire to relinquish the beneficial interest which he held in those companies.

[35] Mr. Davis goes on in his affidavit to recount the events of 29th April, 2019. He states that he, along with Mr. Fleming and Ms. Fleming, travelled to Anguilla and attended the office of Stott & Co. Whilst

there, they met with Ms. Catherine Brookes and Mr. Fleming instructed that the 10,000 shares in Wendore Limited which had been previously vested in his 8 children be returned to him and that Ms. Fleming be added as a director in his companies. Mr. Davis states that Mr. Fleming did not request that Ms. Fleming be placed as a director in Syrus Holding because he knew at that point that he was no longer the owner of that company. In fact, the evidence suggests that when Ms. Brookes presented Syrus Holdings' file to Mr. Fleming, Mr. Davis interjected to state that this was his company. Mr. Fleming did not react to this, except to say that if the company belonged to Mr. Davis, why was he not taking responsibility for the payment of the various fees. The discussions relating to Syrus Holdings appeared to have ended there.

[36] Mr. Davis initially asserted that during that visit there were also no discussions about lands in Anguilla. He denied that there were visits to any lands at the time. I do note, however, that although Ms. Fleming was not appointed as a director of Syrus Holdings, she was a co-director of Wendore Ltd, which was, at that point, still registered as the sole director of Syrus Holdings. Mr. Davis expresses some surprise at the fact that in February 2022, Mr. Fleming Jr. was registered as the owner of 10,000 shares in Wendore Ltd. He references and exhibits an affidavit sworn by Ms. Fleming in proceedings before the Registrar of Companies in Anguilla in which she states that she, along with Mr. Davis and Mr. Fleming, had visited lands in Anguilla in May 2019.

[37] Mr. Davis admits that he took efforts to have Wendore Ltd removed as a director in Syrus Holdings. He states that there was a misunderstanding between Mr. Fleming and John Benjamin's chambers and that he was of the impression that after the meeting of 4th June, 2018 Wendore Ltd had been removed as a director in Syrus Holdings. Mr. Davis states that it was sometime in 2021, when he attempted to sell a portion of land owned by Syrus Holdings, did he become aware that Wendore Ltd. was still registered as a director. He goes on to state that on 7th December 2021, in his capacity as President of Wendore Limited, he signed a resignation letter from Wendore Ltd as well as a resolution on behalf of Syrus Holdings seeking to have Wendore removed as a director. These documents were submitted to Stott & Co.

[38] However, Mr. Davis was informed that this resignation letter had to also be signed by Ms. Fleming. He therefore reached out to her in December 2021 to have her co-sign the document. She refused and a meeting of the family was held in that same month as mentioned earlier in this judgment. It is

this attempt by Mr. Davis which raised obvious tensions between himself and Ms. Catherine Brookes of Stott & Co. Ms. Brookes was clearly of the view that Mr. Davis was not authorized to remove Wendore Ltd as director of Syrus Holdings without the consent of Ms. Fleming. It is also worth noting that at the time, no attempt had been made to properly register the share transfer which Mr. Davis had obtained in October 2018.

[39] Mr. Davis states, in his affidavit, that he presented the letters dated 14th May 2018 and 25th June 2018 to the family as proof of Mr. Fleming's instructions to transfer the shares in Syrus Holdings to him. In relation to the correspondence and documents sent to Stott & Co. Mr. Davis indicated that this was done in order to give effect to Mr. Fleming's wishes as stated in 2015. As far as Mr. Davis is concerned, the removal of Wendore Ltd as director in Syrus Holdings was an ongoing issue which he was simply trying to resolve. It was Mr. Davis's position that there was, in fact, no decision to be taken by Wendore Ltd. to resign as director in Syrus Holdings as Mr. Fleming had already given those instructions as far back as 2015. He denies that the letters of 14th May and 25th June, 2018 were forgeries and insists that, in any event, those desires were confirmed verbally by Mr. Fleming at the meeting with Mr. John Benjamin and Mrs. Jacinth Jeffers. It was his position that Mr. John Benjamin, as well as the notary who witnessed Mr. Fleming's signature, would not have acted had this been false.

[40] In cross-examination on the issues relating to Syrus Holdings, it was put to Mr. Davis that the letters of 14th May and 25th June, 2018 were prepared by him. In fact, it was also put to him that all letters relating to this share transfer were prepared by him. His response to this line of questioning was rather evasive. Counsel for the claimants put to Mr. Davis that at a family meeting in December 2021 he acknowledged that he had prepared the letter. His reply was that he could neither confirm nor deny this. He stated that Mr. Fleming often relied on secretaries and administrators to type his letters. He was his father's servant and simply carried out his instructions. Mr. Davis could not confirm or deny whether he was present when Mr. Fleming signed those letters but insisted that Mr. Fleming gave him the letters to take to Mr. John Benjamin's office.

[41] As it relates to the meeting of 4th June, 2018 at Mr. John Benjamin's office, Mr. Davis confirmed that he presented no actual minutes of the meeting but insisted that the letter from John Benjamin's office confirmed that the meeting did take place. He stated that the purpose of the meeting was to reinstate

Syrus Holdings to the register, among other things. Mr. Davis stated that Mr. Benjamin wanted to see Mr. Fleming up front as part of his own due diligence. Mr. Davis also denied that he prepared the letter of 19th July, 2018. It was put to him that this letter made no mention of the fact that it was reconfirming an instruction to transfer the shares in Syrus Holdings to Skave as having been discussed at the meeting in Mr. Benjamin's office. Mr. Davis also acknowledged that Mrs. Jeffers' letter of 21st June, 2018 did not refer to any transfer of shares. Mr. Davis, however, went on to state that there was no need for the letter to mention that and that, in any event, there were other letters sent to Mr. Benjamin on the issue.

- [42] In further cross-examination on the letter of 19th July, 2018, Mr. Davis confirmed that he did not present this letter to the claimants during the meeting held with the family in December 2021. He also acknowledged that this letter was not initially referred to in his affidavit filed in this matter. He states that the letter was not before him at the time but that he later discovered this letter in the file. He was also pressed on whether he had mentioned the transfer of the lands in Anguilla to family members prior to Mr. Fleming's diagnosis of Alzheimer's and he stated that he could not recall but had no responsibility to do so in any event.
- [43] It was also put to Mr. Davis that at the family meeting in December 2021 "Mama"³ expressed the view that Mr. Fleming would not have given all of that land to one child and that it was likely that any share transfer was for the purpose of Mr. Davis becoming a trustee. It was also put to him that this view was consistent with what was expressed by Catherine Brookes in her own evidence. Mr. Davis denied this. He stated that "Mama" did not work in Mr. Fleming's companies and that he, Mr. Davis, had worked with Mr. Fleming for 40 years. He described him as a generous man and that the transfer of the property was on account of his service to the companies over the years. The other children also did not work in the companies. As it relates to Catherine Brookes' evidence, Mr. Davis acknowledged what she said but was of the view that Stott & Co. had to act in accordance with the companies' by-laws and instructions given by Mr. Fleming, not by Ms. Brookes' own perspective.
- [44] Mr. Davis was also pressed on the question of whether the actual transfer of shares in Syrus was in fact a gift. It was put to him that in paragraph 40 of his affidavit he stated that this transfer of shares, and by extension the lands in Anguilla, was a gift as a bonus for the work he had done for Mr.

³ "Mama" was Mr. Fleming's ex-wife

Fleming's companies. It was put to him, however, that in none of the letters presented as proof of Mr. Fleming's intention was it stated that the transfer was a gift. Further, it was put to Mr. Davis that, by his own admission, he had gone through the steps of properly documenting the transfer of other lands in St. Martin to himself as a gift from Mr. Fleming in order to protect himself. Nothing similar was done in relation to the lands in Anguilla. Mr. Davis responded by stating that the correspondence relating to the transfer of Syrus' shares to Skave was an exchange between Mr. Fleming and AGM in a business capacity. No mention was made there of this being a gift for that reason. In relation to the transfer of the property in St. Martin, Mr. Davis stated that this property was directly under his control, and it was therefore necessary to document why he was now transferring it to himself. A similar situation did not arise in relation to the land in Anguilla.

[45] It was put to Mr. Davis in cross-examination that during the meeting in Mr. John Benjamin's office, Mr. Fleming was never informed, nor was he aware, that Syrus Holdings was the owner of the lands in Anguilla. Mr. Davis stated that Mr. Fleming had those discussions with his nominee and he did not see any specific reason for him to explain that issue during the course of the meeting. It was put to Mr. Davis that if he had explained to Mr. Fleming that Syrus Holding was the company which owned the land in Anguilla, he would have made it clear that he did not give the shares in Syrus Holdings to Mr. Davis. He denied this assertion.

[46] Mr. Davis stated, in cross-examination, that at the time of the meeting in Mr. John Benjamin's chambers he was not aware that Wendore Limited was the sole director of Syrus Holdings. He was of the view that Wendore's directorship had been revoked based on Mr. Fleming's instructions. It was put to Mr. Davis that Mrs. Jeffers' letter did indicate that the removal of Wendore Limited as director of Syrus would have had to be done after Syrus Holdings was restored to the register and that written instructions had to be provided in order to have Wendore's directorship replaced. Mr. Davis's response was that he had assumed that this was done upon Syrus' restoration to the register. It was then put to Mr. Davis that Syrus was not restored to the register until 2021.

The Law and Submissions regarding Syrus Holdings Ltd.

[47] As it relates to the transfer of the shares in Syrus Holdings to Mr. Davis, counsel for the claimants refers to the case of **J. Sainsbury plc v. O'Connor (Inspector of Taxes)**⁴ where Nourse LJ noted that there “**is no difficulty in ascertaining the legal ownership of shares, which is invariably vested in the registered holder**”. Counsel goes on to refer to various legislative provisions in the **Companies Act**⁵ regarding the need for registration of share transfers. It must be noted that the **Companies Act** was repealed and replaced by the **Business Companies Act**⁶ of 2022. However, given the overlap between the events which gave rise to the dispute between the parties and the filing and trial of the claim, it is important to give consideration to the provisions of both the historic and current legislation in order to reconcile the issues in this case and determine the court’s current powers in granting the remedies which the claimants’ seek.

[48] Provision was made for the transfer of shares in a company in **The Companies Regulations**⁷ which were enacted in accordance with section 270 of the **Companies Act**. Counsel refers to section 5(6) of the **Companies Regulations** which states that:-

“...a company ...is not bound or entitled to treat the transferee of shares or debentures as the owner of them until the transfer to him has been registered or until the Court orders the registration of the transfer to him, and, until the transfer is presented to the company for registration, the company is not to be treated as having notice of the transferee’s interest therein or of the fact that the transfer has been made”.

[49] Counsel goes on to refer to sections 7 to 9 of the **Companies Regulations** and Syrus Holdings’ By-Laws 1.2 and 2.7 both of which require the approval of the directors of a company before a share transfer is entered on the register. Section 7(1) of the Regulations states that “**[a] company must issue a certification of the transfer of a share or debenture on the presentation to the company of a transfer that is signed by the holder of the share or debenture and accompanied by**

⁴ [1991] 1 WLR 963

⁵ R.S.A. c. C65 (repealed)

⁶ R.S.A. c. B72

⁷ R.R.A. c C65-1 (repealed)

delivery to the company of the share or debenture.” This section therefore requires that the transferee must present the transfer of the shares to the company for a share certificate to be issued.

- [50] Section 7(2) goes on to state that “[t]he certification by a company of any transfer of a share or debenture of the company is a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on their face show a prima facie title to the share or debenture in the transferor named in the transfer but is not a representation that the transferor has any title to the share or debenture.”

This underscores the importance of the issue of a share certificate upon the transfer of shares. Once this certificate is issued it stands as the company’s own representation to anyone dealing with those shares in good faith as to the title to the shares.

- [51] Section 8(1) of the Regulations states that “[a] company must, within 5 weeks after the allotment of any of its shares or debentures, and within 2 months after the date on which a transfer of any of its shares or debentures is presented to the company for registration, complete and have ready for delivery to the allottee or transferee a proper certificate or debenture for any share or debenture allotted or transferred to him.” In accordance with this section, the company has a two-month window within which to issue a share certificate once the transfer instrument is presented to it.

- [52] Section 8(2) of the Regulations states that “[w]hen a company on which a notice is served requiring the company to make good any default in complying with subsection (1) fails to make good the default within 7 days after the service of the notice, the Court may, on the application of the person entitled to have a certificate or debenture delivered to him, make an order directing the company and any officer of the company to make good the default within such time as may be specified in the order.” This subsection is of significance to the issues raised in this case. If a person to whom shares have been transferred presents this transfer to the company, he may issue notice to the company of any default in its obligation to issue the share certificate. If within 7 days of this notice the certificate is not issued, the transferee is entitled to apply to the court for an order directing the company or a relevant officer to issue a share certificate.

- [53] It is also important to reference section 9(1) of the regulations which states that “[n]otwithstanding anything in the articles or by-laws of a company or in any debenture, trust deed or other contract or instrument, the company shall not register a transfer of any share or debenture of the company unless a transfer in proper form and duly signed by the transferor has been delivered to the company, but nothing in this section affects any duty of the company to register as a shareholder or debenture holder of the company any person to whom the ownership of any share or debenture of the company has been transmitted by operation of law.” Section 9(2) states that “on the application of the transferor of any share or debenture of a company, the company must enter in its register of shareholders or debenture holders, as the case may be, the name of the transferee in the same manner and subject to the same conditions as if the application for the entry had been made by the transferee.
- [54] These are the provisions of the legislation in force at the time of the facts which gave rise to the dispute between the parties. I make an observation here that this claim was filed in June 2022 and the **Companies Act** was abolished in April of that same year. It is important to give consideration to the current state of the law.
- [55] Under the **Business Companies Act**, which was promulgated on 19th April, 2022 section 42 states that “[t]he entry of the name of a person in the register of members as a holder of a share in a company is evidence that legal title in the share vests in that person.” Insofar as it relates to the transfer of registered shares, section 54(1) of the Act states that “[r]egistered shares are transferred by a written instrument of transfer signed by the transferor and containing the name and address of the transferee.” Section 54(8) states that “[t]he transfer of a registered share is effective when the name of the transferee is entered in the register of members.” Therefore, as it now stands, although registered shares are transferred by way of written instrument, this is not effective until such time as the written instrument is registered. This instrument should be registered in the name of the person or company identified on the share transfer.
- [56] Section 54(3) states that “[t]he instrument of transfer of a registered share shall be sent to the company for registration.” This is written in mandatory terms and section 54(4) states that “[s]ubject to subsections (5) and (7), the company shall, on receipt of an instrument of transfer, enter the name of the transferee of the share in the register of members, unless the

directors resolve to refuse or delay the registration of the transfer for reasons that shall be specified in the resolution.” Subsection (5) prohibits the directors from passing “a resolution refusing or delaying the registration of a transfer unless this Act or the articles or by-laws permits them to do so. And subsection (6) states that “[w]here the directors pass a resolution under subsection (4), the company shall, as soon as practicable, send the transferor and the transferee a notice of the refusal or delay in the approved form.” Section 43 of the Act states that:

(1) A member of the company or an aggrieved person may apply to the Court to rectify the register where it is believed that—

- (a) information to be entered in the register of members under section 41 is omitted from or inaccurately entered in the register; or
- (b) there is unreasonable delay in entering the information in the register.

(2) The Court may—

- (a) refuse the application, with or without costs to be paid by the applicant; or
- (b) order the rectification of the register and may direct the company to pay all costs of the application and any damages that the applicant may have sustained.

[57] The court was referred to the Privy Council’s decision in the case of **Chen v. Ng**⁸. In that case, the dispute centered on the ownership of 40,000 shares in a company registered in the British Virgin Islands. Although a share transfer had been executed between the parties which recorded a sale of the shares for consideration of US\$40,000.00, along with a resolution of the company acknowledging and approving the share transfer, a dispute arose between the parties regarding the beneficial ownership of those shares. It was common ground between the parties that the sum of US\$40,000.00 had not been paid for the shares despite what was stated in the transfer. In light of this, Lord Neuberger and Lord Mance noted that:

⁸ [2017] UKPC 27

In the present case, the agreed statement that consideration had been paid was clearly gratuitous, and for the benefit of one side only. Both parties knew that it had not been paid, and neither can have relied on the statement that it had been paid. Their intention to be bound, or any reliance they placed on their agreement to be bound, without consideration cannot suffice; otherwise gratuitous promises could readily be made binding.

[58] In reconciling the specific issues in that case, the Privy Council went on to note that the terms of the transfer of shares under consideration can fall into one of two alternatives. The first is that the value of the shares, as outlined in the transfer, remains payable as consideration in an enforceable contract. The second is that, despite the recital in the transfer, there was clearly no intention for the US\$40,000.00 to ever be paid, raising a possible presumption that a resulting trust had arisen. A third potential option, as noted by the Privy Council, was that the transfer of the shares amounted to a gift. Given the nature of the pleadings and the facts presented in that case, the Privy Council was of the view that, ***“in the light of the incontrovertible fact that the Shares were registered in the name of Madam Chen, the onus was firmly on Mr. Ng to establish a right over or in respect of the Shares.”***

[59] Counsel for the claimants argues that, in light of the circumstances of the present case and, unlike in ***Chen v. Ng***, the burden in fact rests on Mr. Davis to prove that he has a right over the shares in Syrus Holdings. It is her argument that he must prove that there was an intention on the part of Mr. Fleming to transfer the beneficial ownership of the shares to Mr. Davis. Counsel submits that the evidence does not prove that there was an intention to transfer the beneficial ownership of the shares to Mr. Davis or any of his companies. In support of that proposition, counsel refers to the case of ***Ng, Man Sun (also known as Ng Wei) v. Peckson Limited et al***⁹ where Farara JA noted the following:

“It is convenient to begin with a re-statement of the basic principles by which equity (which in this respect is shared by England and Wales and the British Virgin Islands) provides for identification of beneficial interests arising from a gratuitous transfer of property. First, if either the transferor or the transferee makes a written (or oral)

⁹ BVIHCMAP 2019/0011

declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them: see for example *Whitlock v Moree* [2017] UKPC 44, (2017) 20 ITELR 658. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. Finally, recourse may be had to time honoured presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court."

[60] It is submitted that this case falls into the second category outlined by Farara JA and that the court must examine the documentary evidence to consider whether there was in fact an intention to gift the beneficial ownership of the shares in Syrus Holdings to Mr. Davis. Insofar as it relates to the pleadings and evidence in this case, counsel for the claimants submits that Mr. Davis had in fact altered his reliance on the letters dated May and June 2018 at trial and opted instead to rely on the notarized letter of 19th July, 2019. Despite referring to the letters of May and June 2018 as being peripheral to the issues, counsel asks the court to nonetheless find that the signatures were in fact forgeries and argues further that the forgeries and irregularities flagged by the claimants ought to excite the Court's suspicion.

[61] Counsel for Mr. Davis, in pre-trial skeletal submissions, argues that the burden is on the claimants to prove fraud. In closing submissions, however, counsel submits that *"...it is clear, from the evidence adduced at trial, coupled with the documentary evidence, that Mr. Fleming deceased gave clear instructions to transfer the shares in AGM International Limited (the shareholder of the 2nd*

Defendant) to the 1st Defendant, either in his personal capacity or to companies of which the 1st Defendant was the ultimate beneficial owner. He sought to do so on not once, not twice, but on three (3) recorded occasions.” Counsel goes on to submit that Mr. Fleming personally visited Mr. Benjamin’s office on 4th June, 2018 and gave clear instructions, not only in the letters of 14th May and June, 2018 but in the notarized letter of 19th July 2018. The shares were therefore transferred to Mr. Davis on written instructions from Mr. Fleming. Counsel therefore submits that “...while one may wish to speculate as to why Mr. Fleming, Deceased sought to transfer ultimate ownership of the 2nd Defendant to the 1st Defendant, the evidence before this Honourable Court is: (i) Mr. Fleming, Deceased did not leave a will and the Court is entitled to take judicial notice that the Intestates Estates Act does not make provision for a foster child to inherit from a foster parent under Anguilla law; (ii) The 1st Defendant is the foster son of Mr. Fleming, Deceased and worked in his father’s companies since he was seventeen (17) years old; and (iii) Mr. Fleming, Deceased transferred ultimate beneficial ownership of the 2nd Defendant of his own free will.”

- [62] Counsel therefore submits that in the absence of clear evidence the Court ought not to interfere with the clear decision of Mr. Fleming, to transfer ultimate beneficial ownership of Syrus Holdings to Mr. Davis.

The Court’s Conclusions on Syrus Holdings

- [63] I have carefully considered the evidence and submissions filed in this case. Each party made representations regarding the circumstances under which Mr. Davis came to be registered as the sole shareholder in Syrus Holdings. During the course of the trial, numerous documents were put before the court to prove (a) the alleged dishonesty in Mr. Davis’s actions on the one hand, and (b) the intentions of Mr. Fleming as it relates to the shares in Syrus Holdings on the other. It was put to Mr. Davis in cross examination that the beneficial interest in the shares in Syrus Holdings was never transferred to him. The claimants, in submissions presented by counsel, have therefore asked this court to consider not only the evidence of alleged dishonesty on Mr. Davis’s part, but the question of whether the evidence is sufficient to show that there was ever any intention on Mr. Fleming’s part to transfer ownership in Syrus Holdings as a gift to Mr. Davis.

[64] The starting point in determining this issue is to observe that from the very inception Mr. Fleming had separated the beneficial ownership of those shares in Syrus Holdings from the legal title holder. AGM always acted as Mr. Fleming's nominee and therefore held title to the shares in trust for him. It is also important to note that there has been no express documentation or statement which can be attributed to Mr. Fleming, which states that he wished to gift his property in Anguilla to Mr. Davis. The court must therefore examine the evidence to determine whether **"a common intention as to beneficial ownership may be inferred"**.

[65] I am not satisfied that the letters of 3rd July, 2015 and the subsequent letters regarding the transfer of the shares in Syrus Holdings were intended to communicate a desire to gift Mr. Fleming's property in Anguilla to Mr. Davis. Having examined Mr. Davis's evidence, his actions and demeanour at trial, I also do not believe him when he said that in 2015 Mr. Fleming personally expressed a desire to gift the property to him.

[66] In the documents presented by Mr. Davis, there was a letter written by Mr. Fleming in which he sought to expressly transfer beneficial and legal title to property owned by him to Mr. Davis. This is a letter dated 7th May, 2018 which was one month prior to his visit to Mr. Benjamin's office. The letter stated as follows:

Dear Valentin,

As beneficial owner of Dynamo Holding Limited, which company owns the land described in rooibrief nr. 31/19S8 and is further known as Diamond Legacy Estate, Cole Bay I herewith grant you the rights to ownership and transfer in your name lot M, with an area of 1530 square meter. This property described above is without any cost to you and is giving as a bonus and reward for your many years in my employment.

You may go ahead and make the title transfer to your name with all transfer fees being at your cost.

[67] This is an example of a clear and unambiguous statement on Mr. Fleming's part as to the purpose of the transfer of property and his insistence that the transfer costs were to be met by Mr. Davis. Nowhere in any of the letters presented to this court was it expressly stated that the transfer of the

shares to Island Asset Company Limited and Skave Ltd. were designed to also include the ultimate beneficial ownership of those shares to Mr. Davis. In fact, in the notarized letter of 19th July, 2018, no mention is made of the transfer of beneficial ownership. In addition to that, the actual share transfer dated 10th October, 2018 was said to be subject to the conditions in which the shares were held by AGM in the first place. The shares were held in trust, and a presumption is therefore raised that they were issued to Mr. Davis in trust.

[68] Whilst I appreciate that the claim was initially pleaded in fraud, I make two observations about this. Firstly, when the claim was filed the claimants were relying on 2 letters which a handwriting expert had deemed to contain forged signatures. The letter of 19th July, 2018 was not disclosed by Mr. Davis until after the pleadings were closed. This adds to the general lack of accountability on Mr. Davis's part when the family appeared genuinely concerned about Mr. Fleming's affairs in Anguilla after he had been formally diagnosed with Alzheimer's.

[69] Secondly, I accept that the letters of May and June 2018 did in fact contain a fraudulent signature and that the letters were likely to have been drafted by Mr. Davis himself. I also find that Mr. Davis engaged in certain questionable actions regarding his dealings with Syrus Holdings from at least 2018 onwards. I find that Mr. Davis's exchange with Ms. Catherine Brookes did show that he was trying to engage in certain actions relating to Syrus Holdings which were not proper procedure. It seems clear to me that whatever the dispute regarding Wendore Ltd.'s role as sole director of Syrus Holdings, Mrs. Jeffers, in her letter of 21st June, 2018, specifically requested written consent from Mr. Fleming to remove Wendore Ltd. as director. I also make the point here that the documents create serious doubts in my mind that Mr. Davis is giving a clear picture of these events and that he is not deliberately evasive. In the resolution of December 2017, purportedly signed by Mr. Davis himself, Wendore Ltd. appointed him as managing director of Syrus Holdings. Yet, there is a dispute with Mr. Benjamin's office as to whether Wendore Ltd. was ever appointed as a director in Syrus Holdings in the first place.

[70] In the notarized letter of 19th July, 2018, Mr. Fleming expressly states that *in order to move forward, as beneficial owner of Syrus Holding, I herewith have decided and request ...*. If this letter is to be taken as Mr. Fleming's clear instructions in order to move forward from this dispute, then it must also be observed that he gave no specific instructions to remove Wendore Ltd as the sole director of Syrus

Holdings in this letter. In April 2019 he went one step further and appointed Ms. Fleming as an additional director along with Mr. Davis.

- [71] Ms. Catherine Brookes was therefore correct when she raised red flags in relation to Mr. Davis's behaviour in seeking to remove Wendore Ltd. as sole director of Syrus Holdings without the express consent of Ms. Fleming. Even before this court, Mr. Davis argues that he was simply trying to carry out his father's wishes. However, as I have said, his father gave no such instructions in his notarized letter of July 2018 to Mr. Benjamin. I am satisfied that the claimants are entitled to an order setting aside Mr. Davis's removal of Wendore Ltd. as director of Syrus Holdings in May 2022. No instructions to do so were given by Mr. Fleming and there was no authorization provided by the co-director in Wendore Ltd. when this was done.
- [72] As it relates to the shareholding, it would be observed that, if indeed a proper transfer was issued to Skave on 10th October, 2018, it was open to Mr. Davis, as a director in Skave, to have presented this transfer to the company for the issuance of a share certificate. If the company had failed to issue the share certificate, it was open to him to issue the requisite notice and to make an application to the court for an order directing that the certificate be issued to Skave. There is little to no evidence here to prove that Mr. Davis did in fact present this transfer document to the company and when exactly he did so. That is especially in light of the fact that prior to 19th April, 2019 Mr. Davis was the Managing, and perhaps sole director of Wendore Ltd. which was in turn the director of Syrus Holdings. He took no steps to regularize this position. By April 2019, Ms. Fleming had become a fellow director and was entitled to be engaged in this process in accordance with the by-laws of the company.
- [73] Mr. Davis also never availed himself of the option of seeking an order from the court directing the issuance of the certificate. What ensued, however, was an eventual transfer of the shares directly to Mr. Davis's own name and a dispute with the agents Stott & Co. as to whether Wendore Limited should be removed as a director. It is also apparent that at the time of the share transfer in October 2018 and the events of 2021, Skave was no longer on the register of Companies as it had been struck off.

- [74] In assessing the evidence presented by the parties in relation to Syrus Holdings, it seems evident to this court that both Mr. John Benjamin and the offices of Stott & Co. had reservations regarding the true nature of certain transactions and representations relating to Syrus Holdings. It appears that Mr. Fleming had a longstanding relationship with Mr. Benjamin's chambers and even Mr. Davis acknowledges at various points in his evidence that Mr. Benjamin generally acted on Mr. Davis's instructions as the shares in the company were held in trust for Mr. Fleming. Yet, as it relates to the "gifting" of the lands in Anguilla to Mr. Davis as far back as 2015, these instructions were never carried out and Mrs. Jeffers' letter of 21st June, 2018 to Mr. Fleming did not raise this issue.
- [75] Given that Mr. Fleming was an astute businessman and politician, I fail to appreciate the rather complicated and roundabout way in which the alleged transfer of shares in Syrus Holdings and, by extension, the lands in Anguilla were being executed as a gift to Mr. Davis. Nowhere in any of the documentation did Mr. Fleming indicate any wish to gift his land to Mr. Davis. Given that he was the ultimate beneficial owner of the shares in Syrus Holdings, it seems to me that there is a clear gap in the intentions expressed by Mr. Fleming in the numerous letters allegedly written by him. When one examines the clear difference in the manner in which Mr. Fleming gifted land to Mr. Davis in St. Martin on the one hand, and the evidence presented regarding the gifting of the lands in Anguilla on the other, the approach is glaringly different. In one, Mr. Fleming is explicit in his intention. He also requires that Mr. Davis meet the costs of the transfer. In the other, Mr. Fleming makes no mention of divesting himself of the beneficial ownership. I find, as a matter of fact, that his actions in April and May of 2019 also show that Mr. Fleming still considered himself to be the ultimate beneficial owner of the land. I believe the evidence presented by the claimants where it is stated that Mr. Fleming asked Mr. Davis to take him to see his land in April 2019 and that he was attempting to sell the land to Mr. Francillette in May 2019.
- [76] Overall, I do not find Mr. Davis's account of what transpired regarding the shareholding of Syrus Holdings to be credible. I do not believe his evidence when he states that Mr. Fleming expressed a desire to gift him the land in 2015. Despite the authenticity of the signature on the letter of June 2015, Mr. Davis's answers to questions in cross-examination satisfies me on balance that he drafted this letter and that the letter does not stand as proof that there was an intention on the part of Mr. Fleming to relinquish his beneficial interest in the lands in Anguilla.

- [77] The piecemeal nature in which Mr. Davis provided evidence to the rest of the family and the court also raises serious doubts in my mind regarding the authenticity of the letters of May and June 2018. I accept the evidence of the handwriting expert that the letters of May and June 2018 contained forged signatures, and this is enough to question Mr. Davis's honesty. In addition, notwithstanding the content of the notarized letter of 19th Jun 2018, I accept that as late as April and May 2019, Mr. Fleming visited Anguilla and gave clear indications that he was still the beneficial owner of the lands.
- [78] Overall, I find that Mr. Davis was acting dishonestly in his dealing with Syrus Holdings and that Mr. Benjamin's transfer of the shares to him was influenced by this dishonesty. In any event, even if that were not the case, I am satisfied that the share transfer of 10th October, 2018 was subject to the same conditions under which AGM held those shares in the first place I am not minded to set aside the share transfer at this late stage. This is because to do so would have the shares revert to AGM Limited as it was the status quo before. That is not a desirable option. However, I hold that the shares were held on trust for Mr. Fleming and those conditions remained in place after the transfer was issued to Mr. Davis. There was no gift of those lands to Mr. Davis. In addition to that, I find that Mr. Davis was not authorized to remove Wendore Ltd as the director of Syrus Holdings and that his actions in doing so in May 2022 were improper and ought to be set aside. In all of the circumstances therefore, and given the current state of affairs, Mr. Davis is ordered to take steps to ensure that the shares in Syrus Holdings are fully transferred to Mr. Fleming's estate.

Dynamo Holdings

- [79] Dynamo Holdings was incorporated in Anguilla on 28th January, 1977. It is asserted that Dynamo's sole shareholder is Wendore Limited. Dynamo's directors are Ms. Fleming and Mr. Davis. In fact, by way of resolution dated 21st April, 2019, Ms. Fleming was appointed as the Managing Director of Dynamo Holdings. In that resolution it was also noted that *"Marie Dominique Fleming and/or Emile Valentin Davis sign documents, contracts and all and any documents for the Company, DYNAMO HOLDING COMPANY LIMITED, jointly. Documents may only be signed individually by the expressed wishes of the Shareholder, Mr. R. Albert Fleming and/ or by the signed notice of the other director."*

- [80] The claimants submit that Mr. Davis has consistently excluded Ms. Fleming from participating in the management of Dynamo Holdings. He has restricted online access to bank accounts in the company's name at the First Caribbean International Bank in Sint Maarten. Ms. Fleming asserts that although she is allowed to view outgoing wire transfers and bill payments on the online platform, she is unable to view deposits, bank balances or do any transactions in relation to the accounts.
- [81] Mr. Fleming Jr. states, in his affidavit, that in March 2022 Mr. Davis entered into an agreement with Mr. Cyril Bernard Mazataud and his spouse Mrs. Habiba Mazataud for the sale of a parcel of land owned by Dynamo in Sint Maarten. The Mazataud's agreed to pay US\$240,000.00 for the property. A deposit of US\$60,000.00 was paid by wire transfer in accordance with the agreement. It is claimed that Mr. Davis received US\$40,000.00 in two separate equal payments out of the deposit. It is alleged that those funds were, however, not paid into Dynamo's account. It was also alleged that Mr Davis has not accounted for the use of those funds.
- [82] In response to the allegations relating to Dynamo Holdings, Mr. Davis states that he had been the managing director of Dynamo and that the company owned the Royal Palm Plaza, the Diamond Chateau Villa and other undeveloped land in St. Martin. He was also the managing director of Sea Heaven and Kelmador Holdings. These were also companies owned by Mr. Fleming. I note, however, that there is documentary evidence which indicates that Mr. Davis was not the managing director of Kelmador Holdings. The evidence suggests that Sea Heaven Development was appointed as managing director of Kelmador¹⁰. By resolution dated 21st April, 2019, Ms. Fleming was appointed as the Managing Director of Sea Heaven Development.
- [83] Mr. Davis states that, since Ms. Fleming had not been involved in the management of those companies before her appointment as director, he prepared and presented an extensive business report to her. This was done in order to inform her as to the business affairs of the companies. Mr. Davis goes on to state that he did not think it sufficient to simply present her with financial statements, but that he needed to present a more comprehensive overview of the business dealings of those companies. This report was dated 6th May, 2021, which was approximately two years after Ms. Fleming's appointment as Managing Director. He also offered to meet with Ms. Fleming.

¹⁰ See Supplemental Trial Bundle 3 pages 54 and 55

- [84] Mr. Davis states that Ms. Fleming requested financial statements from him. In August 2022, more than 3 years after her appointment, he provided statements to her for the period 2012 through to 2021. He states that she made no enquiries regarding the current affairs of the companies. Mr. Davis denies that he has failed to provide access to the online banking platform for the companies to Ms. Fleming. He states that, on her appointment as director of the companies, he added her name to the bank accounts. He states, however, that he was aware that the bank's branch in Barbados would have had to send a link to Ms. Fleming via email in which she would have been given instructions on how to access the account online.
- [85] Mr. Davis contends that Ms. Fleming is able to write checks, wire transfer money and is authorized to communicate with staff at the bank on matters relating to the company's bank accounts. He states that she can solicit information relating to the companies if she desires and can visit any person at the bank in order to access relevant information. He states that he has numerous email correspondence between himself and Ms. Fleming which show his willingness to share pertinent information with her regarding the finances of the companies.
- [86] I note here that Ms. Fleming has denied these assertions made by Mr. Davis. In her witness statement she stated that the bank informed her through email correspondence that the authority to provide full access to the online banking platform rests with Mr. Davis as the Internet Banking Administrator. It is he who must provide access to Ms. Fleming's user ID. Ms. Fleming states that Mr. Davis continues to refuse to provide this access. She notes that she is forced to request and pay for hard copies of checks and details of transactions. Ms. Fleming goes on to state that there is always a delay in obtaining this information from the bank.
- [87] Ms. Fleming states that there is a complete lack of transparency in the manner in which Dynamo Holdings is being managed. She asserts that Dynamo Holdings' financial statements do not assist her as the journals and ledgers are prepared by Mr. Davis himself and they are not audited. Ms. Fleming also states that annual reports for Dynamo Holdings are not submitted to the Inspectorate of Sint. Maarten. This is because Mr. Davis has taken the view that no tax administration is required of Dynamo Holdings. She states that this view is wrong as all companies that do business in Sint Maarten, that collect rent and have employees, are obligated to pay turnover and payroll taxes to the authorities.

- [88] In relation to the sale of land to the Mazatauds, Mr. Davis states that this was part of a subdivision of land owned by Dynamo and known as the Diamond Legacy Development Subdivision. This subdivision was at Mr. Fleming's request in 1997. The agreement for the sale of the property to the Mazatauds was concluded in March 2022. He states that the initial US\$20,000.00 deposit was paid in January 2022 in Ms. Fleming's presence. Mr. Davis states that the funds from this payment were paid into Dynamo's account, save for US\$1,000.00 which was retained and assigned to petty cash. The other US\$20,000.00 was paid in March 2022. He goes on to state that US\$17,500.00 was deposited into the bank account and the remaining US\$2,500.00 was allocated to petty cash. Mr. Davis goes on to state that another US\$20,000.00 was paid to Dynamo upon the execution of the agreement for sale in March 2022. He states that this was transferred into Dynamo's bank account. Mr. Davis provides statements reflecting those deposits. The remaining balance on the total sale was therefore paid in the presence of a notary when the sale transaction was complete.
- [89] Mr. Davis insists that this US\$180,000.00 was paid into the company's bank account and that Ms. Fleming was present when the transaction was complete. Mr. Davis expresses his disbelief that he would be accused of not accounting for the funds. He states further that proof of payment of these funds into the company's account was requested by the siblings in April 2022 and he provided that information to them.
- [90] In support of his assertions, Mr. Davis led evidence from Mr. Erick Van Engelen, who is the Managing Director of Haven Audit, Accountants & Consultancy ("HAAC"). HAAC is a firm operating in Sint Maarten which specializes in audit and accounting. Mr. Engelen claims to have no personal or prior professional relationship with any of the parties or Mr. Fleming. His services were engaged by Mr. Davis to provide an account of the use of the funds from the sale of the property to the Mazatauds. He confirmed that the monies were deposited into Dynamo's account and that a total sum of US\$3,500.00 was paid into petty cash and in assessing the petty cash expenses he noted that a total of US\$4,704.83 was paid out of the petty cash with supporting documentation over the period March, April and May 2022.
- [91] I note, however, that Ms. Fleming now confirms that the funds from the sale of the lands were initially deposited into the company's account on 21st April, 2022. However, in her evidence she goes on to

state that the sum of US\$110,000.00 was paid out of the account by way of a manager's check the following day. She states that the board of directors did not approve this payment, and no account has been given for it. Ms. Fleming goes on to allege that Mr. Davis has been using funds belonging to Dynamo Holdings to settle financial obligations on behalf of Kelmador Holdings. Ms. Fleming notes that salaries for employees of Kelmador are paid out of Dynamo's account. She raises a particular concern regarding payments to a Mr. Osnel Mombia who is an employee of Kelmador. Whilst Mr. Mombia earns a salary of US\$1,200.00 per month, there are checks issued in his name and cashed for as much as US\$10,000.00 on numerous occasions in 2022. She also states that Kelmador's tax obligations are paid from funds belonging to Dynamo Holdings.

[92] Ms. Fleming also states that Mr. Davis was paid the sums of US\$35,000.00 and US\$14,300.00 on 11th December, 2020 and 12th July, 2022 respectively. These payments, she states, are not in keeping with his contracted salary. She fears that Mr. Davis is misappropriating funds belonging to Dynamo Holdings. I make the observation here that Ms. Fleming is the Managing Director of this company and appears to have no involvement in the making of these decisions which, to my mind, are part and parcel of the managerial and director's obligations associated with such transactions.

[93] In response to these allegations, Mr. Davis led evidence from Mr. Patrick Mulder. Mr. Mulder is the managing director of an accounting firm operating in St. Martin named Match Advisory Services B.V. ("MAS"). MAS has had a professional relationship with Mr. Davis for many years, and Mr. Mulder has been acquainted with him for over 20 years. Mr. Mulder states that he has provided accounting services for Kelmador Holdings since 2015. He states that MAS has been engaged by Kelmador Holding N.V. to carry out the accounting compilation services for the firm and its annual profit tax filing, along with other associated accounting exercises for the period 2011 through 2022.

[94] Mr. Mulder states that Kelmador and Dynamo Holdings are interrelated and operate intercompany accounts. He goes on to state that Mr. Davis had informed him that Ms. Fleming was appointed as a co-director in Dynamo Holdings in April 2019 and that a director's fee should be "booked" for her. Mr. Mulder provided an analysis of 5 components of the financial operations of Kelmador. These are:

- (a) Cash flow effects of loans on the company over the years since 2008;
- (b) Cash flow effects on the company operation by Hurricane Irma and Covid 19;

- (c) Review of intercompany Dynamo
- (d) Accounts Payable due to E, Valentin Davis; and
- (e) Taxes due.

- [95] Mr. Mulder concluded that over the years there were several loans granted to the companies which were not used for the increase in the companies' asset base or their operations. Mr. Mulder states that the proceeds of these loans were diverted from the companies into other third-party assets on the instructions of Mr. Fleming. This, it is stated, affected the optimal operation of the business enterprise.
- [96] Mr. Mulder notes that in December 2008, Kelmador Holdings initiated a loan for US\$650,232.00 and another in the sum of US\$136,777.00 with a combined loan repayment of US\$787,009.00. The monthly payment on these facilities was US\$16,093.00. It was Mr. Mulder's evidence that the loan agreement indicated that the financing of these loans was for debt consolidation, the purchase of real estate on the French side of St. Martin for Mr. Raoul Albert Fleming and the consolidation of an overdraft facility and demand loan plus increase to repay debts.
- [97] Mr. Mulder also noted that Dynamo Holdings secured another loan in October 2009 with the Royal Bank of Trinidad and Tobago in Sint. Maarten. This loan was initiated on 2nd October, 2009 and was stated to be for an additional sum of US\$515,750. Those funds were allegedly used to purchase a house at # 105 Hummingbird Road, Monte Vista, Point Blanche, bringing the then refinanced loan to a total sum of US\$671,214.00 with monthly loan payments of US\$6,609.71. According to Mr. Mulder, this house in question was purchased for Mr. Fleming's ex-wife and upon his instructions. Mr. Mulder noted that, in all, the loans for Dynamo and Kelmador Holdings had a combined monthly payment of US\$22,702.71. This had a negative impact on the companies' cash flow for the period 2009 to 2021.
- [98] Mr. Mulder went on to note that the records of the companies indicate that the two loans were refinanced on 4th August, 2015 with FCIB-CIBC Bank. The loans were for a total of US\$540,880.33 to Dynamo Holding Limited and US\$328,599.97 to Kelmador Holdings. In addition to that, a new loan was taken for the sum of US\$270,649.92. This was used for the development of Diamond Legacy Estate. The companies were therefore indebted to a total of US\$ 1,115,000.00. Mr. Davis personally

guaranteed these loans. Mr. Mulder also stated that although Kelmador's books recorded a receivable of US\$687,249.00 to Mr. Fleming, this was written off, or made provision for, in 2011. This impacted the company's equity position. Despite this, Kelmador Holdings secured an additional loan of US\$150,000.00 in 2018. That was for the purpose of repairs after Hurricane Irma.

- [99] Insofar as it relates to the income of the companies. Mr. Mulder notes that Hurricane Irma had a serious impact on the operations of Dynamo and Kelmador. Mr. Mulder stated that the companies lost income of approximately US\$43,000.00 for the year 2017. He noted that the rental income went down from US\$301,000.00 to US\$258,000.00. The rental income recovered to US\$276,500.00 in 2018 and lost another US\$25,000.00 in rental revenues. Mr. Mulder's evidence was that the company earned US\$400,000.00 in rental revenues for the year 2019. Almost all small units were rented out in that year. This brought the company back on track financially. However, the Covid-19 pandemic occurred, and rental revenues took a downward turn to US\$176,500.00 in 2020 and US\$169,000.00 in 2021.
- [100] Mr. Mulder goes on to note that Kelmador is currently operating at 55% of its capacity. He states that this is because of US\$140,000.00 in lower rental revenues compared to previous years. If compared to 2019, the best rental year of its operations, Kelmador is currently operating at 45%.
- [101] Given the nature of the intercompany accounts, the loans which were taken were booked to Dynamo's account. Mr. Mulder stated that intercompany revenues and expenses for each company would be paid according to which company had funds available at the time. He also noted that Kelmador Holdings has had a receivable intercompany account for Dynamo of US\$49,068.00 as of 31st December, 2021.
- [102] Mr. Mulder went on to state that since 2011 the companies have had a running account owed to Mr. Davis for outstanding remuneration. As at December 2021 that balance stood at US\$186,817.00. The companies are apparently charged property management fees by Mr. Davis. These fluctuate between US\$30,000.00 to US\$45,500.00 annually. He notes that on 4th April, 2022 the sum of US\$110,027.94 was paid to Mr. Davis. I take it that this was the sum which raised a red flag in Ms. Fleming's mind. In addition to that, the sum of US\$10,000.00 was paid to Mr. Davis on 26th April, 2022 and an additional US\$5,000.00 was paid to him on 5th May of that same year. Mr. Mulder notes

that as at December 2022, the balance owing to Mr. Davis for those charges stands at US\$95,156.31.

- [103] I pause here to make the observation that the sums paid over to Mr. Davis were made at a time when Ms. Fleming was in fact the Managing Director of Dynamo Holdings. She was also the director of Sea Heaven Development, which is in turn the Managing Director of Kelmador. It is worth repeating that the resolution which appointed her also stated that documents executed on behalf of the company are to be signed jointly by Ms. Fleming and Mr. Davis unless authorized by Mr. Fleming or executed on notice to the other director. At the time of such significant payments to Mr. Davis, Mr. Fleming was not in charge of his own affairs due to his diagnosis and a court order to that effect. It would seem, therefore, that such a significant payment out of the accounts of any of these companies would have required express approval by Ms. Fleming.
- [104] Mr. Mulder also states in his evidence that the companies are indebted to the government of SintMaarten for outstanding taxes in the sum of US\$264,696.21 as at January 2023. Although it is expected that some adjustment to the tax liability will be made due to queries of the tax assessment for 2010, the amount owed is likely to still be in excess of US\$200,000.00.
- [105] Mr. Mulder was cross-examined on his report and witness statement. He acknowledged that the accounts payable as reflected in the balance sheets for 2011 and 2012 did not specifically indicate whether and what amounts were owed to Mr. Davis. He stated in cross-examination that a specific amount of money owed to Mr. Davis in the accounts payable was first identified in the accounts for 2013. Although Mr. Mulder indicated that he didn't quite recall all from memory, he was of the view that the lack of specific identification of the accounts payable was a matter which was corrected in the 2013 accounts. This, he states, was perhaps the reason Mr. Davis's name specifically appeared in the accounts payable for the year 2013 for the first time. Mr. Mulder acknowledged that he only began compiling accounts for Kelmador and Dynamo in 2015 but stated that the decision to separate the accounts payable to Mr. Davis was taken in compiling the 2013 accounts and not the accounts prior to that. He also acknowledged that the bulk of the accounts payable appear to have been owed to Mr. Davis.
- [106] Mr. Mulder was cross-examined on whether Mr. Davis was the bookkeeper of the records used to prepare the accounts. His response was that this was not the case. He stated that someone by the

name of Vanya initially prepared the books and that she was eventually replaced by someone else. Mr. Mulder stated that he did not know whether Mr. Davis was the bookkeeper in earlier years as he was not engaged to prepare the accounts for the company prior to 2015. It was put to Mr. Mulder that the accounts were prepared in 2018 or 2019; as such, he would not know who the bookkeeper was. He stated that Vanya kept the books at that point, and he assumed that she had done so for the years between 2011 and 2013. He confirmed that the accounts presented have not been audited.

Submissions and Conclusions relating to Dynamo Holdings

[107] In relation to Dynamo Holdings, the submissions put to the court are, for the most part, factual. In summary, counsel for the claimants submit that the evidence presented by Mr. Davis and his witnesses ought to be rejected for lack of credibility. Ultimately, it is a matter of accountability regarding Mr. Davis's handling of the affairs of this company. On the other hand, counsel for Mr. Davis submits that in cross-examination, Mr. Fleming Jr. acknowledged that he was satisfied with the accounting for the US\$240,000.00 proceeds from the sale of land in Sint Maarten. It is submitted that no documentary or other evidence was presented sufficient to warrant the court's intervention in the management affairs of this company.

[108] The court was referred to section 59 of the **Companies Act**, which was in force for most of the period in dispute. This section outlines the rights of the directors to exercise the powers of the company directly or indirectly through the employees and agents of the company and direct the management of the business and affairs of the company. It is also important to consider the provisions of section 97(1), (2) and (3) of the Act which states that:

(1) Every director and officer of a company in exercising his powers and discharging his duties shall—

(a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) In determining what are the best interests of a company, a director shall have regard to the interest of the company's employees in general as well as the interests of its shareholders.

(3) The duty imposed by subsection (2) on the directors of a company is owed by them to the company alone and the duty is enforceable in the same way as any other fiduciary duty owed to a company by its directors.

[109] There is no controversy, nor is there anything novel, in saying that a director owes a fiduciary duty to act in the best interest of the company. Having examined the evidence and submissions, I am satisfied that there is a lack of credibility in the evidence presented by Mr. Davis sufficient to question whether he has acted in a manner which is contrary to the interests of Dynamo Holdings and its affiliate companies. Ultimately, this is a matter of accountability in circumstances where both Mr. Davis and Ms. Fleming were placed in the position of fiduciaries. There was a duty to act jointly in the management of the affairs of this company from April 2019 and it appears that this simply did not take place on a number of key issues.

[110] Firstly, Mr. Davis took a decision to pay himself substantial amounts of money allegedly owed to him without Ms. Fleming's consent. She was the managing director and had a right to be informed of and to authorize those payments. On the issue of the debt allegedly owing to Mr. Davis, I too express serious doubts about the credibility of this claim on his part. The documentary evidence suggests that Mr. Davis was paid, or entitled to a monthly salary, at least prior to April 2019. It is unclear to me as to whether the outstanding sums allegedly owed to Mr. Davis are for property management fees, outstanding monthly salary payments or both. However, there is no documentary evidence to substantiate the fact that there was ever any agreement by the companies, or Mr. Fleming, to pay a property management fee to Mr. Davis. There is also insufficient evidence here to independently verify that he had not been paid his remuneration over the years.

[111] I agree with the submission of counsel for the claimants where she argues that the court ought not to treat the accounting evidence presented as sufficient to account for Mr. Davis's actions in managing these companies. There is little to no evidence to determine why it is that proper and audited accounts had not been prepared and presented for Dynamo and Kelmador Holdings in a

more timely manner. The evidence reveals that these are companies collecting rent of hundreds of thousands of US dollars with little accounting being done. It took almost 3 years for Mr. Davis to even present anything remotely close to an account to Ms. Fleming after she became Managing Director of this company.

[112] Secondly, there is sufficient evidence here to question whether Mr. Davis was in fact fulfilling his obligations as a director in this company, as well as Kelmador Holdings, over the years. Kelmador is heavily indebted to the tax authorities in Sint Maarten. Sums of money are paid over to a Mr. Osnel Mombia without proper documentation and accounting. The two accountants who gave evidence on behalf of Mr. Davis were not presented as independent experts to the court. Their evidence was simply to outline accounting exercises they had conducted on Mr. Davis's instructions. To my mind, they posed more questions than they provided answers to the issues raised in this case.

[113] It must be noted that a director's primary duty is to act in the best interest of the company. I express some concern here that Mr. Davis seems to be casting some blame on Mr. Fleming's actions in taking loans for his personal benefit rather than the benefit of the company. That is not a good enough explanation. It was always open to Mr. Davis to put on record his concern regarding the loans allegedly taken by Mr. Fleming for his personal use. But very little to no documentary evidence was presented to substantiate much of what was being said about the financial position of these companies over the years. The accountants were not independent, and they clearly relied on information provided by Mr. Davis. I do not find these accounts to be particularly credible.

[114] In the circumstances I am satisfied that there is a need for a proper independent and forensic account of Mr. Davis's actions in the management of Dynamo Holdings over the years.

Sea Heaven

[115] Sea Heaven was incorporated in Anguilla on 11th November, 1981. On 29th March, 2007, all 1000 of the issued shares in Sea Heaven were transferred to Wendore Limited. As noted earlier, Mr. Fleming was the sole beneficial owner of Wendore Limited. Sea Heaven is also the sole shareholder of Kelmador Holdings NV. Kelmador Holdings is the owner of the Promenade Mall, which is located at #44 Front Street, Sint Maarten.

- [116] As I have already stated, on 25th April, 2019, Mr. Fleming appointed Ms. Fleming as Managing Director of Sea Heaven. Mr. Davis had previously been appointed as director of Sea Heaven. On 25th April, 2019 it was resolved that he continue in that capacity. However, the claimants assert that they recently discovered that Mr. Davis had transferred 125 of Sea Heaven's shares to himself by way of a resolution purportedly passed on 21st November 2017. Mr. Davis had allegedly acted in his capacity as a director of Sea Haven when the resolution was passed. The transfer was said to be "*in consideration of full value received*". It is alleged that Mr. Fleming did not authorize this transaction.
- [117] Mr. Davis states that he became the sole director of Sea Heaven in 1996. He denies the allegations made against him in relation to this company. He states that Mr. Fleming wrote a notarized letter to Stott & Co. instructing the transfer of 125 shares to him. This letter was not exhibited at trial. He states that Stott & Co. prepared a Corporate Resolution, share certificates and an updated share register in order to effect this transfer. Given that Mr. Davis was the sole director at the time, the documents were prepared for him to sign. He states that Mr. Fleming retained the balance of the 875 shares for himself.
- [118] Mr. Davis states that he relocated to St. Martin in 2006 after selling a hotel he managed in Anguilla. Mr. Fleming consented to the use of property owned by Sea Heaven by Mr. Davis in order to operate a restaurant. In 2017 Mr. Fleming allegedly agreed to transfer the shares in Sea Heaven to Mr. Davis as he had managed this company since 1978. Mr. Davis states that he negotiated a One Million Dollar loan in order for Mr. Fleming to invest in various business entities, projects and private properties. The decision to transfer those shares was therefore one made by Mr. Fleming on his own free will. It would appear, therefore, that Mr. Davis is acknowledging that there was no consideration exchanged for the shares and asserts that it was a gift. He insists that over the years, all actions regarding Sea Heaven were taken on Mr. Fleming's instructions and that he, Mr. Davis, had always been forthcoming with information regarding the operations of this company.
- [119] Despite Mr. Davis's evidence, I note that Mr. Fleming's initial instructions, given as far back as 2007, are that he was to retain beneficial ownership of the shares in his companies until he died. There was no evidence presented to show that Mr. Fleming gave instructions in writing to transfer 125 shares in Sea Heaven to Mr. Davis. The notarized document referred to by Mr. Davis was not presented to the court. Ms. Brookes, in her own evidence, stated that in performing her own due

diligence on the file, she observed that there were no instructions from Mr. Fleming authorizing the transfer of the shares. She therefore made a note on the file as Stott & Co. had previously proceeded with the share transfer.

[120] In addition to this, the minutes of the shareholders meeting dated 25th April, 2019 were presented to the court. Attendance at that meeting was recorded as R. Albert Fleming as Shareholder, Emile Valentin Davis as Director and Marie Dominique Fleming as the proposed Director. There is nothing in these minutes which recognizes Mr. Davis as a shareholder in this company when such an important decision was being made. Mr. Davis acknowledges that Mr. Fleming made decisions at that meeting with the intention of diluting his role as Managing Director of the companies. Mr. Fleming went as far as to mandate that Ms. Fleming and Mr. Davis are to jointly execute documents unless he authorized otherwise or notice is provided to the other director. Mr. Davis stated in oral evidence that he was not offended by this. He felt that he had managed the companies for over 30 years and saw nothing wrong in giving an opportunity to another sibling.

[121] I note that Mr. Fleming Jr., in his affidavit in response to Mr. Davis's initial affidavit, stated that the various companies he managed on behalf of Mr. Fleming have been struck from the registry of companies on a number of occasions for non-payment of Government fees. Mr. Fleming Jr. goes on to state that Mr. Davis has also failed and/or refused to pay taxes which are due in respect of one of the shopping malls under his management. In addition to that, the other shopping mall was assessed as owing 1,437,281.00 Netherlands Antillean Guilders for delinquent noncompliance with tax obligations. He would also like the court to consider that Mr. Davis was at one point arrested for certain land transactions next to the Frangipani Hotel in Anguilla. In fact, it is stated that Stott & Co. at one point made a report to the police regarding Mr. Davis's dealings with the various companies.

Submissions and the Court's Conclusions on Sea Haven Development

[122] Counsel for the claimants submits that the court ought to reject Mr. Davis's account of the facts leading up to the transfer of the shares. It is emphasized that there is no proof that express directions had ever come from Mr. Fleming, who was the ultimate beneficial owner of those shares. Counsel asks the court to consider Ms. Catherine Brooke's evidence that even at the meeting in April 2019 Mr. Fleming again repeated those instructions that he retain ultimate beneficial ownership of the shares until his death. It is also submitted that, in any event, the share transfer did not conform with

the formalities outlined in section 9 of the **Companies Regulations**. It is also submitted that in construing the provisions of the **Companies Regulations** as a whole, that Stott & Co. had no power to enter Mr. Davis's name on Sea Haven Development's share register and even if it did, it ought not to have done so because the transfer was not in keeping with the provisions of the regulations then in force.

- [123] In assessing the facts presented before me, I find that there were no instructions given by Mr. Fleming to transfer 125 shares in Sea Haven to Mr. Davis. The shares were transferred on the basis of a director's resolution of Wendore Limited signed by Mr. Davis himself. Whilst there is evidence to show that this was executed by Stott & Co. there is no record of Mr. Fleming ever giving such instructions in writing. I have also given consideration to the notes of the minutes of the meeting of 25th April 2019 in which Mr. Fleming was described as the shareholder. There is no mention here of Mr. Davis as a shareholder and this was corroborated by Catherine Brookes in that the issue was not mentioned at the meeting. Mr. Davis was recorded merely as a director.
- [124] In light of these I also reject Mr. Davis's viva voce evidence regarding Mr. Fleming's intention to transfer the shares to him. Again, it seems to me, based on the evidence presented, that Mr. Fleming acted in making changes to the directorship and shareholding of his companies in a direct manner. He recorded minutes of those meetings, and, on the one occasion when he gifted property to Mr. Davis, he did so expressly in writing. On these occasions when shares were being transferred in Mr. Fleming's companies in Anguilla, there was no documentary instruction or acknowledgement on Mr. Fleming's part.
- [125] I find therefore that the transfer of those shares was not done on Mr. Fleming's instructions. He was the ultimate beneficial owner of the shares, and it was clear from the onset that shares in those companies ought not to have been transferred unless his approval was granted. I also reject Mr. Davis's explanation as to why Mr. Fleming was diluting his managerial and directorship powers in April 2019. Putting all of the evidence together, Mr. Fleming clearly made a decision that Mr. Davis was no longer to operate these companies primarily on his own.
- [126] In the circumstances I agree with the claimants that the transfer of 125 shares in Sea Haven ought to be set aside.

Disqualification

[127] The final issue for determination in this case is whether Mr. Davis should be disqualified from serving as a director in the companies registered in Anguilla. In support of this submission, counsel for the claimant refers firstly to the case of **Re Ipcon Fashions Ltd**¹¹ where Hoffman J stated that:

“The public is to be protected not only against the activities of those guilty of the more obvious breaches of commercial morality, but also against someone who has shown in his conduct.... A failure to appreciate or observe the duties attendant on the privilege of conducting business with the protection of limited liability”.

[128] It is submitted that the test for disqualification is whether the director’s conduct, viewed cumulatively and taking into account any extenuating circumstances has fallen below the standards of probity and competence appropriate for persons fit to be directors of companies.

[129] However, in my view, the starting point in determining whether the claimants succeed in this aspect of their claim is the provisions of the legislation itself. In both the now repealed **Companies Act** and the current **Business Companies Act**, the legislation grants powers to the court to disqualify a director on an application by the Registrar of Companies. Section 66(1) of the **Companies Act** states that **“[w]hen, on the application of the Registrar, it appears to the Court that an individual is unfit to be concerned in the management of a company, the Court may order that, without the prior leave of the Court, he may not be a director of the company, or, in any way, directly or indirectly, be concerned with the management of the company for such period...”**

[130] It would be readily observed that under the old regime, the disqualification order is one made on an application from the Registrar. I have found nothing in the legislation which empowers a co-director or other person to make such an application. Given that the court is considering a disqualification order as at the date of this judgment, it is important to give consideration to the current legislative regime. Section 105(1) of the **Business Companies Act** states that **“[w]here the Registrar is**

¹¹ (1989) 5 BCC 733

satisfied that the conduct of a director warrants disqualification from being a director, the Registrar may apply to the Court for a director's disqualification order."

[131] The section goes on to make provision for notice to be provided and sets the broad criteria for determining an application for disqualification. However, subsection 4 states that **"[w]here it appears to the Court that a director is unfit to hold that office, the Court may order that, without the prior leave of the Court, the director is disqualified to hold the office for a period not exceeding 5 years and the Court may include any condition necessary to satisfy the justice of the case."** It may very well be argued that the scope of the disqualification order in the new regime is broader. However, in my view, the application is one to be made by the registrar.

[132] There was nothing by way of submission to address the question of whether there is a common law power to disqualify a director on an application by persons in the position of the claimants. In any event, it is always open to the shareholders of the company to simply relieve the director of his duties if they are not satisfied with his actions. Given that the share transfers under review in this case have either set aside or to revert to Mr. Fleming's estate, whoever is now in control of his estate can take the necessary steps to remove Mr. Davis as a director. In the circumstances, I would dismiss the claim for disqualification of Mr. Davis.

Final Orders

[133] Having considered the issues raised between the parties the court makes the following declarations and orders:

- (a) Mr. Raoul Albert Fleming (now deceased) was and remains the true beneficial owner of Syrus Holdings Ltd. and Sea Haven Development.
- (b) Mr Davis is to take immediate steps to transfer the shares in Syrus Holdings to the Estate of Mr. Fleming or a nominee appointed by a personal representative of the estate. In the interim he is to take no action in relation to the shares of the assets of Syrus Holdings unless there is approval by Ms. Fleming.
- (c) The transfers of in Sea Haven Development to Mr Davis is set aside.

- (d) Wendore Limited was and remains the sole director of Syrus Holdings.
- (e) The registers of Syrus Holdings and Sea Haven Development are to be rectified so as to reflect the orders in (a) to (d) above.
- (f) It is directed that a proper forensic account of Mr. Davis's dealings with the affairs of Syrus Holdings and Dynamo Holding be undertaken and that any financial benefit wrongly acquired during his management of the companies are to be paid back to the company. The account is to be conducted at Mr. Davis's expense.
- (g) The request for disqualification is denied.
- (h) As previously ordered, Mr. Davis will pay the costs of this claim to be assessed on application by the claimants if not agreed within 21 days from the date of this order.

Ermin Moise
High Court Judge



BY THE COURT

REGISTRAR