

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2018/0154

BETWEEN:

[1] **WILTON TRUSTEES (IOM) LIMITED**
[2] **FIDUCIANA VERWALTUNGSANSTALT**
(as Trustees of the Erica Settlement)
Claimants/Applicants

and

[1] **AFS TRUSTEE LIMITED**
First Defendant/
Respondent

[2] **AFS DIRECTORS LIMITED**
[3] **APPLEGATE FS SA**
[4] **GEORGE ALAN EVANS**
[5] **DAVID ROMANO**
[6] **JEAN-NOEL PASQUIER**
[7] **FIHAG FINANZ-UND**
HANDELS-AKTIENGESELLSCHAFT
[8] **MARKUS JOOSTE**
[9] **FORMAL HOLDINGS LIMITED**
[10] **MALCOLM KING**
[11] **WELLCOURT INVESTMENTS GROUP S.A.**
[12] **DEAN INVEST & FINANCE INC.**
[13] **SHANNON PROPERTIES LIMITED**
[14] **TREGANNA INVESTMENT INCORPORATION**
[15] **BAILOR INVEST & FINANCE CORP.**
[16] **FRANKLAND ASSETS INC.**
[17] **LENA HOLDINGS CORP.**
[18] **FREELAND INVESTMENT CORPORATION**
[19] **DORSET INVESTMENT CORPORATION**
[20] **GEMONA INVESTMENT CORPORATION**
[21] **LEXINGTON INVESTMENT CORPORATION**
[22] **MARYLAND INVESTMENT CORPORATION**
[23] **MYRON INVESTMENT CORPORATION**
[24] **NAPIER INVESTMENT CORPORATION**
[25] **NYRA INVESTMENT CORPORATION**
[26] **PRIMROSE INVESTMENT CORPORATION**
[27] **WELLSIDE INVESTMENT CORPORATION**
Defendants

Appearances:

Lady Camilla Bingham, QC with her Mr. Matthew Brown and Ms. Allana-J Joseph for the Claimants

Mr. Gerard Clarke for the First and Second Defendants

Mr. Brian Lacy for the Seventh Defendant

Mr. Shane Donovan for the Ninth and Tenth Defendants

2020: January 22;
February 24

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** This is the decision in relation to an application for summary judgment pursuant to rule 15.2, Civil Procedure Rules 2000 ('CPR') filed by the Claimants Wilton Trustees (IOM) Limited ('Wilton') and Fiduciana Verwaltungsanstalt ('Fiduciana') against the First Defendant ('AFS'). They do so in respect of part of the claim which they have brought in their purported capacity as trustees of the Erica Settlement, a discretionary trust established by Declaration of Trust dated 11th December 1996 (the 'Trust' and 'Trust Instrument' respectively). Only AFS is the Respondent to the application, although other parties assisted AFS in resisting the application by adducing evidence, in particular the Second Defendant, AFS Directors Limited, who were represented by the same counsel as AFS.
- [2] The wider circumstances of the dispute are undoubtedly complicated. The part of the claim on which the Claimants seek summary judgment is a statement of case they have advanced against AFS that they are current trustees of the Trust and that they are entitled to an order that AFS transfers the Trust assets to them. AFS has resisted strongly calls by the Claimants to transfer the assets. Whilst AFS by its learned counsel has represented that it would welcome the Court's guidance on the question whether it should transfer the assets, it has not applied to the court for directions, and its conduct, including in relation to this application, strongly suggests that it is trying to delay as long as possible having to transfer them. Instead, it has questioned the Claimants' standing as Trustees and urged that a transfer should await a thorough judicial review of all the evidence, whether by a trial of preliminary issues or a full trial. AFS urges that instead of summary judgment the Court should sensibly go no further than to order a trial of preliminary issues, including the issue of asset transfer. AFS says that such a

trial of preliminary issues is in essence a hearing for directions. The Claimants say the contention by AFS for a trial, whether of preliminary issues or a plenary trial, is no more than a cynical ploy on the part of AFS in an attempt to stifle the serious claims against the Defendants, including AFS, through denial of funding.

- [3] I am most grateful to learned counsel for the parties for their written submissions. The approach and style of the Claimants' and AFS's submissions respectively differ significantly. The Claimants' approach is analytical and detailed. AFS's approach is more general, stressing the circumstances and background to the matter. Whilst the latter initially appeared attractive to me, I was persuaded by the Claimants that AFS's approach is not the better one here. To appreciate the contrasts between these approaches it is appropriate in my respectful judgment to set out both parties' closing submissions almost verbatim, with only logical amendments to render them more immediately accessible for readers of this judgment.

The Claimants' Closing Submissions

1. Introductory matters

- [4] The application relates to an isolated head of relief claimed against the First Defendant: AFS Trustee Limited ('AFS'). The wider proceedings brought by the Claimants against multiple defendants centre on the propriety or otherwise of AFS's transfer in April 2018 of a substantial portion of the Trust's assets to the Seventh Defendant, FiHAG Finanz-und Handels-Aktiengesellschaft ('FiHAG'). The Claimants accept that that central dispute must await trial. However, they maintain that there is no reasonably arguable defence to their claim to the balance of the Trust assets such as were not alienated from the Trust.
- [5] There is no dispute that those assets (the 'Uncontentious Trust Assets') belong to the Trust. Nor is there any dispute that AFS is currently holding the Uncontentious Trust Assets against the wishes of the settlor and beneficiary of the Trust, and without seeking directions from the courts of the Territory of the Virgin Islands ('BVI'). The question for the Court to decide is: is it reasonably arguable that AFS is entitled to do so?
- [6] The Claimants claim that they are the trustees of the Trust and they sue in that capacity. Their disputed status as trustees is central to this application and is discussed further below.

- [7] The settlor of the Trust is a Mr. David Sussman and his son, Mr. Ryan Sussman, is its sole adult beneficiary.
- [8] The assets of the Trust include, on the one hand, a portfolio of properties in North London which is held by thirteen BVI and Liberian companies (Defendants 15 to 27) which are in turn owned by the Eleventh Defendant, Wellcourt Investments Group S.A. ('Wellcourt'). Then there are three separate companies (Defendants 12 to 14) which own respectively a bank account with Investec Bank (Switzerland) AG and residential properties in England and in Israel.
- [9] AFS is a company incorporated in Saint Christopher and Nevis which was purportedly appointed trustee of the Trust on 10th July 2012 and has, to all appearance, been removed from that (purported) role in March 2018. The other defendants to these proceedings are not parties to this summary judgment application.
- [10] The Claimants issued these proceedings on 5th September 2018, subsequently filing an Amended Claim Form and the Amended Statement of Claim ('ASOC') pursuant to CPR 20.1 on 19th November 2018.
- [11] By the proceedings the Claimants seek ownership and control of the Trust assets on behalf of the Trust and its beneficiary/ies. The Claimants allege that Defendants 1 to 10 (the principal Defendants) have conspired with each other to misappropriate the assets of the Trust, including by the issue and allotment to FiHAG (a non-beneficiary) of 1,000 new shares in Wellcourt – representing 50% of Wellcourt's share capital – and by the appointment of the Tenth Defendant (a Mr. Malcolm King) as a director of Wellcourt. The Claimants say that in issuing and allotting shares to FiHAG, AFS acted in breach of trust and fiduciary duty, and various allegations are made against the other principal Defendants in relation to their roles in the alleged wrongdoing. Those claims are not the subject of the application for summary judgment now before the Court.
- [12] The claim on which summary judgment is sought is set out at paragraph 76 of the ASOC. The complaint is that AFS is in breach of trust by failing to transfer to the Claimants the Uncontentious Trust Assets. The Claimants seek relief in respect of that allegation in

paragraph 1 of the Prayer to the pleading, namely an order that AFS transfers the Uncontentious Trust Assets to the Claimants.

[13] On 17th January 2019, this Court by Mr. Justice Adderley granted the Claimants permission to serve the Amended Claim Form and ASOC and all other documents in these proceedings on those defendants resident out of the jurisdiction, namely Defendants 3 to 8, 10, 14 and 18 to 27.

[14] On 6th March 2019 challenges to the jurisdiction of this Court made by those defendants resident (and served) in the BVI or Saint Christopher (Defendants 1 to 2, 9, 12 to 13 and 15 to 17) were heard by Mr. Justice Michael Green QC. Green J dismissed those challenges on 15th April 2019.

[15] All of the principal Defendants to the claim apart from the Eighth Defendant, Mr. Markus Jooste, have now been served with proceedings and have filed Defences. In particular, insofar as is relevant to the application before the Court:

(1) On 31st May 2019, Defendants 1, 2, 12 and 13 filed a Defence ('AFS's Defence'), which has subsequently been adopted also by Defendants 3 to 6. In that Defence, AFS did not admit that the Claimants are the present trustees of the Trust, pleading that the Claimants' appointments in June and July 2018 'may' not have been valid (at paragraph 20). AFS further pleaded, in denying paragraph 76 of the ASOC in which it was alleged that AFS had in breach of trust refused to transfer Trust assets to the Claimants, that it 'has been and remains willing to transfer assets, but subject to clarification as to the alleged defects in appointments of trustees, including the Claimants, and as to proper and normal agreements, arrangements and indemnities on handover'.¹

(2) On 31st May 2019 Defendants 9, 10 and 15 to 17 filed a Defence to the claim ('Mr. King's Defence'). Mr. King's Defence, which is in material part adopted by AFS, put the Claimants to proof as to the validity of their appointment as trustees.

¹ By paragraph 74 of AFS's Defence.

- (3) On 12th July 2019 AFS responded to a Request for Further Information submitted by the Claimants. In answer to the question (Q9), 'Does [AFS] itself advance a positive case as to the validity of the Claimants' appointment, and if so what is that case?', AFS responded that '[AFS] seeks determination of the issues of what law governs the Trust and puts the Claimants to proof as to validity of their appointment'.
- (4) By the same Further Information AFS claimed that 'AFS Trustee is applying for directions from the Liechtenstein Court to determine the issues [surrounding trustee appointments]'. It is, however, common ground that AFS did not at any stage seek directions from the Liechtenstein Court or from the BVI Court.
- (5) On 21st August 2019 the Claimants issued the instant application for summary judgment, and evidence was served by the parties as appears below.
- (6) On 11th November 2019 FiHAG filed an Amended Defence in which it denied that the Claimants had been validly appointed as trustees. FiHAG alleges that the Claimants' appointments in June and July 2018 were invalid because they were made by the beneficiary/ies of the Trust in circumstances where the right of appointment was vested in the Trust's Protector, Mr. Darren Yanover. FiHAG pleads that it is 'also possible that the Trust had effectively been terminated' by a deed dated 4th April 2018 by which AFS's predecessor Trustee, Trident Trust Company (I.O.M.) Limited ('Trident'), purported to appoint the entire Trust fund on a 'Vesting Date' to Mr. Ryan Sussman.

[16] On 23rd December 2019 the Claimants issued an application for permission to amend the ASOC to plead developments that would put their status as trustees beyond doubt. In particular, by the newly amended paragraph 4.3, the Claimants would plead that:

- (1) On 25th November 2019 the Protector of the Trust, Mr. Darren Yanover, executed a deed confirming the existing appointment of Fiduciana as trustee or appointing Fiduciana to that position if and to the extent that it was not already a trustee;

- (2) On 10th December 2019 the Protector, Mr. Yanover, executed a deed confirming the existing appointment of both the Claimants as trustees or appointing them to that role if and to the extent that they were not already trustees (the 'Confirmatory Deed'); and
- (3) Also on 10th December 2019 Mr. Ryan Sussman issued a direction that if and to the extent that the entire assets of the Trust had been appointed to him (which the Claimants denied), those assets are to be transferred to the Claimants to be held by them on the trusts of the Erica Settlement.

[17] The amendment application was unopposed and was granted by the Court at the commencement of the hearing on 22nd January 2020.

[18] The Claimants say that for completeness, in addition to the proceedings in the BVI:

- (1) Criminal proceedings are ongoing in Switzerland against the Fourth Defendant Mr. Evans, the Fifth Defendant Mr. Romano, the Sixth Defendant Mr. Pasquier and the Eighth Defendant Mr. Jooste, in relation to the wrongdoing summarised above. The Genevan Court of Appeal has recently (i) maintained a freezing order against Mr. Evans on the basis that the evidence against him gives rise to a credible suspicion that he has committed a criminal breach of duty in relation to AFS's transfer of shares to FiHAG, and (ii) made similar findings as to its suspicions of a criminal offence against Mr. Romano but lifted the freezing order against him on proportionality grounds, finding that there was no evidence that Mr. Romano had directly benefitted from the share transfer.
- (2) There is also a related set of proceedings in England, brought by Defendants 7 and 9 against Defendants 15 to 27, which are not relevant to the present hearing.

[19] The Claimants' application is supported by the Seventh Affidavit of Mr. Theunis Bassage, the Head of Corporate and Legal at Wilton. Mr. Bassage exhibits to his affidavit an opinion obtained from Liechtenstein counsel, Messrs. Walch & Schurti, dated 28th January 2019 and which had been shared with AFS on 22nd July 2019, which opines that under Liechtenstein law the Claimants are the trustees of the Trust, having been validly appointed in June and July 2018 respectively.

[20] AFS relies in response on the Fourth Affirmation of Mr. Jean-Noël Pasquier sworn on 5th November 2019. Mr. Pasquier contends that the Claimants' status as the current trustees of the Trust is 'in dispute and requires a court ruling...following a full trial' because it is 'a complex issue requiring detailed analysis of fact and law'. Specifically, Mr. Pasquier contends that the identity of the present trustees cannot be ascertained until the Court conclusively determines (1) the proper law of the Trust and (2) the validity of the various appointments/purported appointments of trustees by reference to that proper law. He suggests that one or both of the Claimants may not be validly appointed as trustee(s) of the Trust on any of the following possible bases:

- (1) The entire assets of the Trust may have been appointed to Mr. Ryan Sussman by Trident by the deed of 4th April 2018;
- (2) It may be that neither Claimant was validly appointed as trustee in June/July 2018 because they were not appointed by the Protector of the Trust;
- (3) The appointment of Wilton as trustee may be defective by virtue of its not being resident in the Principality of Liechtenstein, leaving only Fiduciana as trustee;

[21] Mr. Pasquier acknowledges the Claimants' evidence of Liechtenstein law but does not challenge it. It seems that AFS has obtained advice from Liechtenstein Counsel but has not put it before the Court, nor shared it with the Claimants.

[22] Mr. Pasquier reiterates AFS's pleaded position that the second barrier to it transferring the Uncontentious Trust Assets is the Claimants' alleged failure to provide AFS with the 'usual and reasonable indemnities in respect of any transfer', continuing that AFS 'remains committed to entering into [a deed of indemnity] should agreement be reached on the final outstanding matters', such matters being identified in paragraphs 37 to 38 of Mr. Pasquier's Fourth Affirmation.

[23] In response, the Claimants have filed the Third Affidavit of Mr. Ryan Sussman sworn on 16th December 2019, the First Affidavit of Mr. Israel David Sussman (Mr. David Sussman) sworn on

12th December 2019, and the Eighth Affidavit of Mr. Bassage, sworn on 18th December 2019. That evidence relies upon and exhibits various documents, including:

- (1) The deeds of 25th November and 10th December 2019 and the direction of Mr. Ryan Sussman of 10th December that are described above and are pleaded in the amended paragraph 4.3 in the intended Re-Amended Statement of Claim ('RASOC'). These documents are said by the Claimants to address all of Mr. Pasquier's hypotheses and put the Claimants' position as trustees of an existing trust beyond any doubt;
- (2) Further foreign law expert opinions covering the hypotheses raised by Mr. Pasquier and also those matters raised by the Defences filed, including that of FiHAG - under the laws of Liechtenstein,² the Isle of Man and Jersey,³ as all of the potential candidates for the governing law of the Trust. The Claimants' experts conclude (among other things) that (i) under all of those laws, the Claimants have been validly appointed as trustees, (ii) the documents recently executed to put the matter beyond doubt are effective in so doing (if and to the extent that that was necessary), and (iii) AFS is not entitled to hold the Uncontentious Trust Assets pending the parties' agreement as to the terms of the indemnity being offered to it;⁴ and
- (3) An updated draft deed of indemnity sent to AFS on 26th November 2019, which (i) the Claimants say addresses all of AFS's stated concerns about the indemnity formerly tendered and (ii) the foreign law experts opine provides (at least) adequate indemnification to AFS, but (iii) has not been accepted by AFS.

[24] That reply evidence was served (some before it had been sworn) on AFS on 13th December 2019, over five weeks before the hearing of the summary judgment application on 22nd January 2020. AFS was entitled under CPR 15.5(2) to file any further evidence up to seven days before the hearing on 22nd January. It did not do so. The Claimants' expert evidence remained unchallenged.

² A supplemental opinion of Messrs. Walch & Schurti dated 13th December 2019.

³ Opinion of Alan Steinfeld QC dated 12th December 2019.

⁴ Steinfeld Opinion paragraphs 31-41 and 46; Messrs. Walch & Schurti January 2019 Opinion paragraphs 9-10 and 14-15, Messrs. Walch & Schurti December 2019 Opinion paragraphs 12-16, 31-33, 37.

[25] The Claimants also rely on the Ninth Affidavit of Mr. Bassage, which addresses a last-minute development regarding the control of Wellcourt, the company whose portfolio is the Trust's most valuable asset.

[26] The following documents are centrally relevant to the application for summary judgment.

2. The Trust Instrument

[27] Clause 11 of the Trust Instrument governs the appointment, removal and conduct of business of trustees. In particular:

- (1) Clause 11.2 provides that the Protector of the trust has the right and power to appoint and remove trustees. Clause 11.4.4 provides that the office of trustee will be vacated if the trustee is required by the Protector to resign.
- (2) Clause 11.3 provides that if a 'vacancy in the Trusteeship has occurred or is about to occur', and there is no Protector in place to appoint a successor trustee, then the power to appoint trustees vests in the adult beneficiaries of the Trust (unless the Trust has certified accountants or auditors who make the appointment).
- (3) Clause 11.7 provides that '[a]ny appointment of a Trustee shall be made in writing specifying the time when such appointment is to take effect and be signed by the person making such appointment and witnessed by two persons'. The Claimants note that the effect of clause 11.7 is central to the wider debate between the parties about the Claimants' appointments in June and July 2018. Those appointments were purportedly effected by the adult beneficiary of the Trust (under clause 11.3) on the basis that there was, at that time, both (i) a vacancy in the trusteeship because of a repeated failure to adhere to clause 11.7's requirement to have two witnesses, and (ii) no Protector in place because the purported appointment of Mr. Yanover as Protector (on 23rd January 2018) had been executed by a purported trustee (AFS) that the Claimants say was not in fact validly appointed. The Defendants have called that analysis, and therefore the Claimants' appointments in June / July 2018, into question. This is not a debate which needs to concern the Court on this occasion.

- (4) Clause 11.10 provides that '[a]ny outgoing Trustee shall as soon as reasonably possible execute and do all such transfers or other acts or things as may be necessary for vesting the Trust Fund in a new or continuing Trustee(s)...'.
- (5) Clause 15.5 provides that if there is no Protector, the trustees are entitled to appoint one.
- (6) Clause 12 addresses the liability, remuneration and security of trustees. Clause 12.1 provides that '[n]o Trustee shall be liable to make good to the Settlement or any Beneficiary any loss sustained by the Trust Fund or any Beneficiary by reason of any acts or omissions by any Trustee in good faith and in the exercise of judgement usually expected from men of ordinary prudence in connection with the administration of Trusts'. Clause 12.2 sets out various matters against which trustees are entitled to indemnification, subject to clause 12.1.

3. The Confirmatory Deed of 10th December 2019

[28] By a Confirmatory Deed dated 10th December 2019, Mr. Yanover as the Protector of the Trust confirmed the existing appointment of the Claimants as the (only) trustees of the Trust, but to cater for the possibility that that was wrong, also appointed the Claimants as trustees of the Trust, if and to the extent that that was necessary. The Claimants say that despite AFS's counsel's suggestion to the contrary at the hearing on 22nd January 2020, this cannot seriously be disputed by AFS. The terms of the deed provide in particular:

- (1) The parties to the Confirmatory Deed are Mr. Yanover and both the Claimants.
- (2) Recital 1.2 states that the parties understand and wish to confirm that the Claimants were already the (only) validly appointed trustees of the Trust.
- (3) Recital 1.3 acknowledges however that it has been suggested that that may not be correct, and continues:

"Each of the Parties rejects, and nothing in this Deed should be taken to support, any such suggestion. Nevertheless, the Parties wish to ensure that there can be no doubt that Recitals 1.2(a) and (b) reflect the position from the date of this Deed, even if (which they deny) those Recitals do not reflect the

position prior to the date of this Deed. Each of the Parties confirms that the Deed is executed for that purpose”.

- (4) Recitals 1.4 and 1.5 state that Mr. Yanover has been validly appointed as the Protector of the Trust and that the Protector has the power under clause 11 of the Trust instrument to appoint and remove trustees.
- (5) Recitals 1.6 and 1.7 state that by the Confirmatory Deed the parties thus intend to confirm or (if necessary) effect that the Claimants are the trustees of the Trust and that neither Trident nor AFS are trustees, and that it is intended that the Trust property shall forthwith be transferred to the Claimants as the only trustees of the Trust.
- (6) Accordingly, by clause 2.1 Mr. Yanover (i) appointed each Claimant as trustee of the Trust (or alternatively confirmed their existing appointments) and (ii) removed Trident and/or AFS from the role of trustee (if and to the extent that either held that role).
- (7) The Confirmatory Deed is signed and delivered as a Deed by the Protector, Mr. Yanover, in the presence of two witnesses.

4. The Direction of Mr. Ryan Sussman of 10th December 2019

[29] Mr. Sussman’s Direction is addressed to AFS. In it, Mr. Sussman states as follows (bold type in original):

“I understand that it has been suggested that the entire assets of the above-named Trust have or may have been appointed to me by virtue of a Deed dated 4 April 2018. I understand that that is in fact incorrect, and the Deed dated 4 April 2018 was ineffective.

However, if and to the extent that the Deed dated 4 April 2018 was effective, I understand that the result would be that (i) a bare trust of all the assets of the Trust would have been created for my benefit, and accordingly (ii) the assets of the Trust can and should be transferred to me or as I direct.

Accordingly, if and to the extent that the Deed dated 4 April 2018 was effective, I make the following direction:

All of the assets of the Trust purportedly appointed to me by the said Deed are to be transferred to [Wilton] and [Fiduciana], to be held by them on the trusts of the Erica Settlement originally constituted by Declaration of Trust dated 11 December 1996.”

5. The Draft Indemnity of 26th November 2019

[30] The draft indemnity sent to AFS on 26th November 2019 offered AFS an indemnity in the following terms:

“against all claims, demands, actions, damages, costs, taxes, liabilities, proceedings and accounts of any kind on the part of any person (whether in existence or not) actually or prospectively interested whatsoever, wheresoever and howsoever arising for which any of the Indemnified Parties may be sought, in relation to all such matters in respect of which the Indemnified Parties would be entitled to an indemnity out of the Trust Fund under clause 12 of the Declaration of Trust dated 11 December 1996 assuming that the Retiring Trustee had been validly appointed as a trustee of the Trust, provided always that the liability of [Wilton] and [Fiduciana] shall not extend beyond the assets subject to the Trust in their respective possession or under their direct or indirect control from time to time.”

6. Correspondence

[31] A great deal of correspondence has been exchanged between the parties and their solicitors on the theme of a transfer of the Uncontentious Trust Assets since March 2018. The Claimants say that they and their English and BVI solicitors have pressed for those assets by more than sixteen letters and emails, all of which are before the Court. The Claimants urge the Court to note in particular the correspondence exchanged between Messrs. Conyers Dill & Pearman (for the Claimants) and Messrs. Collas Crill (for AFS) in November and December 2019 and AFS's disengagement when the Claimants reasonably, the Claimants say, sought to accommodate the concerns identified by AFS to date.

7. The legal test for summary judgment

[32] Rule 15.2 of the CPR provides that:

“The court may give summary judgment on the claim or on a particular issue if it considers that the...(b) defendant has no real prospect of successfully defending the claim or the issue.”

[33] The main principles to be applied on an application for summary judgment were usefully summarised in **T-Tobba Company Limited v Thornton Smith Trust Corporation**,⁵ adopting the principles set out in **Easyair Ltd (t/a Openair) v Opal Telecom Ltd**.⁶

[34] The applicant has the initial evidential burden of showing that there are credible grounds on which the defence to the claim or issue in question may be found to have no real prospect of succeeding. Thereafter the defendant must show that one or more of its defences has a real, as opposed to fanciful, prospect of succeeding.⁷ In particular:

- (1) The Court does not have to accept without analysis everything said by a party in its statements before the Court.⁸ A 'realistic' defence is one that carries 'some degree of conviction'; it must be 'better than merely arguable'.⁹ The Court's assessment of the prospects of success of the relevant defence requires 'an exercise of judgment'; 'it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters'.¹⁰
- (2) Where a defendant has failed to produce anything to persuade the Court that it has a realistic prospect of success – for example, where it has failed to challenge relevant evidence – the Court should not allow the matter to proceed to trial.¹¹
- (3) Similarly, AFS in its skeleton argument draws attention to the *dictum* of the Court of Appeal in **Walton v De La Hay**¹² that summary judgment should only be granted (save in instances of abuse of process) in cases where it is clear that a claim or defence

⁵ Unreported; BVIHCV2014/0044 (delivered 13th January 2017) at [7] (Master Ventose (Ag.)).

⁶ [2009] EWHC 339 (Ch) at [15] (Lewison J).

⁷ Unreported; *The Bank of Bermuda Ltd v Pentium (BVI) Ltd & Anor.*, BVI Civil Appeal No 14 of 2003 (delivered 20th September 2004) at [15] (Saunders CJ (Ag.)); *Athena Brands Ltd v Superdrug Stores plc* [2019] EWHC 3503 (Comm) at [6] (HHJ David Cooke).

⁸ *ED&F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [10] (Potter LJ).

⁹ *ED&F Man Liquid Products v Patel* at [8] (Potter LJ).

¹⁰ *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 285 at [158] (Lord Hobhouse of Woodborough). Although Lord Hobhouse was in the minority in that case, this dictum has been cited with approval on a number of occasions since (see e.g. *John Calland v Financial Conduct Authority* [2015] EWCA Civ 192 at [28]-[30] (Lewison LJ)).

¹¹ *The Bank of Bermuda v Pentium* at [15]-[16] and [18] (Saunders CJ (Ag.)).

¹² Unreported; BVIHCVAP 2014/0004 (delivered 14th August 2015) at paragraph [52] (Blenman JA), following *Saint Lucia Motor & General Insurance Co. Ltd v Peterson Modeste*, Unreported; SLUHCVP2009/0008 (delivered 11th January 2010)(George-Creque JA).

‘obviously cannot be sustained’ and ‘has no real prospects of success’. In the same paragraph (52), the Court also said that ‘[a] defendant with no or no more than a partial defence will not be allowed to cheat a claimant of his just desserts by producing an illusion¹³ of complexity where none exists’.

[35] The power to dispose summarily of the case or issue at hand is one that must be exercised in accordance with the overriding objective.¹⁴

8. The rival positions

8.1 The Claimants’ position

[36] The Claimants start with the following uncontroversial points:

- (1) AFS lays no proprietary claim to the Trust assets. AFS does not dispute that the Uncontentious Trust Assets should be transferred to the properly appointed trustees of the Trust.
- (2) The settlor and beneficiary of the Trust have both sworn affidavits confirming their strong desires for the Trust assets to be held by the Claimants as trustees – and not AFS, a party in which, to put it at its lowest, they have lost all confidence.
- (3) The Claimants are willing to act as trustees (and indeed have been acting on that basis since June and July 2018 respectively).
- (4) The Trust currently has, in the words of Green J at the hearing of AFS’s (and others’) jurisdiction challenge on 6 March 2019, ‘nobody looking after its interest on the board’ of Wellcourt, the company whose shares are currently split 50-50 between the Trust (as held by AFS) and FiHAG and which owns a valuable residential portfolio in London. That is, as Green J observed and AFS’s counsel accepted, ‘not a very happy position to leave trust assets in’. The Trust will continue to have no representation on the Wellcourt board until the Uncontentious Trust Assets are transferred to the Claimants by AFS, because Wellcourt’s sole director, Mr. King (the Tenth Defendant) will allow a director

¹³ The word ‘elusion’ appears in the report. It is assumed that the word ‘illusion’ was intended.

¹⁴ See e.g. *The Bank of Bermuda v Pentium* at [25] (Saunders CJ (Ag.)).

nominated by the Claimants to be appointed only when the 50% shares in Wellcourt belonging to the Trust - and currently held by AFS - are transferred into the Claimants' name.

[37] As to AFS's insistence that it cannot transfer the Uncontentious Trust Assets to the Claimants until certain allegedly complex matters as to the Claimants' appointments are resolved, the Claimants say that it cannot be right that in the circumstances described above - i.e. where the settlor, beneficiary/ies and Protector of a trust all *want* to appoint nominated trustees, and have done everything they can to effect the appointment of those trustees - a former trustee is entitled to withhold the transfer of the trust assets because it is concerned that there *might* be a technical problem with their appointment. Green J's view - despite the various alleged 'complexities' that AFS now prays in aid about the parties' positions on historic trustee appointments, and the Claimants' appointments in June / July 2018, being well explained to him, was that AFS 'should get on with [the transfer]'. The Claimants agree and urge me to adopt the same conclusion.

[38] In more detail, the Claimants say there can no longer be any room for doubt (if there ever was) that the Claimants are the present, validly appointed, trustees of the Trust. The clear and unchallenged expert evidence before the Court is that if Liechtenstein law governs the Trust, the Claimants were both validly appointed in June/ July 2018, and if Manx / Jersey law governs the Trust, Wilton was validly appointed in June 2018 and Fiduciana on 25th November 2019. It does not therefore matter which law applies: the Claimants are validly appointed in accordance with all candidates for governing law. The experts also reject the suggestion that the Trust was terminated and/or its assets appointed to Mr. Ryan Sussman by the deed of 4th April 2018.¹⁵

[39] For the purposes of this summary judgment application the Court need not decide when the appointments took effect, because the two documents executed on 10th December 2019 put the position beyond doubt:

- (1) Mr. Ryan Sussman's Direction means that if the Trust assets were appointed to him by the deed of 4th April 2018, and accordingly a bare trust of the assets was created for him, those assets must now be transferred to the Claimants to be held by them as trustees of

¹⁵ Steinfeld Opinion paras. 26-29; Messrs. Walch & Schurti January 2019 Opinion paras. 32-33.

the Trust. This document speaks for itself, say the Claimants, but they ask the Court to note Mr. Steinfeld, QC's confirmation, as one of the Claimants' legal experts, that this was a valid and effective direction which must be adhered to by AFS.¹⁶

- (2) The Confirmatory Deed means that if and to the extent that the Trust exists but for whatever reason the Claimants had not been validly appointed as its trustees, they are now so appointed (and any other potential trustee suggested by AFS's evidence is removed). Again, this is a self-explanatory document say the Claimants, but they also ask the Court to note that both experts consider it to be effective.¹⁷

[40] So much for the Claimants' status as trustees of the Trust. The Claimants contend that AFS cannot plausibly maintain its second pretext for withholding the transfer of the Uncontentious Trust Assets, namely that the Claimants have failed to provide it with the 'usual and reasonable indemnities' in respect of its proposed transfer of the assets. The draft deed of indemnity provided by the Claimants to AFS on 26th November 2019 addresses every one of AFS's alleged concerns with the previous indemnity offering. The indemnity offered provides AFS with the same protection to which a validly appointed trustee of the Trust would be entitled, under clause 12 of the Trust instrument. That is what AFS's legal representatives in Jersey, Noirmont Consulting, have previously sought, and both experts confirm that the indemnity offered is (at least) adequate under the laws on which they opine.¹⁸

[41] Third, AFS is not in any event entitled to hold on to the Uncontentious Trust Assets until these matters are determined to its satisfaction by the Court:

- (1) Clause 11.10 of the Trust instrument imposes on an outgoing trustee an unqualified obligation to vest the Trust assets in a new trustee as soon as reasonably possible. That clause does not entitle an outgoing trustee (whether validly appointed trustee or *trustee de son tort*) to withhold the Trust assets from trustees who the Protector, settlor and beneficiaries all consider to have been validly appointed and all *want* to be appointed, on the basis that there 'might' be some defect in those appointments. The position is a *fortiori* where, as here, AFS has not adumbrated any theory as to why the documentation

¹⁶ Steinfeld Opinion paragraph 41(b).

¹⁷ Steinfeld Opinion paras. 37-38 and 41(a); Messrs. Walch & Schurti December 2019 Opinion paras. 13-14 and 31.

¹⁸ Steinfeld Opinion paras. 43-45; Messrs. Walch & Schurti December 2019 Opinion paras. 34-36.

of 10th December 2019 might be ineffective in putting the appointments of the Claimants beyond doubt. AFS's current position would mean that a trustee who has been removed can always obstruct the transfer of trust assets to a new trustee, on the basis that there *could potentially* be some defect in the appointment of the latter, pending a Court ruling on the point. That is not how trusteeship works, and it is not how Clause 11.10 of the Trust instrument works.

- (2) Nor is AFS entitled to retain the Uncontentious Trust Assets pending agreement on the terms of the indemnity. That is again confirmed by both foreign law experts.¹⁹ Mr. Steinfeld, QC relies in particular on **Meritus Trust v Butterfield Trust (Bermuda)**,²⁰ a decision of the Supreme Court of Bermuda which followed the Australian case of **Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd**,²¹ applying the same principles as would apply under English or Manx law; and, as regards Jersey law, the Trusts (Jersey) Law 1984, arts. 34 and 43A and **Re Essel Trust**.²² Thus even if and to the extent that AFS is still unhappy with any aspect of the indemnity, that would not be a bar to the transfer of the Uncontentious Trust Assets.

8.2 AFS's position

- [42] The Claimants make the following observations concerning the First Defendant's position.
- [43] AFS does not lay a proprietary claim to the Uncontentious Trust Assets or dispute that they must be transferred to the properly appointed trustees. Nor has it suggested at any point that it has a defence to the Claimants' claim that the failure to do so would in principle amount to a breach of trust. Its case at paragraph 74 of its Defence is to deny that it is in breach not on the basis that the assets should not be transferred but because it first needs (i) 'proper and normal agreements, arrangements and indemnities on handover' and (ii) 'clarification' about the appointments of trustees including the Claimants.
- [44] It is not clear whether AFS pursues any 'defence' based on the adequacy of the indemnity it has been offered. There was no mention of the indemnity in AFS's skeleton argument; and

¹⁹ Steinfeld Opinion paragraph 46; Messrs. Walch & Schurti December 2019 Opinion paragraph 37.

²⁰ [2018] WTLR 545

²¹ [2008] NSWSC 1344.

²² [2008] JRC 065.

AFS's learned counsel Mr. Clarke did not advance any argument in relation to the indemnity at the hearing of the application. The point is readily disposed of in any event: AFS has been offered precisely what the Trust Instrument says it can expect.

[45] That leaves the alleged need, as pleaded by AFS in its Defence at paragraph 74, for 'clarity' about the appointments of trustees 'including' the Claimants.

[46] A threshold difficulty with that 'defence' is that AFS has not been able to point to any authority suggesting that it is entitled to demand a Court determination of the validity of the appointment of trustees as a precondition of its transfer of the assets to those trustees. The Claimants are not aware of any such authority and such a position would be contrary to clause 11.10 of the Trust instrument as set out above. Unless there is a credible, *bona fide* argument that the Claimants have *not* been appointed, the parties and the Court can and should proceed on the basis that they *have*.

[47] Turning in any event to the substance of AFS's challenge to the application based on alleged uncertainty concerning the Claimants' status as trustees, AFS's skeleton identifies at paragraph 29 what it says are three reasons why no transfer of the Uncontentious Trust Assets should be ordered:

- (1) First, AFS has set out a 'credible case' that the governing law has not been changed from Jersey law and on that basis, or even if the governing law has been changed, the Claimants have not been validly appointed.
- (2) Second, that the Court is being asked to determine 'complex and intricate questions of construction of multiple deeds on the basis of at least three possible options for the proper law of the Trust', which is unsuitable for summary judgment.
- (3) Third, that it is not 'safe' to rely on the expert evidence relied upon by the Claimants, for which permission was not obtained and which in any event only went to show that there were arguable issues of fact to be decided.

- [48] In brief summary, say the Claimants, there is no 'credible case' that the Claimants have not been validly appointed. AFS has failed altogether to grapple with the documentation executed in December 2019 which places the Claimants' status as trustees beyond doubt.
- [49] Second, the Court is expressly *not* being asked to determine complex issues. Final determinations of when and how and under what governing law the Claimants' appointment took place can await trial, or a trial of preliminary issues (if that course commends itself to the parties and the Court).
- [50] Thirdly, the Court can and should have regard to all unchallenged evidence before it, in the ordinary way. The Court should view with some suspicion the submission that it cannot safely have regard to the Claimants' expert evidence of foreign law in circumstances where AFS: (i) has had sight of the Claimants' original report on Liechtenstein law since 22nd July 2019, (ii) knew that that evidence was being relied upon in support of the summary judgment application when it was exhibited to Mr. Bassage's Seventh Affidavit on 21st August 2019, (iii) did not at any point until the filing of the skeleton argument two days before the hearing object to the Claimants' deployment of that advice; (iv) obtained its own Liechtenstein legal advice regarding the appointments of trustees but declined to share that with the Court and has not challenged the Liechtenstein advice relied upon by the Claimants; (v) has had notice of the Claimants' intention to rely on further foreign law evidence including as to Manx and Jersey law since 9th December 2019 and did not object; and (vi) has also failed to raise any challenge to that further evidence.
- [51] In more detail, the Claimants say every point identified by AFS here is misdirected. The Claimants do not deny that complex issues have been raised on the pleadings, though it is by no means obvious that the outcome of the litigation will turn on them. That is because realistically, the egregious breach of trust complained of (if established) is likely to qualify as a breach of trust under *any* system of law, and it is hard to see that anything is going to turn on the precise date of the Claimants' appointment. The point was not lost on Green J who rejected the submission that one of the 'real substantive issues' in these proceedings was 'the validity or invalidity of the appointments of trustees', holding that it would in fact 'seriously

mischaracterise the claim' to see that as a core issue: see Green J's judgment of 15th April 2019 in this matter.²³

- [52] But for the reasons explained above, such issues do not need to be resolved by the Court upon this application. In order for the Court to be satisfied that the Uncontentious Trust Assets should be transferred to the Claimants, the only appointment of trustees that matters is that of the Claimants, and in that regard it would suffice if the Claimants were validly appointed at any point. AFS's skeleton repeatedly emphasises the alleged centrality of whether AFS was validly appointed trustee – for example, at paragraph 9, where it is suggested that the Claimants' claim that AFS should transfer the Trust assets arises from the Claimants' position that AFS was never validly appointed as trustee, and paragraph 25, where it is suggested that the applications before the Court 'relate to the validity of [AFS's] appointment as trustee'. That, say the Claimants, is simply wrong.
- [53] The Court does not need to address the question of the Claimants' appointments in 2018, or any of the historic appointments that bear on that question, because even if one assumes that the Claimants were not validly appointed in 2018, and that the 'credible case' (or rather series of hypotheses) set out by AFS is right, the Claimants' case is that the Confirmatory Deed and Direction of Mr. Ryan Sussman executed on 10th December 2019 ensure that since that date (and certainly now) they are, on any basis, the trustees of a subsisting trust.
- [54] The central question for the Court is therefore whether AFS has any realistic prospect of arguing that the documentation of 10th December 2019 does not resolve the position beyond doubt. AFS has simply failed to engage with those documents. It did not file any evidence about them. It did not mention them in its skeleton argument, even in the paragraph (29.3) that purported to address 'the evidence on which [The Claimants] rely'. When pressed in Court as to whether AFS could identify any reason why these documents might not be effective, AFS's counsel repeatedly referred to 'complexity' and 'problems' but was unable to articulate what those alleged problems were, summing the position up neatly with words to the effect of: 'I'm not saying it doesn't work. I'm just saying it might not work'.

²³ Unreported; Wilton Trustees (IOM) Limited and Anor. v AFS Trustee Limited and Ors. BVIHC (COM) 2018/154, (delivered, 15th April 2019) at [55] (Green, QC J (Ag.)).

[55] The Claimants say that AFS has failed to engage with the documentation of 10th December 2019 because there is no plausible basis on which it can dispute that those documents have resolved all its objections such that the Claimants are now indubitably the trustees. The terms of those documents are set out above. They are clear, and plain enough to take effect whatever the governing law of the Trust, and as set out above are confirmed as being effective under those governing laws by both experts. AFS appeared to suggest at the hearing on 22nd January 2020 that it was not common ground that Mr. Yanover was the Protector, which in turn would cast doubt on whether his execution of the Confirmatory Deed was effective. That is a desperate suggestion:

- (1) The very purpose of the Confirmatory Deed is to cater for the possibility that the Claimants may not have been validly appointed in June/ July 2018 *because a Protector (Mr. Yanover) was in existence at the time* and therefore the power to appoint trustees fell to the Protector (under clause 11.2 of the Trust instrument) rather than the beneficiary/ies who did purport to appoint the Claimants at that time (under clause 11.3). AFS cannot have it both ways: it must accept that either no Protector had been appointed by 4th June 2018, meaning that the power to appoint trustees did then vest in the beneficiary/ies as the Claimants contend (and so the Claimants have been validly appointed on their primary case); or that Mr. Yanover had been appointed by that date and is still the Protector today (there being no suggestion that he has resigned or been replaced by a third party). Thus FiHAG, which is the only defendant to have pleaded a positive case about the various trustee and Protector appointments, pleads in the affirmative that Mr. Yanover has been appointed Protector (and that the Claimants' appointments in June/July 2018 were accordingly invalid because they should have been effected by Mr. Yanover), and counsel for Defendants 9 and 15 to 17 similarly submitted at the jurisdiction hearing that if the Claimants' case about appointments pre-June 2018 is wrong then Mr. Yanover 'would have been the Protector'.
- (2) AFS cannot realistically, on the basis of its own pleading, suggest any different. It was AFS, acting in its role as (purported) trustee, that purported to appoint Mr. Yanover as Protector on 23rd January 2018. AFS denies at paragraph 23 of its Defence that its own appointment as trustee was invalid. If that is right, and AFS was duly appointed as trustee, it must follow that its appointment of Mr. Yanover was also effective.

[56] Two further arguments advanced at the hearing on behalf of AFS were (a) that it is safest to leave the Uncontentious Trust Assets with AFS until trial because if the Claimants gain control of the assets, they might liquidate and spend them all in the conduct of the litigation, leaving the Trust depleted for the true trustees if it is ultimately determined at trial that the Claimants are not the properly appointed trustees; and (b) that awarding summary judgment could prejudice the other Defendants because the Court would effectively be summarily disposing of points that those Defendants had pleaded regarding the Claimants' status as trustees. AFS suggests that these issues should be dealt with by way of a preliminary issues hearing, involving all defendants that have been served, instead.

[57] As to (a), as set out above, both the sole adult beneficiary and the settlor of the Trust want the Trust assets to be held by the Claimants as trustees; plainly *they* do not consider there is any real risk of dissipation, or if there is a risk, it is viewed as preferable to leaving the Trust assets at the mercy of AFS. The value of the Uncontentious Trust Assets is put by the Claimants at not less than £26 million (but, it would appear, without evidence of this, other than a sweeping assertion in the Seventh Affidavit of Mr. Theunis Bassage on behalf of the Claimants at paragraph 22 that the assets are 'undeniably worth tens of millions of dollars') so it is hard to conceive of a situation where the funds could be exhausted by the litigation. But the suggestion that the Trust assets are best left with AFS for safekeeping is ambitious in the extreme. It is directly contrary to the position taken by Green J at the jurisdiction hearing, referred to above. The Trust's settlor and beneficiary have explained their deep discomfort with AFS holding the Trust assets, in that AFS is a party accused of dishonest wrongdoing and breach of trust in relation to the Trust.

[58] As to (b), there is no danger of any other Defendants being prejudiced by an award of summary judgment against AFS:

- (1) First, the issue before the Court upon this application is whether AFS has a realistic prospect of resisting an order that it transfer the Uncontentious Trust Assets to the Claimants. That is a discrete issue, involving only AFS. Any order made will be binding only on AFS; it will not amount to a finding as to the Claimants' standing in the wider proceedings and will not prevent other Defendants from taking a point about the Claimants' standing in a later hearing if so advised.

- (2) In particular, an award of summary judgment against AFS will not preclude any and all Defendants from arguing (if so advised) that the Trust is governed by Jersey, Liechtenstein or Isle of Man law, or that the Claimants' appointments in June/July 2018 were invalid. The Court is not trespassing on that issue.
- (3) A preliminary issues hearing *may* be helpful in due course, if the governing law of the Trust continues to be contentious, and if the Court concludes that the validity of historic appointments of trustees before 2019 should be resolved ahead of trial. But any such hearing could not serve as a substitute for summary judgment. It could not be listed imminently. One of the principal Defendants, Mr. Jooste, has not yet been served in South Africa, there having been significant, and ongoing, delays to the service process. Before any listing of a preliminary issues hearing, time would need to be allowed for him to be served (which may take months yet unless the Claimants are granted permission to serve on Mr. Jooste by alternative means) and to file an acknowledgment of service and a defence (within 56 days thereafter). The Claimants urge that they cannot afford any such delay, which might lead (among other things) to the Claimants being forced to abandon this litigation through lack of funding.

9. Summary judgment: application of the test

- [59] To avoid summary judgment, AFS must identify a defence to the claim for an order that it transfer the Uncontentious Trust Assets to the Claimants that carries 'some degree of conviction' and is 'better than merely arguable'.²⁴ Yet AFS has failed to identify *any defence at all* to the point it must meet.
- [60] The Claimants' case is that, between them, the Confirmatory Deed and Direction of Mr. Ryan Sussman executed on 10th December 2019 put the Claimants' status as trustees beyond doubt. If the Court agrees that that is a credible position, the Claimants' initial evidential burden must be found to have been satisfied, and the onus shifts to AFS to show that it has a realistic defence.²⁵ AFS cannot avoid summary judgment by declining to advance counter-arguments

²⁴ ED&F Man Liquid Products v Patel at [8] (Potter LJ).

²⁵ The Bank of Bermuda Ltd v Pentium at [15] (Saunders CJ (Ag.)); Athena Brands Ltd v Superdrug Stores plc at [6] (HHJ David Cooke).

or to challenge evidence adduced by the Claimants, and then proclaiming that the Claimants' arguments and evidence have not been proved and will need to be more rigorously assessed: see in this regard **Bank of Bermuda v Pentium** at [15]-[16].

[61] AFS's refrain that matters are too complex (even though the only complexity actually identified relates to matters that the Court need not determine) and that the 10th December 2019 documentation 'might work but might not', is not sufficient. A defence which cannot be identified is not a defence that carries a 'degree of conviction'.

10. Summary judgment is available despite the fact that AFS has not yet filed an amended statement of case in response to the Re-Amended Statement of Claim

[62] A final question which arose at the hearing (which was raised by the Court, not by AFS) was whether it is appropriate to grant summary judgment in circumstances where AFS has not yet pleaded a response to the amendments setting out the steps taken on 25th November 2019 and, in particular, 10th December 2019, to put the Claimants' status as trustees beyond doubt.

[63] The Claimants contend that that is no bar to the grant of summary judgment.

[64] There is nothing in Part 15 of the CPR to suggest that summary judgment is only available *after* the filing of a defence. If there were any such limitation, it would be specified in the rules. In the English CPR, rule 24.4 makes clear the general rule that an application can be brought as soon as an acknowledgment of service has been filed. AFS's acknowledgement of service was filed as long ago as 28th February 2019.

[65] The authorities show that that is the practice followed in the Eastern Caribbean, to the extent that there is any temporal limitation on when summary judgment is available: see **Nevis Island Administration v West Indies Power (Nevis) Limited**.²⁶

[66] Unlike CPR 26.3, which provides that the Court can *strike out* the whole or part of a 'statement of case' if that document or part thereof does not disclose any reasonable ground for defending

²⁶ Unreported; NEVHCV2012/0078 (delivered, 16th January 2013) at [33] (Actie M (Ag.)).

the claim, the summary judgment jurisdiction makes no reference to statements of case. Instead, the rules provide for the respondent to a summary judgment application to put forward his case by affidavit: see **CITCO Global Custody NV v Y2K Finance Inc.**²⁷

[67] CPR 15.5(2)(b) allows a respondent to such an application to file evidence up to seven days before the hearing. The rules thus ensure that a defendant has the opportunity to state why it says it has a real prospect of success. There is no need for that case to be put across in a formal defence rather than or as well as in evidence – indeed in circumstances where the defendant must show not simply the *existence* of a defence but the existence of a defence that is more than merely arguable, witness evidence on the particular claim or point in issue may well be more suitable than a pleading.

[68] AFS has acknowledged service in these proceedings, so the summary judgment application is not premature under the ‘general rule’ applied in **Administration v West Indies Power (Nevis) Limited**²⁸ (and under the English CPR). AFS has also had ample opportunity to file evidence and state its case on the deeds of 25th November and 10th December 2019, and Mr. Ryan Sussman’s Direction of 10th December 2019. On 26th November 2019, the Claimants’ lawyers sent to AFS the deed executed the previous day and also explained that they could arrange the production of the documents that subsequently became the Confirmatory Deed and Direction of 10th December 2019. The Claimants sent a further letter on 5th December 2019 explaining again why the proposed documents would address every alleged concern of AFS’s (and also why they would meet FiHAG’s pleaded case). The executed documents were then served on AFS on 13th December 2019, accompanying Mr. Bassage’s Eighth and Ninth Affidavits and Mr. Ryan Sussman’s Third Affidavit which again explained what the Claimants considered to be the effect of the documents. Finally, the Claimants’ amendment application and proposed draft RASOC was served on AFS on 23rd December 2019, a full month before the hearing of the summary judgment application.

[69] In those circumstances, the fact that AFS has not yet had an opportunity formally to plead to the amendments at paragraph 4.3 of the RASOC does not vitiate the application nor give rise to any arguable defence. Summary judgment always was, and still is, sought on the basis that

²⁷ Unreported, HCVAP 2008/022 (delivered, 19th October 2009), at [17]-[18] (Edwards JA).

²⁸ Unreported; NEVHCV2012/0078 (delivered, 16th January 2013) at [33] (Actie M (Ag.)).

the Claimants are the trustees and the assets should be transferred to them. The amendments do not change that or introduce any unfamiliar new claim. It bears emphasis that the CPR do not require the Claimants to specify how or when they became trustees. The only requirement is that the claim form specifies that they are claiming in a representative capacity, i.e. as trustees (CPR 8.6(6)). Paragraphs 4.1 and 4.2 of the original Statement of Claim (spelling out the Claimants' primary case as to the date of their appointment) are thus, strictly speaking, surplus to requirements and could be struck through, leaving the bare allegation that 'the Claimants are the present trustees of the Trust'. The date of appointment is a matter for evidence. As it happens, the Claimants have deemed it constructive to particularise the date and manner of their appointment (and to introduce alternative cases by amendment). But it cannot be that their fastidious approach to pleading provides AFS with a lifeline in circumstances where a bald assertion of their capacity would not.

- [70] All that has changed is that the Claimants have pleaded additional methods by which they say they have been validly appointed, if they had not been already. By the time the Claimants circulated the draft pleading, they had long since explained in correspondence, and adduced evidence to explain, why those steps were effective, although in reality they are self-explanatory. AFS then had a number of weeks to set out its case on the three short documents pleaded in those amendments. It could have filed evidence setting out its case on those documents at any point up to seven days before the hearing under CPR 15.5(2)(b). It did not do so. AFS could also have set out its position in correspondence, as the Claimants did at length. It did not do so. Instead it took the position that it was 'not disposed to litigate by correspondence'. AFS cannot now rely on its own failure to engage, to challenge the Claimants' evidence and to present counter-arguments, in resisting summary judgment: see again **Bank of Bermuda v Pentium** at [15]-[16] and [18].

11. CONCLUSION

- [71] As Green J observed with litotes nearly a year ago, this is 'not a very happy position'. Acknowledged Trust assets are being held against the will of the settlor and beneficiary of a trust by a party in whom they have no confidence. Proceedings which are being brought by the Claimants in the interest of the Trust and its beneficiary/ies are at risk of being stifled because they cannot at present be funded out of the Trust assets. The Trust has no-one looking after its

interest on the board of the company that owns the most valuable portfolio of Trust assets, because the Claimants will not be permitted to appoint a director until they are the registered holders of the Trust assets. Neither the Trust nor its beneficiary have any control over the defence of a substantial claim brought against another company, whose shares are owned entirely by the Trust, because AFS currently has control of that company. Despite its protestations that there is complexity, AFS has taken no steps to resolve that complexity, for instance by issuing a summons for directions.

[72] Fortunately, submit the Claimants, this is not a situation that need be tolerated any longer by the Court. AFS, which was told by this Court nearly a year ago that it should 'get on with' transferring the Uncontentious Trust Assets to the Claimants, has always accepted that the assets should be transferred to the trustees of the Trust. It protested that there were two obstacles to a transfer to the Claimants: uncertainty about whether the Claimants are the trustees, and dissatisfaction with the draft indemnity offered by the Claimants.

[73] The Claimants have never accepted that those are genuine concerns. Had they been genuine, AFS could and should have moved the Court for directions, many months ago (in the words of AFS's learned counsel, AFS has not 'covered itself in glory' in that regard). Be that as it may, all concerns articulated by AFS have on any view now been addressed, say the Claimants. No defence has been identified, far less one which carries any conviction or enjoys any real prospect of success. The Claimants say the Uncontentious Trust Assets must be transferred now.

AFS's Closing Submissions

[74] The following are AFS's closing written submissions, slightly edited to remove reference to evidence filed after the hearing on 22nd January 2020 and arguments flowing therefrom for which permission was refused. The expressions used are those of AFS's learned counsel.

[75] AFS's position is that it is wrong in principle and fundamentally illogical to order the transfer of Trust assets to the Claimants, whose purported appointments as trustees are doubtful and firmly contested (including by parties not currently before the Court). There persist live issues as to governing law and as to the validity of trustee (and by extension protector) appointments

which, even on the Claimants' own case as presented to the Court on 22nd January 2020, will inevitably have to be determined by the Court. The Claimants appear now to favour such determination by way of preliminary issues, as suggested by AFS, but, the Claimants say, this should be after granting the summary judgment application.

[76] It is, AFS says, striking that the Claimants do not ask the Court to determine any of those issues on a summary basis. Instead, they accept (as they must) that those issues should be tried either as preliminary issues (as all active parties now appear to suggest), or at a single trial of the action, but the Claimants nonetheless press the Court for an immediate transfer of the Trust assets, and do so on the express and avowed basis that the assets will then be used to pursue this litigation, with all of its large and hotly disputed claims against AFS and all of the other active Defendants. This is on the basis that the Claimants assert that this claim, for all its trenchantly asserted alleged merits, is not otherwise fundable.

[77] The course of action which the Claimants invite the Court to take presents the very real risk that the Trust assets will be consumed or substantially diminished at the direction of parties whom the Court may ultimately find have never held valid trustee appointments.

[78] This point is worth stressing. Even the Claimants appear now to accept that the preliminary issues are necessary. They nonetheless seek to jump the gun by first asking for summary judgment on untested issues. In circumstances where AFS is not touching the Trust assets (still less 'helping itself' to the assets as was wrongly suggested at the hearing - a suggestion encumbered by unintended irony, as helping themselves to the Trust assets to fund the litigation is exactly what the Claimants wish to do), and where all active parties wish for the issues listed in the preliminary issue application to be determined, it is hard to see why the Court should not proceed in a careful and orderly manner to decide those issues as the first step. That will allow, consequent on the ruling that the Court then makes, any transfer of assets then justified to be made.

[79] This is *the one approach* that will do justice for all parties, rather than merely conferring an advantage on the Claimants without requiring them to grapple with the difficulties that face their claim.

- [80] AFS is willing to undertake that it will continue to act as it has done thus far, not drawing on, charging or encumbering the Trust assets for the purposes of this litigation pending further order by this Court.
- [81] The Court should resist the Claimants' urging simply to brush aside the real concerns as to the Claimants' status as Trustees (concerns that can only be addressed by first determining the correct governing law of the Trust). The Trust is an irrevocable discretionary trust and does not operate on the basis that whatever wish is expressed by settlor and/or beneficiary must be obeyed. The incumbent trustee has to have regard to more than just such wishes, and this Court, exercising its equitable jurisdiction as the ultimate regulator of trusts, has to have such regard also. Even if the Claimants choose not to do so, the Court must keep steadily in mind the interests of the full class of potential beneficiaries, some of whose wishes have not been and cannot be ascertained.
- [82] It would, AFS says, be remarkable, and wrong, for the Court to award the Trust assets (minus, at this stage, only the disputed portion of Wellcourt shares) to the Claimants before making even a preliminary ruling or attempting even a summary evaluation of the issues as to governing law and appointments of Trustees. A clearer and more perilous example of taking important steps in the wrong order is hard to envisage.
- [83] This is particularly the case when on Claimants' own case the value of the Trust assets is a high value, of at least £25 million. AFS disputes this assertion and sought to rely upon evidence filed after the hearing of 22nd January 2020 for which ultimately permission to rely upon it was refused.
- [84] In addition, the nature and liquidity of those Trust assets should also occasion serious pause for thought. The assets are shares in BVI and Liberian companies. The Second Defendant, by virtue of AFS's appointment as trustee, acts as sole director of three of those companies. The companies' assets consist mainly of loans made to persons (individual and corporate) connected with the beneficiaries, or to fund purchases of properties for the beneficiaries. The Second Defendant accepted its directorships pursuant to the assumption of responsibility by AFS as trustee, in the usual manner and subject to the terms of the Trust instrument.

- [85] Accordingly, the Second Defendant would ordinarily be entitled to commensurate protection (for instance, by inclusion within the terms of the outgoing trustee indemnity) in its role as the appointee of AFS. The Claimants, purporting to act as the current trustees, have not addressed this issue at all, this being another example of an approach that can be classified as myopic and self-interested, rather than the approach that responsible parties claiming to be trustees should adopt.
- [86] The approach that the Claimants wish the Court to take would leave these matters unresolved. The Claimants' suggested precipitate course would, on the contrary, lead to difficult questions about the efficacy of decisions taken by invalidly appointed trustees and their appointee directors. Here again are exemplified the risks that flow from the Claimants' attempt to narrow the Court's focus to the issue of their appointment only, disregarding what has happened before.
- [87] Resolution of such matters would be achieved by the proposed preliminary issues, which would enable the Court to reach sensible determinations with all affected parties before it.
- [88] Importantly, the issues of governing law and validity of appointments affect all active Defendants, but the Claimants have chosen only to apply for summary relief against AFS. The Claimants themselves have not sought directions or preliminary issues, as they could have done. Instead they have pursued various rushed strategies, further discussed below.
- [89] The Claimants' application for summary judgment can accurately be characterised as the latest in a series of attempts by the Claimants to compel a rushed and ill-considered decision in their favour, gaining control of Trust assets in order to allow the expenditure of such assets in pursuit of a case which is, at best, ambitious and speculative.
- [90] That case the Claimants do *not* now ask the Court to scrutinise. They instead confidently, even stridently, assert that their case must be right, but do not ask the Court to rule on it.
- [91] On analysis, the Claimants' case is a remarkable one. It is suggested that a professional trustee company (AFS), with professional directors (the Second Defendant) and managers (the Fourth to Sixth Defendants), has, for no apparent or coherently explained motive, embarked on a criminal conspiracy with various other parties to assist in the misappropriation of Trust assets,

transferring half of the Wellcourt portfolio to a party (FiHAG) that, on the Claimants' case, has no entitlement to it.

[92] The Claimants have notably failed to address the active Defendants' carefully pleaded, and evidenced by documents, cases as to the joint venture under which FiHAG invested funds and in return obtained an interest in half the Wellcourt portfolio, all this happening at a time when the Trust appears in effect to have been run by or at the behest of the Messrs. Sussman, before AFS was appointed (validly or not) as trustee.

[93] As noted above, the other active Defendants have themselves put forward detailed Defences, again not replied to by the Claimants, and in those pleadings make the case that they are independent parties acting reasonably and commercially, not dancing to a tune played by Mr. Jooste, the individual whom the Claimants seek to portray as the sinister puppet-master of the alleged conspiracy.

[94] Mr. Jooste is a party to the case, and, the Claimants say, lies at the centre of the dispute, but, even almost a year and a half into the litigation, and almost two years since the dispute broke out, the Claimants have failed to serve him with any proceedings. The Claimants have not applied for substituted service or provided any evidence as to steps taken to serve Mr. Jooste under the Hague Convention.

[95] This is a problem for the Claimants, who name Mr. Jooste as the chief villain in their conspiracy theory. The preliminary issues can, however, be determined even if the Claimants have still not served Mr. Jooste, as on no pleaded case has Mr. Jooste personally transacted with the Trust. The relevant parties, including FiHAG, are before the Court. FiHAG is said by the Claimants (in one of their characteristic unevidenced assertions) to be in some way the creature of Mr Jooste. FiHAG denies this unsupported allegation.

[96] The Claimants' case proceeds, in ambitious leaps and bounds, from ignoring the evidence that there was a joint venture deal to asserting that, since making the impugned transfer, AFS has persisted in wrongful acts by holding on to the balance of the Trust assets for reasons that are improper. Bold allegations of bad faith and of stifling are made. AFS's carefully stated objections to the courses suggested by the Claimants, canvassed in detailed correspondence, are brushed aside.

- [97] The Claimants ask the Court simply to press on without pause or scrutiny through the substantial issues raised by AFS, in correspondence between Noirmont (for AFS) and Covington (for Claimants and the Messrs. Sussman, who appear to drive this claim) and then in the detailed pleaded Defence put forward by AFS, amplified in detailed further particulars, and never replied to by the Claimants.
- [98] The Court should not do as the Claimants ask.
- [99] The problems with the draft indemnity, addressed at length in correspondence, cannot be brushed aside. The Claimants have in their case focused only on events since they were appointed and pay little or no attention to events beforehand. They ask the Court to do likewise, but that would be a wrong step. The Claimants' approach is self-serving – they have nothing to lose by looking only at the most recent past, and (if they persuade the Court) will now have the Trust assets at their disposal. This misses the point that the effects of past events need to be clarified before forward progress can safely be made – ‘What’s past is prologue’: citing Shakespeare’s *The Tempest*, Act 1, Scene 2.
- [100] Claimants’ attempts at rushing the fences have consisted of -
- (1) A failed attempt before this Court to appoint receivers over Wellcourt, which application was not even served on the relevant parties.
 - (2) The issue of these proceedings, leading to a substantial forum challenge which, although it failed because of the multiplicity of possible *fora* available as alternates to the BVI (itself an indication of the complexity of the case), was not, as the Claimants now suggest, a hopeless challenge, and was on the contrary one in which the Court granted permission to appeal.
 - (3) An attempt to instigate criminal proceedings in Switzerland (AFS says purely to place pressure on AFS, its directors and managers), which proceedings the Claimants airily asserted at the hearing on 22nd January 2020 the Court knows about, and in which the

Claimants claim to be prevailing (in fact the Court knows little of those proceedings, and they are at an interim stage and not a determinative one).

(4) This application for summary judgment against AFS alone, made in the face of AFS's fully pleaded and realistic Defence, and the fully pleaded, realistic, and relevant Defences of the other active Defendants, who will not even be bound by the summary judgment if granted, and who will if they win at trial be seeking substantial costs against a trust estate that may by that point have been seriously dissipated.

(5) The substantial re-pleading of the case based on the documents from November and December 2019.

[101] Point (5) is of distinct significance, as it appeared at the hearing on 22nd January 2020 that the Court was at least initially impressed with those documents and thus with the re-pleaded case as a means to cut the Gordian knot represented by the disputes raised in opposition to the claim as originally pleaded. This Gordian knot, however, is not one that can be safely cut (the cutting of the proverbial Gordian knot itself was not, in the event, a safe move – calm and clarity did not follow on). It needs to be unpicked and untied, even if the process of doing this will be laborious.

[102] The newly pleaded case raises the question of what law governs the documents now relied on, and whether they can be valid in the light of the previous events, especially if (this being one of the issues on the pleadings), the Trust ended in 2018 with the appointment of assets to Mr. Ryan Sussman.

[103] As the history of the case thus far should demonstrate, there are no quick and easy solutions to this dispute. There is no substitute for careful scrutiny of the issues and considered determinations of them based on evidence and full argument.

[104] This is why AFS's suggestion that there now be a trial of preliminary issues (in effect an application for directions, or trustee interpleader) is the suggestion that should impress itself on the Court, on careful consideration, as the logical, prudent, and the only just way forward in this complex case.

Discussion

[105] In relation to the legal principles to be applied to an application for summary judgment, I accept the Claimants' formulation that the applicant has the initial evidential burden. The Claimants need to show that there are credible grounds on which the defence to the claim or issue in question may be found to have no real prospect of succeeding. Thereafter the defendant must show that one or more of its defences has a real, as opposed to fanciful, prospect of succeeding.²⁹

[106] It is not the law that summary judgment should not be given when there are complex issues in a matter as a whole. CPR 15.2 does not allow such an interpretation. It provides, materially, that

“[t]he court may give summary judgment on the claim or on a particular issue if it considers that the – ... b. defendant has no real prospect of successfully defending the claim or the issue.”

This means that if a defendant has no real prospect of successfully defending an issue the Court can, in the exercise of its discretionary jurisdiction, enter summary judgment in respect of it in favour of the claimant. As stated in **St Lucia Motors Ltd & General Insurance Co. v Peterson Modeste**³⁰

“...the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or defence has a real prospect of success.”

[107] AFS relies upon dicta in the Privy Council case of **Hallman Holding Ltd v Webster & Anor**.³¹ that

“it will often be appropriate to determine a dispute about a short point of law or the construction of a simple contract by summary judgment, where the legal issue between the parties is straightforward and the court is satisfied that there is no need for an investigation into the facts that would require a trial.”

The Privy Council derived that principle from **Easyair Ltd v Opal Telecom Ltd**.³² a decision of which the Privy Council impliedly approved. AFS also relies upon the next sentence that

²⁹ Unreported, *The Bank of Bermuda Ltd v Pentium (BVI) Ltd & Anor* Civil Appeal No 14 of 2003 (delivered, 20th September 2004) at [15] (Saunders CJ (Ag.)); *Athena Brands Ltd v Superdrug Stores plc* [2019] EWHC 3503 (Comm) at [6] (HHJ David Cooke).

³⁰ Unreported; SLUHC VAP2009/0008 (delivered 11th January 2010) at paragraph [21] (George-Creque JA).

³¹ [2016] UKPC 3 at paragraph 17 (Hodge LJ).

³² [2009] ESHC 339 Ch.

“[w]here, in the absence of any factual dispute, more complex legal issues arise, including difficult issues of contractual construction, they may be determined on an application for a preliminary issue... .”³³

- [108] What AFS seeks to do is to point to the complexity of issues in these proceedings as a whole to say that this case is not suitable for summary judgment, even in part, but is more suited to a trial of preliminary issues. In doing so AFS tacitly invites the Court to look beyond (i.e. to overlook) the fact that AFS puts forward no positive case, whether in evidence or pleadings, that could stand as a defence to the Claimants’ claims on the issue for which it seeks summary judgment. I am satisfied that is not what the Privy Council intended in **Hallman Holding Ltd v Webster & Anor**. A positive defence had been put forward there. It is also pellucid from the passage quoted above from **St Lucia Motors Ltd & General Insurance Co. v Peterson Modeste** that the state of the pleadings and evidence before the Court – including a lack thereof – is a necessary consideration.
- [109] It also follows that for complexities to be material, they must be specific to a particular issue between the parties. If a defendant does not have a real defence in respect of that issue, summary judgment can be granted against him on that issue.
- [110] In my respectful judgment the Claimants have discharged their initial evidential burden. They have produced credible grounds that AFS has no defence with a real prospect of success to their claim to have the Trust assets transferred to them. This is because the Claimants have a credible and powerful case that, as they say, the deeds of 25th November and 10th December 2019 and the direction of Mr. Ryan Sussman of 10th December 2019 (which I shall refer to as ‘the Confirmatory Deeds’ and ‘Direction’ respectively) put their status as current Trustees beyond doubt – at least so far as AFS is concerned. They do so irrespective of the historical complexities underlying the Claimants’ original status (or not, as the case may be) as Trustees. I agree with the Claimants’ submission that the Court is not being asked, nor is it required, to address such complexities on this application.
- [111] The Claimants have adduced expert evidence that as a matter of possibly applicable foreign laws, either the Claimants were the validly appointed Trustees before the Confirmatory Deeds and the Declaration were effective, or if not, then they are now. That expert evidence is

³³ *Hallman Holding Ltd v Webster & Anor*. [2016] UKPC 3 at paragraph 17 (Hodge LJ).

unchallenged by AFS, despite ample opportunity to adduce evidence contradicting it. These are adversarial proceedings. Consequently, that evidence stands unopposed.

[112] This is important, because it is also a part of the legal principles concerning summary judgment that

“[i]n general, disputed questions of fact are to be taken on the basis of the defendant’s evidence, unless the court is satisfied that there is no realistic prospect of that evidence being accepted at trial.”³⁴

AFS’s evidence does not contradict the Claimants’ expert evidence. Nor does it engage with the Confirmatory Deeds and Declaration. In those respects, there are thus no properly disputed questions of fact. Since AFS has not taken a factual position on these aspects, there is simply no Defendants’ position that the Court can proceed from to find that there are issues as to their validity and effect arising from them that should go to trial.

[113] AFS argued at the hearing that the expert evidence had been filed without prior permission and that one of the Claimants’ experts, Mr. Steinfeld, QC, though indisputably eminent and an English Trust lawyer, is not a qualified practicing Manx lawyer. Neither criticism goes to the essential question whether the Claimants’ expert foreign law evidence is wrong. AFS simply has not contradicted that evidence, nor advanced credible grounds for finding that it is of insufficient weight for the Court to be persuaded thereby. The Court is indeed assisted by that evidence. I do not see that it should be disregarded on grounds that the Claimants did not obtain prior permission to file it. AFS knew that the Claimants intended to rely upon such evidence but did not object timeously or at all.

[114] Moreover, concerning the question of an appropriate indemnity for AFS, the Claimants have produced credible evidence that they are prepared to offer AFS the same indemnity as provided by the Trust Instrument. It is a persuasive argument on the part of the Claimants that AFS should be satisfied with this, and indeed that the Claimants need not offer anything more. AFS do not refer me to any authority why this should be insufficient.

[115] I agree the burden then shifts to AFS to show it has a defence which has a real, as opposed to fanciful prospect of succeeding.

³⁴ *Athena Brands Ltd v Superdrug Stores Plc* [2019] EWHC 3503 (Comm) at paragraph 6 (HHJ David Cooke).

[116] AFS accepts in its evidence (the First Affirmation of Mr. Jean-Noël Pasquier at paragraph 16) that AFS is an outgoing Trustee of the Trust. But AFS argues that the Claimants' purported appointments as trustees are doubtful and firmly contested (including by parties not currently before the Court) and it would be fundamentally illogical to order a transfer of Trust assets to such a party.

[117] The flaws in this latter argument include that:

- (1) AFS has put forward no evidence to show that following the Confirmatory Deeds and the Direction the status of the Claimants or the assets of the Trust is 'doubtful'. I accept the Claimants' submission that AFS has entirely failed to engage with the effect of these documents. I agree with the Claimants that where a defendant has failed to produce anything to persuade the Court that it has a realistic prospect of success – for example, where it has failed to challenge relevant evidence – the Court should not allow the matter to proceed to trial.³⁵
- (2) AFS has not 'firmly contested' the Claimants' appointment as Trustees. AFS has pleaded no more than that they do not admit the Claimants had been validly appointed and they plead no more strongly than to say that the Claimants' appointments in June and July 2018 'may' not have been valid. This is part of what AFS says is its 'fully pleaded and realistic Defence'. To suggest that the Claimants 'may' not have been validly appointed falls short of a positive case that they were not, or a positive case setting out why they may not have been. It is, with great respect, nothing stronger than speculation.
- (3) Despite ample opportunity to file evidence prior to the hearing of 22nd January 2020 showing why the Confirmatory Deeds and the Direction are or might not be effective, AFS did not do so. This omission is crucial. At the hearing on 22nd January 2020 AFS did not show it has any defence at all to the Claimants' assertions that the effect of those documents is that their status as current Trustees of a Trust with assets in it is beyond doubt. AFS sought to introduce evidence subsequently to the hearing to cast doubt upon it, but for reasons expressed during a hearing on 12th February 2020 at which AFS

³⁵ The Bank of Bermuda v Pentium at [15]-[16] and [18] (Saunders CJ (Ag.)).

sought permission to adduce it, this late evidence was not allowed in. This evidence was not of a sufficient quality to give rise to reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge and so affect the outcome of the case.³⁶ In relation to the Confirmatory Deeds and Declaration, the evidence amounted to no more than arguments presented by a Jersey lawyer in a letter dated 2nd February 2020 that AFS's learned counsel could have used at the hearing on 22nd January 2020. That argumentation failed to address the key element that upon AFS's case in these proceedings AFS are not in a position to dispute that the Claimants are the duly appointed Trustees of the Trust. The strongest point, in my view, that lawyer made was made last – namely that if the Trust assets had been appointed out to Mr. Ryan Sussman and the Trust terminated by deed of 4th April 2018, it is not possible for him simply to restore the assets to the Trust; the assets would need to be settled upon a new trust on express terms. This is not a fundamental difficulty for present purposes. Quite apart from any argument that Mr. Sussman can be construed as merely having resettled the assets upon the same terms as the Erica Settlement, there is the more basic point that the Confirmatory Deeds assume the Trust currently subsists, as does AFS. AFS does so not just as a matter of position in relation to these proceedings but in all its conduct in holding on to the Trust assets. This 'evidence' does not introduce any factual basis why, as a matter of Jersey law, the Confirmatory Deeds do not or might not 'work'. That 'evidence' was in my view no more than a contention that 'the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction'.³⁷ AFS has produced nothing to suggest that there can reasonably be expected to be evidence available at trial that was not already before the Court on 22nd January 2020.³⁸

- (4) It does not lie in AFS's mouth to say that the Confirmatory Deeds made by the Protector Mr. Yanover were not effective on grounds that Mr. Yanover was/is not the Protector. AFS claim to have appointed Mr. Yanover as Protector, when, as AFS asserts, AFS was the validly appointed Trustee. I accept the Claimants' submission that AFS cannot now

³⁶ T-Tobba Company Limited v Thornton Smith Trust Corporation, BVIHCV2014/0044 (delivered 13th January 2017) at [7] sub-paragraph (vi) (Master Ventose (Ag.) (unreported).

³⁷ T-Tobba Company Limited v Thornton Smith Trust Corporation, BVIHCV2014/0044 (delivered 13th January 2017) at [7] sub-paragraph (vii) (Master Ventose (Ag.) (unreported).

³⁸ T-Tobba Company Limited v Thornton Smith Trust Corporation, BVIHCV2014/0044 (delivered 13th January 2017) at [7] sub-paragraph (v) (Master Ventose (Ag.) (unreported).

realistically adopt a position that Mr. Yanover was not the Protector. AFS tried to argue at the hearing that the Court should not accept the effectiveness of these deeds because it is the Claimants' case that Mr. Yanover was not properly appointed as Protector. This submission merely tends to expose the desperation of AFS not to transfer the Trust assets, contradicting their professed willingness to do so. The point is that the Claimants rely upon the Confirmatory Deeds precisely upon the premise of AFS's case that AFS was a duly appointed Trustee and, being appointed by AFS in that purported capacity, Mr. Yanover is indeed the Protector. AFS cannot have it both ways. If Mr. Yanover is the Protector, and absent any defects in those deeds (and AFS do not identify, nor allege, any), then AFS cannot argue that the Claimants are not currently the validly appointed Trustees.

[118] AFS additionally raises an argument that the Second Defendant is entitled to an indemnity before the Trust assets are transferred, because the Second Defendant's appointment as a corporate director was predicated upon and consequent to AFS's appointment as a Trustee. A preliminary difficulty with this submission is that the Second Defendant is not a Respondent to this application, and it has not sought to be joined as one. That apart, a substantive flaw in this argument is that such an approach conflates the separate legal persons of the First and Second Defendants and it conflates their separate roles. It would seem to me to be a matter of contract between AFS and the Second Defendant to what extent, if any, AFS should be required to indemnify the Second Defendant and no such contract springs up, it seems to me, between the Claimants and the Second Defendant by dint of a change of trustees from AFS to the Claimants. Nothing prevents the Second Defendant claiming an indemnity from the Claimants if the latter are liable to provide one. The Second Defendant is not an out-going Trustee and thus, it seems to me (without being referred to any authority or hearing argument on the point), it is not entitled to retain trust assets or block their transfer until it receives an indemnity that satisfies it.

[119] In my view this case is materially on all fours and perfectly resonates with the Court of Appeal case of **The Bank of Bermuda Limited v Pentium (BVI) Ltd & Anor**.³⁹ Paragraph [15] of that decision could be re-written with the facts of this matter and arguments of AFS substituted for

³⁹ Unreported, BVI Civil Appeal No. 14 of 2003 (delivered 20th September 2004).

those there, with only slight linguistic adjustments. The Honourable Chief Justice Saunders powerfully concluded at paragraph [18]:

“A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant’s case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.”

[120] I will respectfully follow the Honourable Chief Justice Saunders’ guidance. In **ED&F Man Liquid Products Ltd v Patel & Anr.**⁴⁰ the English Court of Appeal stated that summary judgment can be withheld on the ground that there is some compelling reason why the case or issue should be disposed of at trial. The key word here is ‘compelling’. In the passage above from **The Bank of Bermuda Limited v Pentium (BVI) Ltd & Anor**, the Honourable Chief Justice Saunders was doing no more than to express this. It is not enough for AFS to say that various aspects of the factual matrix here should be investigated, and if they are, they may be found not to support the Claimants’ case. AFS have to go further than that. They have to identify a positive case, which has a realistic prospect of success, why the Claimants could be wrong.

[121] AFS urges that it would be wrong for the Court to order transfer of Trust assets from a party that has not depleted them to a party who admits it would use them to fund this litigation and who might substantially deplete them. This is a prudential argument, but there is no evidence before the Court as to the net value of the Trust assets. A more compelling approach, it seems to me (without being referred to authority), is to treat the matter as a question of entitlement, not of prudence. If the Claimants are the current Trustees, and if AFS is not a current Trustee, then the Claimants are entitled to have the Trust assets transferred to them by AFS. This is the effect of clause 11.10 of the Trust Instrument, as the Claimants have observed.⁴¹ If there are parties interested in the Trust assets with adequate standing and an adequate legal basis to seek an order protecting Trust assets from improper depletion, then they can move the Court with an appropriate application.

⁴⁰ [2003] EWCA Civ 472 at paragraph 8 (Potter LJ).

⁴¹ Seventh Affidavit of Mr. Theunis Bassage at paragraph 53.

- [122] I do not accept that the Court needs to conduct a thorough review of the facts and issues, whether by a trial of preliminary issues or a full plenary trial, before disposing of the issue whether AFS should transfer the Trust assets. This is a discrete issue, which ultimately has nothing to do with the historical complexities of the matter. AFS cannot on its own case properly oppose the effect of the Confirmatory Deeds and, despite ample opportunity to adduce evidence in opposition thereto before the hearing on 22nd January 2020, they have not done so. It is not in the interests of justice, nor would it further the Overriding Objective of dealing with cases fairly, for the Court to hold back from determining this discrete issue any longer. I am drawn to conclude that AFS has sought to create the illusion of complexity where there is none.
- [123] In circumstances where AFS has represented that it has not used the Trust assets to fund this litigation and would not do so, I see no prejudice to AFS if it were to be required to transfer the assets now. I am not persuaded either that any other party would suffer any improper prejudice in this regard.
- [124] I agree with the Claimants that in order for AFS to avoid summary judgment, AFS must identify a defence to the claim for an order that it transfer the Uncontentious Trust Assets to the Claimants that carries 'some degree of conviction' and is 'better than merely arguable'.⁴² However AFS has failed to identify any defence at all to the points it must meet. It is not enough for AFS to say (as AFS's learned counsel stressed in oral submissions) that the law governing the Confirmatory Deeds and Declaration needs to be ascertained before their effect, if any, can be determined. AFS does not adduce evidence that they would not be effective under any particular system of law.
- [125] I also accept the Claimants' argument that it is not premature to grant summary judgment. Of course, as at 22nd January 2020, the Claimants had not yet filed or served their amended pleading for which permission was granted at that hearing, and AFS had not yet had an opportunity to plead a Defence to this new case. My initial inclination was to find that this application should stand adjourned for further determination once the Claimants had filed and served their amended pleading and AFS had had an opportunity to plead their case in response. But I am persuaded that to do so would serve no useful purpose. This is because

⁴² ED&F Man Liquid Products v Patel at [8] (Potter LJ).

the amendments all concern the fact and apparent effect of the Confirmatory Deeds and Declaration and AFS had ample opportunity to counter the Claimants' evidence of these prior to the hearing on 22nd January 2020. Despite such a generous opportunity, AFS came up with no objection of substance and nothing that suggested they have a defence, let alone one which carries some degree of conviction or is better than merely arguable. I also note that apart from short oral submissions at the hearing in which learned counsel for AFS sought to adopt and travel with my initial concern, AFS's written closing submissions are curiously devoid of any objection that AFS should now, by reason of the new amendment, have a further opportunity to say how they would negate the effect of the Confirmatory Deeds and the Declaration.

[126] Should the reasons I have given not suffice, I otherwise accept the Claimants' written closing submissions as dispositive of the application. They were closely argued and addressed the detail of the matter carefully.

[127] That said, I have disregarded information proffered by the Claimants concerning proceedings elsewhere, such as Switzerland. Although founded on affidavit evidence filed in relation to this matter a considerable time ago and not effectively countered prior to the hearing by AFS, that information is irrelevant to the application before me. It has not influenced my mind in any way whatsoever. I have also disregarded the fact that the settlor and the current sole adult beneficiary have expressed the wish that the assets be transferred to the Claimants from AFS. AFS stresses that the fact the Trust is a discretionary Trust is a matter of paramount importance, in that such wishes are not to be automatically followed. I regard this as wholly irrelevant to the matters requiring determination now. What the Court should do with the Claimants' claim on this application does not in any way turn on those persons' wishes.

[128] Accordingly, for the reasons I have stated, in the exercise of my judgment, it is my decision to exercise the Court's discretionary power to decide the part of the Claimants' claim for transfer of the Trust assets from AFS without a trial and to give summary judgment in respect of that part. I do so because I conclude that AFS has no real prospect of succeeding with a defence in respect of that aspect.

Disposition

[129] The Claimants' application for summary judgment succeeds and AFS must transfer title to the Trust assets to the Claimants forthwith. That will be the order of the Court.

- [130] Costs should in this case follow the event. The appropriate order for costs is that AFS should pay the Claimants' costs of this application from AFS's own funds, not from the Trust assets. Such costs are to be summarily assessed if not agreed within fourteen days. The Respondent, AFS, has liberty to apply for any issue as to the incidence of costs to be determined as part of the assessment of costs by 16th March 2020 at 4 p.m. The Claimants shall then have fourteen days to file evidence and/or written submissions in response. Thereupon a further hearing shall be fixed, with a time estimate of forty-five minutes for the summary assessment of the costs of the hearing on 22nd January 2020.
- [131] By CPR 15.6(2), if the proceedings are not brought to an end by an order for summary judgment, the Court must also treat the hearing as a case management conference. The order upon judgment shall provide that the hearing on 22nd January 2020 was a case management conference. The parties of course have liberty to apply generally for further directions to progress the matter.
- [132] The period for appeal will run from the date the finalised and sealed written judgment is delivered.
- [133] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar