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

CLAIM NO. BVIHC (COM) 2018/0027

BETWEEN

SEMPACHER FOUNDATION

Claimant

And

(1) LARK SERVICES INC.
(2) JAN-ERIK MOE
(3) KNUT IWAN HEYDERDAHL-LARSEN
(4) TCC TECHNOLOGIES (formerly known as LARK SERVICES (NORWAY)

Defendants

Appearances:

Mr. Andrew Willins and Mr. Ryan Hocking of Appleby for the Claimant
Mr. Robert Nader of Forbes Hare for the Defendants

2019: September 30;
October 1,2,3,9;
2020: January 17.

JUDGMENT

Whether the claimant has standing to bring the Claim - whether it was permissible after the transition date to convert or to exchange bearer shares for registered shares under the BVI Business Companies Act, 2004 (BVIBC Act) – what is the legal effect of section 38(2) of the BVIBC Act and does it permit a company to convert or to exchange bearer shares for registered shares after the transition date - Is redemption of bearer shares the only remedy available after the transition date - Whether BVI law pursuant to s. 245 of the BVIBC Act or Swiss law or the law of another country applied to the transfer of ownership of the bearer share certificate on the relevant date – whether the transfer of the bearer shares to claimant was effective pursuant to a deed of appointment under Swiss law- whether the claimant received legal title to the bearer shares- whether legal title to the bearer shares remained with *the person in Switzerland in physical possession of the share certificate- whether the person in physical possession of the share certificate became the custodian thereof under Swiss law pursuant to the Custodian Holding Agreement and legal title to the bearer shares was transferred to the claimant- whether there was a transfer of possession of the bearer share certificate to the claimant under Swiss law- whether at most the claimant became the beneficial owner of the bearer shares- whether the claimant became entitled under section 38(2) of the BVIBC Act and article 23 to have the bearer shares immediately converted to or exchanged for registered shares – what is the validity of various resolutions made by the registered agent, by the claimant as a member and by the first and second defendants as directors of the first defendant company - whether the claimant is an "aggrieved person" under s. 43 of the BVIBC Act – whether the claimant is entitled to an order for rectification of the register of members of the company to show it as the holder of registered shares – what reliefs are the claimant entitled to and can the court grant such reliefs as were not included in the Claim Form – what is the scope of the court's powers under section 20 of the Eastern Caribbean Supreme Court (Virgin Islands) Act.*

[1] **FARARA J** (Ag)**:** This action was commenced by Claim Form filed 16 February 2018. The Statement of Claim (also dated 16 February 2018) was first amended on 18 June 2018. A Defence was filed and served on behalf of all four Defendants on 19 September 2018. A Re-Amended Statement of Claim was filed and served on 20 August 2019.

[2] Paragraph 5(i) of the Re-Amended Statement of Claim, by which the Claimant had originally pleaded that Attendus Trust Company AG ("Attendus") held Bearer Share Certificate No. 2 in the Frist Defendant, Lark Services Inc. ("Lark BVI") "on trust" for Curatus Trust Company (Mauritius) Limited ("Curatus"), was amended to state that Attendus held the said bearer share certificate "*as custodian"* for Curatus. An Amended Defence was filed and served on 5 September 2019. It states, at paragraph 10, in response to the amended paragraph 5(i), that "*at all material times Attendus has been the legal owner of bearer share certificate number 2. The Claimant has at no time been the legal owner of bearer share certificate number 2. It is denied that [sic] Attendus held bearer share certificate number 2 as custodian for Curatus Trust Company (Mauritius) Limited ("Curatus") or later as custodian for the Claimant. It is noted that the Claimant's Amended Statement of Claim pleaded, prior to re-amendment, that Attendus held the bearer share on trust for Curatus and then later on trust for the Claimant*." This issue, as to who held the legal title to Bearer Share Certificate No. 2 on or around 27 January 2004, is of some importance to the determination of this matter, and will be addressed in greater detail later in this judgment.

[3] In the course of these proceedings, there have been several interlocutory applications, hearings and orders. On 22 March 2018 permission to serve the Claim Form and Amended Statement of Claim on the Second, Third and Fourth Defendants out of the jurisdiction was granted by Chivers J. On 22 November 2018 the Defendants' application for summary judgment striking out the Claim on the ground, *inter alia,* of lack of standing to bring the Claim, was dismissed by Wallbank J, with costs to the Claimants. On 14 February 2019 the said costs were assessed by Green J in the sum of $41,152.00. At that hearing, permission was given for the parties to adduce expert evidence of Swiss law "*in relation to the meaning and effect of the Custody Agreement dated 5 February 2004*". In fact, the correct description of that agreement, which will be used throughout this judgment, is the "Custodian Holding Agreement".

[4] The Defendants' interlocutory appeal from the dismissal of their application for summary judgment was dismissed by the Court of Appeal on 26 March 2019, with costs to the Claimant/Respondent to be assessed by a judge of the Commercial Division[1]. The Defendants also made a 'Barrell' application on 5 April 2019, which was dismissed on 15 May 2019, and they were ordered to pay the Claimant's costs. Both of these costs orders were assessed by Adderley J on 12 June 2019 in the sum of $29,570,23 with respect to the dismissed interlocutory appeal, and $11,513.50 with respect to the dismissed 'Barrell' application.[2].

[5] By an order of Jack J dated 31 July 2019[3],the Claimant was granted permission to rely on its Re-Amended Statement of Claim wherein at paragraph 5(i) the words "as custodian" were substituted for the words "on trust". Permission was also granted for the Defendants to respond to this amendment. This is an issue of some significance, particularly as it relates to one of the two preliminary issues of standing raised by the Defendants at the trial. By the said order, Justice Jack also provided for the Claimant to rely on the expert evidence as to Swiss law of Dr. Balz Gross, and for the Defendants to rely on the expert evidence as to Swiss law of Ms. Carmen Oehri.

[6] Various other orders and directions leading to and providing for the conduct of the trial were made by Jack J. These include an order for the Defendants' to provide a list of the documents held by the previous registered agent of Lark BVI, Patten, Moreno & Asvat (BVI) Limited ("PMA"), identifying which they say are not disclosable, and for Ms. Daphne Durrand to attend

[1] Vol.2/13
[2] Vol. 1A/16
[3] Vol.1A/17

at a hearing on 23 September 2019. PMA did produce various corporate documents[4] in relation to the First Defendant company, Lark BVI. Upon Ms. Durrand's attendance on 23 September 2019, it was agreed that she would not be required to attend the trial for the purpose of giving oral evidence, learned counsel for the Claimant, Mr. Willins, having accepted the listed documents which where said to be privileged and ought not to be disclosed to the Claimant.

The Claim - In Brief

[7] In its Claim Form filed 16 February 2018, the Claimant seeks certain declaratory and injunctive reliefs, as well as orders pursuant to section 43 (rectification) of the BVI Business Companies Act 2004 ("the BVIBC Act"), and under the inherent jurisdiction of the court. The Claimant also seeks, "*subject to a case management directions from the* Court", certain orders pursuant to section 184I (unfair prejudice) of the BVIBC Act, and damages for conspiracy against the Fourth Defendant. In brief, at the core of its claim is an entitlement to have Bearer Share Certificate No.2 converted to or exchanged for registered shares in its name and, as a consequence thereof, to be registered as a shareholder of Lark BVI. The Claimant also seeks declarations as to the invalidity of certain resolutions purportedly passed in relation to Lark BVI by (i) the then outgoing "PMA directors", and (ii) subsequently, by the Second and Third Defendants the "Moe Directors", purportedly as directors or, alternatively, as *de facto* directors of Lark BVI, to, *inter alia,* appoint themselves as directors of Lark BVI, to remove directors appointed by the Claimant, to redeem the Claimant's bearer shares held by virtue of Certificate No. 2, to allot 9,900 ordinary shares in Lark BVI to the Fourth Defendant, Lark Services (Norway) AS ("Lark Norway"), and to transfer all of Lark BVI's assets represented by various patents and alleged claims to royalties and penalty interest to Lark Norway, a company owned by the Second Defendant's wife, and effectively managed and controlled by the Second and Third Defendants. These various resolutions and steps taken by the Second and Third Defendants in relation to Lark BVI, have precipitated the Claimant's section 184I application.

The Defence – In Brief

[8] By their Amended Defence, the Defendants contend that (1) the Claimant has no standing or no proper standing to bring the Claim because: (a) it never obtained legal title to Bearer Share

[4] Vol. 3/4

Certificate No. 2; (b) Swiss law does not apply to the question whether the legal and beneficial title to Bearer Share Certificate No. 2 was transferred to the Claimant on or about 27 January 2004, and the proper law for determination of this issue is either BVI law or the law of Mauritius; (c) it was not possible or permissible, as a matter of BVI law, to convert the bearer shares held pursuant to Certificate No. 2 to registered shares after the Transition Date of 31 December 2009, so as to give to the Claimant an entitlement to be a registered shareholder/member of Lark BVI; (d) in any event, Bearer Share Certificate No. 2 continued to be disabled and so the Claimant could not exercise any of the entitlements of a shareholder and to vote the said shares; and (e) as the Claimant is not a registered shareholder of the First Defendant, it cannot bring either a claim for rectification under section 43 or an unfair prejudice claim under section 184I of the BVI BC Act.

[9] It is also the pleaded case for the Defendants, that the Second and Third Defendants were validly appointed directors of Lark BVI, either pursuant to the PMA Resolutions or by virtue of subsequent resolutions which the "Moe Directors" purported to pass, either in their capacity as *de jure* directors or, alternatively, as *de facto* directors or, in the case of the Fourth Defendant, as a shareholder of Lark BVI. In doing so, they contend that the resolutions purportedly passed by the "Foundation Directors" and/or the Claimant *qua* shareholder, were not valid or effective, and the Claimant is not, and cannot now be registered as a shareholder of Lark BVI. Furthermore, the Defendants deny any breach of duty by any of the Moe Directors. Accordingly, they ask the Court to find that the redemption of the bearer shares held pursuant to Certificate No. 2 was valid, as was the redemption of the bearer shares held by the Second Defendant pursuant to Bearer Share Certificate No 3; and the transfer of all assets and effective control of the First Defendant to the Fourth Defendant, a Norwegian company, was also valid. They therefore deny that the Claimant is entitled to any of the reliefs sought in the Re-Amended Statement of Claim.

[10] No counterclaim has been filed by or on behalf of any of the Defendants or any of them.

The Conduct of the Trial

[11] The trial took place over a period of five days, with oral closing submissions on the last day. Unfortunately, on the third day of the trial, 2 October 2019, whilst the cross-examination of the Second Defendant was continuing, he suddenly took ill in the witness box and had to be

transported by ambulance to the hospital. He was unable to continue his testimony due to his continued hospitalization over some days. Whilst this obviously presented a serious challenge to the continuation and conclusion of the trial, both counsel, quite sensibly, agreed to essentially abort the taking of any further evidence from Mr. Moe (indeed he had been cross-examined at some length already), and to permit Mr. Nader for the Defendants to put to the Third Defendant, as part of any examination in chief, any questions he may have wished to out to Mr. Moe by way of re-examination. It was also agreed by counsel that, Mr. Moe's evidence, particularly as it relates to 'proper purpose', would be assessed by the court in the context that the Claimant's counsel had been rendered unable to conclude his cross-examination of Mr. Moe on this particular aspect. The court accepted that this agreed approach by learned counsel for both sides, was a fair and pragmatic one in the prevailing circumstances, and would permit the conclusion of the oral evidence by the remaining witnesses, thereby facilitating the conclusion of the trial. In those circumstances, and with the agreement of counsel and the court, the trial continued and the factual evidence was concluded on 3 October 2019.[5]

Background Facts

[12] The Claimant Foundation was established by deed dated 9 July 1999 under the laws of the Principality of Liechtenstein.[6]. The Winkelried Settlement Trust ("the Winkelried Settlement") was established by deed dated 21 June 1993[7] to hold certain commercial interests of Mr. Bertel Nathhorst ("Mr. Nathhorst") for the benefit of his descendants. Attendus was the first trustee of the Winkelried Settlement and was joined by Brompton Trust Company Limited ("Brompton") on 25 June 1993.[8]. The proper law of the Winkelried Settlement was Mauritius (clause 3(1)[9]).

[13] The First Defendant company (Lark BVI) was incorporated on 12 May 1995 under the International Business Companies Act, 1984 ("the IBC Act"), with the power to issue either bearer shares or registered shares, as was then permissible under the IBC Act.[10]. The main object of Lark BVI was to do or to carry on in any part of the world all things and activities which a person may or can do or carry on in any part of the world. It is said that one of its primary objectives was "*to hold and exploit technologies relating to the cleansing of soil which has been*

[5] Transcript 3 Oct. 2019 pgs. 4-10
[6] Vol 3, Tab 2 pages 266 to 280
[7] Vol 3 Tab 2 page 206-234
[8] Vol. 3 pg.314
[9] V3, 288
[10] see clause 11 of the memorandum of association of Lark BVI – Vol. 3, Tab 4, page 1095

polluted by oil." Article 23 of the articles of association of Lark BVI is of some significance to the issues in this matter, as it provides that the directors "shall" upon receiving a request to exchange a bearer share for a registered share, comply with such request by cancelling the bearer share certificate and issuing a certificate for the corresponding registered shares.[11].

[14] At incorporation, one bearer share certificate was issued by Lark BVI for 100 shares. Bearer Share Certificate No.1 was initially held by Froriep Renggli, a Swiss law firm, for the benefit of the Winkelried Settlement. The Winkelried Settlement remained the sole beneficial owner of Lark BVI until 16 June 1998 when, pursuant to the terms of an agreement between a Mr. Hugo Borsh, on behalf of the trustees of the Winkelried Settlement, and Mr. Jan-Erik Moe, the Second Defendant, it was agreed that the Winkelried Settlement would hold 60 percent and the Second Defendant would hold 40 percent of the shares in Lark BVI. To give effect to this, bearer share certificate No.1 was cancelled, and two bearer share certificates were issued on 16 July 1998 by Lark BVI. Certificate No.2[12] representing 60 shares, was issued to the trustees of the Winkelried Settlement; and Certificate No. 3, representing 40 shares, was issued to the Second Defendant.[13]. Initially, both Certificate No. 2 and No. 3 were held by Froriep Renggli, a Swiss law firm. However, on 24 June 1998 Froriep Renggli sent Certificate No. 2 to Attendus, and on 25 May 2015 sent Certificate No.3 to the Second Defendant.[14].

[15] It is not in dispute that Bearer Share Certificate No.2 continued to be held by Attendus until it was released to the Claimant in February 2015, who sent it to their lawyers in BVI, Appleby, for the express purpose of delivering it to the registered agent of Lark BVI with a request to exchange the said bearer shares for registered shares. On 28 December 2001, Attendus and Brompton resigned as trustees of the Winkelried Settlement and Curatus was appointed sole trustee[15] However, Attendus continued to hold Bearer Share Certificate No. 2, whilst continuing to provide administrative services to the Winkelried Settlement. On 6 February 2002, a new Deed of Settlement was executed by Curatus, as the new trustee of the Winkelried Settlement[16].

[11] Vol. 3, Tab 4, page 1101
[12] Vol. 3 Tab 4, pg 1122
[13] Vol. 3, Tab 4, pg 1123
[14] Vol 3, Tab 4, page 1124
[15] Vol.3 pg. 315
[16] Ibid.

[16] Lark BVI was struck off the register of companies for non-payment of fees on 1 November 2007. It was restored in good standing on 12 September 2014 through the efforts of the Second Defendant, and with the assistance of Carey Olsen in BVI. Lark BVI was again struck off the register on 30 September 2015, this time for not having a registered agent, in breach of section 91(1) of the BVIBC Act. The first registered agent of Lark BVI, Patton, Moreno & Asvat (BVI) Limited (PMA), resigned as registered agent by letter dated 28 January 2015[17], but not before their two nominees directors of Lark BVI, Mr. Oriel F. Kennion V and Mr. Asterio Caballero Ibarra, purported to pass certain resolutions on 26 January 2015 ("the PMA Resolution").

[17] In fact, they had earlier given notice of their intention to resign as directors of Lark BVI on 7 January 2015, to take effect at a meeting on 19 January 2015[18], but subsequently unilaterally extended the effective date of their resignations to 26 January 2015 so as to facilitate the passage of the PMA Resolution intended to appoint four new directors of Lark BVI. However, at the time of the PMA Resolution, no vacancy existed on the board of directors of the Lark BVI[19]. Having passed the PMA Resolution, Messrs. Kennion V and Ibarra, by joint letter dated 26 January 2015, "tendered [their] resignation as [d]irectors and [o]fficers with immediate effect." The four directors which they purported to appoint by the PMA Resolution were: Erik Moe ("2nd Defendant"), Knut Iwan Heyerdahl-Larsen ("the 3rd Defendant") collectively referred to as "the Moe Directors"; and Natco Trading Aktiebolag (a Swedish company) and Rille Aktiebolag, also a Swedish company (collectively "the Foundation Directors"). I will return to the important question of the validity or effectiveness of the PMA Resolution.

[18] It is the case for the Claimant, that from 28 December 2001, Attendus continued to hold Bearer Share Certificate No. 2 as "custodian" for Curatus, the newly appointed trustee of the Winkelried Settlement, with legal and beneficial title being vested in Curatus, as trustee of the Winkelried Trust, and thereafter for the Claimant following the appointment of the assets of the Winkelried Trust to the Foundation. By contrast, the Defendants' case is that legal title in Bearer Share Certificate No.2 continued to vest in Attendus by virtue of its physical possession of Bearer Share Certificate No. 2, and at no time did legal ownership become vested in either

[17] Vol. 3, Tab 4, page 1147
[18] See V3, P77
[19] Vol. 3, Tab 3 page 1143 – 1145

Curatus or the Claimant. Accordingly, the Defendants contend, the Claimant is not entitled, and never became entitled, to be registered as a shareholder of Lark BVI, and has no standing to bring this Claim.

The Issues for Determination

[19] On the pleadings, and from the trial of the Claim, the following issues arise for the Court's determination:-

19.1 Does the Claimant have the requisite standing to bring the Claim (**the Defendants' Standing Points**)? In particular:

> 19.1.1 – Whether the conversion or exchange of bearer shares for registered shares was permissible as a matter of BVI law on 12 February 2015, when the Claimant's legal practitioners in BVI delivered Bearer Share Certificate No.2 to Lark BVI and to its then registered agent PMA? (**the Defendants' First Standing Point)** In short, was the conversion or exchange of bearer shares for registered shares in a "grandfathered bearer share company", which had not been deposited with or held by an authorized or recognized custodian, and which company had not given notice to disapply Part IV of Schedule 2 of the BVIBC Act, permissible after the Transition Date of 31 December 2009, or was the redemption of such shares the only option permissible pursuant to paragraph 36 of the Transitional Provisions.
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> 19.1.2 – Is the effect of the deeming provision at paragraph 34A of the Transitional Provisions such that Lark BVI cease to be a grandfathered bearer share company and reverted to being a "company" as defined in section 3(1) of the BVIBC Act? (**the Paragraph 34A Point)**
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> 19.1.3 – If the conversion of bearer shares in a grandfathered bearer share company to registered shares was possible after 31 December 2009, whether the Claimant became the legal owner of the shares represented by Bearer Share Certificate No. 2, so as to be entitled to be registered as a member of Lark BVI in its own name (**the Defendants' Second Standing Point)**. In short, did the Claimant become the legal owner or merely the beneficial owner of the bearer shares held pursuant to Bearer Share Certificate No.2 by virtue of the Deed of Appointment dated 27 January 2004, or did legal ownership remain with Attendus, it being common ground as between the two expert witnesses as to Swiss law, that title to these shares did not pass to the Claimant by virtue of the Custodian Holding Agreement dated 5 February 2004 (stated to be effective as of 27 January 2004).
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> 19.1.4 – In deciding the issue at 19.1.3 above as to whether legal title to the bearer shares was transferred to the Claimant, which is the applicable law? Is it Swiss law, as the Claimant contends, or is it BVI law pursuant to section 245 of the BVI Business Companies Act 2004, as the Defendants contend? (**the Section 245 Point**)

19.1.5 – Further, if Swiss law is the applicable law to the transfer of legal title in the bearer shares held by Certificate No. 2 to the Claimant, whether Swiss law would deem the *situs* of the shares to be the jurisdiction in which Lark BVI was incorporated, namely, the BVI? **(the Swiss Law Deeming Point**)

19.1.6 – If the validity and legal effect of the Deed of Appointment is governed by the law of Mauritius, and not Swiss law, is this to be treated as the same as the law of the BVI, as the Defendants' contend (**the Mauritius Law Deeming Point**)?

19.2 Do the Defendants have standing as a non-party to deny, or are they prevented as a matter of law from denying, the Claimant's title to the bearer shares held pursuant to Certificate No.2 (**the Claimant's First Standing Point**)? In this regard, the Claimant relies on the doctrines of privity of contract and *jus tertii*.

19.3 Are the Defendants bound by, and prevented from denying, the accuracy of the version of the Register of Members of Lark BVI filed 24 May 2017 with the registry of Corporate Affairs, in which the Claimant is shown as a shareholder in Lark BVI with respect to Bearer Share Certificate No. 2? (**the Claimant's Second Standing Point**)

19.4 Does the meaning of the word "interest" in section 68(1) of the BVI Business Companies Act, include or extend to the transfer of the beneficial interest in bearer shares? (**the Section 68(1) Point**)

19.5 Does the Claimant have standing to bring a claim for, and are they entitled, under section 43 of the BVI Business Companies Act to rectification of the share register of Lark BVI to show it as the registered owner of shares, as the Claimant contends? (**the Rectification Point**)

19.6 Was the PMA Resolution valid and effective to appoint anyone as directors of Lark BVI? (**the Validity of the PMA Resolution**) Specifically, was it valid to appoint the Second and Third Defendants only, as directors of Lark BVI?

19.7 Are the resolutions purportedly passed by the Claimant as a shareholder of Lark BVI appointing the Foundation Directors and removing all previously appointed directors valid and, if valid, what is the legal effect of such appointments (**the Validity of the Foundation Resolutions)**

19.8 Are the various resolutions in Lark BVI purportedly passed by the Moe Directors subsequent to the PMA Resolution valid in appointing them as directors and in redeeming the bearer shares held by the Claimant by virtue of Certificate No. 2? (**the Validity of the Defendants' Resolutions)**?

19.9 Specifically, was the resolution purportedly passed by the Moe Directors allotting 9,900 shares in Lark BVI to Lark Norway valid? (**the Allotment Resolution)**

19.10 Specifically, was the resolution purportedly passed by the Moe Directors authorizing Lark BVI to enter in to a Sale and Transfer Agreement with Lark Norway and to transfer all assets of Lark BVI to Lark Norway valid? (**the validity of the STA Agreement and STA Resolution)**

19.11 If the PMA Resolution was invalid and wholly ineffective in appointing anyone as directors of Lark BVI, were any acts done by the Second and Third Defendants, purportedly as directors of Lark BVI, nevertheless valid as *de facto* directors of Lark BVI pursuant to sections 117 and 109(6) of the BVIBC Act? (**the de facto Directors Point - Sections 117 and 109(6))**

19.12 In any event, did the Moe Directors act for a proper purpose and consistent with their duties as (purported or *de facto*) directors of Lark BVI, when they passed the Allotment Resolution, the Redemption Resolution, and the STA Resolution? (**the Proper Purpose Issue**)

19.13 Has the Claimant made out a proper basis for relief pursuant to section 184I of the BVIBC Act? Business Companies Act (**the Section 184I Claim**)? As will be mentioned, the Claimant has not, at the conclusion of the trial, pursued this claim.

19.14 Is the Claimant entitled to the declarations sought or any of them?

19.15 Is the Claimant entitled to compensatory damages and, if so, against whom?

The Defendants' Standing Points

[20] The Defendants contend (as a preliminary issue for the Court's determination) that the Claimant does not have the requisite standing to bring the Claim, and to obtain any of the reliefs sought in its pleaded case ("the Defendants' Standing Points"). The Defendants put forward two standing points. The first is grounded on an interpretation of the provisions of the BVIBC Act which imposed a legislative regime for dealing with the then existing bearer shares held in BVI incorporated companies, with the objective of disabling and eliminating all bearer shares. The second is based upon the effectiveness, or lack thereof, either under BVI law or under Swiss law (as may be the applicable), of the transfer of ownership of the bearer shares held pursuant to Certificate No.2 to the Claimant on or around 27 January 2004.

[21] As to the first of their standing points, the Defendants submit, as a matter of BVI law, that it was not permissible after 31 December 2009 for the bearer shares held under Certificate No.2 to be converted to registered shares when, on 18 February 2015, the said bearer share certificate was delivered by the Claimant's BVI lawyers, Appleby BVI, to the then registered agent of Lark BVI. As to the second of their standing points, the Defendants' contend that even if the bearer shares represented by Certificate No. 2 could be converted to registered shares after 31 December 2009, the Transition Date, registration was not possible in the name of the Claimant, because the Claimant, at best, only became the beneficial owner of these shares, with Attendus retaining legal ownership of them, as was the position which existed in law prior to the

purported transfer of Bearer Share Certificate No. 2 by Curatus, as trustee of the Winkelried Settlement, to the Claimant.

[22] The second standing point involves a determination, based upon the conflict of law rules of the British Virgin Islands (BVI), as to the law of which jurisdiction governed the transfer of ownership of Bearer Share Certificate No. 2 on or around 27 January 2004, and what is the applicable law of that jurisdiction to a transfer of title in bearer shares in Lark BVI. Is it the law of the BVI or the law of Switzerland or the law of Mauritius? This ground also involves a determination, based upon Swiss law, of whether certain documents executed in January and February 2004, were effective in transferring legal ownership and/or possession of Bearer Share Certificate No. 2, to the Claimant. The documents relied on by the Claimant are: (i) the Deed of Appointment dated 27 January 2004 made by Curatus Trust Company Limited (a company incorporated under the laws of Mauritius), as the then trustee of the Winkelried Settlement Trust, whereby Curatus purported to "*hereby appoint and transfer irrevocably all remaining assets of the Settlement as listed in the Schedule 2 to [the Claimant]*"; (ii) the written resolutions of Curatus, as the then trustee of the Winkelried Trust, made the same date, resolving to transfer "*all assets of the [Winkelried Settlement Trust] to [the Claimant]*"; (iii) the written resolution of the Claimant dated 5 December 2003, resolving to accept "all capital and income of the Winkelried Settlement Trust"; and (iv) the Custodian Holding Agreement dated 5 February 2004 (stated to be effective as of 27 January 2004), by which Attendus agreed to hold Certificate No. 2 in Switzerland as custodian for the Claimant.

[23] The Defendants argue, in support of their submissions on their second standing point, that the applicable law for determining questions as to title and the transfer of the shares held by virtue of Bearer Share Certificate No. 2, is not Swiss law, as contended by the Claimant, but BVI law pursuant to section 245 of the BVI Business Companies Act 2004. They also submit, that the legal owner of bearer shares in a BVI company is the physical holder of the share certificate and, accordingly, legal ownership in Bearer Share Certificate No. 2 remained with Attendus, and did not transfer to Curatus in 2001 when it became the trustee of the Winkelried Settlement. Accordingly, legal title in the bearer shares could not, and did not, transfer to the Claimant in January 2004 by virtue of the Deed of Appointment. I will return to these points and counter-points later on in this judgment.

(1) Defendants' First Standing Point – Was the Conversion of Bearer Shares in a Grandfathered Bearer Share Company to Registered Shares Permissible after the Transition Date?

[24] This issue is exclusively a matter of BVI statute law. A determination of this issue rests upon a detailed analysis and interpretation of the relevant provisions of the BVIBC Act. The principles upon which a court is to interpret provisions of a statute were authoritatively stated in ***Attorney General v Prince of Hanover***[20]. There the House of Lords emphasized that a court, in construing a statutory provision, must interpret the plain and ordinary meaning of the material words of the enacting provisions in their particular context (per Viscount Simmonds at page 463). These principles of interpretation, as summarized at paragraph 47 of the Claimant's Trial Skeleton Argument, are uncontroversial (see Defendants' Closing Written Submissions para. 27). However, the Defendants emphasize that the relevant context here is "the BVI's strict regime of disablement for bearer shares in grandfathered bearer share companies, and s. 68(1) was clearly drafted precisely to achieve disablement even for [former] Act companies." Importantly, the question of whether conversion of bearer shares to registered shares remained permissible after 31 December 2009, has not been determined by any court of law in this jurisdiction, as accepted by counsel for both the Claimant and the Defendants. This notwithstanding, learned counsel for the Defendants has, to some extent, relied upon certain *dicta* and passages from the judgment of the Court of Appeal delivered by Mendes JA (Ag) (with which Baptiste and Michel JJA concurred) in ***The Bank of Nova Scotia Trust Company (Bahamas) Limited v Registrar of Corporate Affairs***[21] delivered 10 October 2018.

[25] In summary, the Defendants contend that conversion was not permissible under the BVIBC Act after 31 December 2009, in relation to bearer shares in a grandfathered bearer share company which had not been deposited with an authorized or recognized custodian, and the only option available to the Claimant when Bearer Share Certificate No. 2 was delivered on 18 February 2015 to Lark BVI, was to have the said shares redeemed by the Company, as they claim they eventually were. This continuing power to redeem bearer shares, was authoritatively recognized and confirmed by the Court of Appeal in ***The Bank of Nova Scotia Trust Company (Bahamas) Limited v Registrar of Corporate Affairs***.

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[20] [1957] AC 436

[21] BVICAP 2016/0009 0010

[26] The Defendants submit further, that the power to convert bearer shares not deposited with an authorized or recognized custodian to registered shares was not preserved under the statute, and that this is clear from the regime which the legislature put in place under the BVIBC Act to deal with 'grandfathered bearer share companies'. This regime provided a clear cut-off date of 31 December 2009, by which bearer shares were required to be either converted or deposited with an authorized or recognized custodian. From 1 January 2010, conversion of bearer shares to registered shares in a BVI company was not permissible, and the only option remaining was redemption or, ultimately, the winding-up of the company by the courts upon the application of the Financial Services Commission ("the Commission"). They go on to argue that, if conversion was still possible after 31 December 2009, this would undermine the clear statutory policy and regime of immobilization of bearer shares. Accordingly, since the conversion of bearer shares held by Certificate No.2 was not permissible on 18 February 2015, the Claimant "*has no present entitlement to be registered as a member"* of Lark BVI (see ***Nilon Limited & Another v Royal Westminster Investments S.A. & Others)***[22]**.**

[27] In reasoning to their conclusions on this first standing point, the Defendants have placed heavy reliance upon certain Transitional Provisions in Schedule 2 of the BVIBC Act. These include paragraphs 34 to 37 of Schedule 2, which have not been amended. By contrast, the Claimant relies, in particular, on the definition of "companies" in section 3(1)(c), and on sections 38(2), 68(3) and 70(3) of the Act, and also on paragraph 9(b)(v) of Schedule 1 and Article 23 of the articles of Lark BVI. Notably, the Claimant places much emphasis and reliance in their submissions in relation to this first issue, on an amendment in 2012 to section 38(2) of the Act. By this amendment, the words "***in this Act or***" were inserted before the reference to the memorandum or articles of a company - see section 14 of the BVI Business Companies (Amendment) Act 2012.

[28] The Claimant also contends that, while certain aspects of the dicta of Mendez JA in **The Bank of Nova Scotia Trust** case could be construed as helpful to the Defendants' case on this first standing issue, in that they could be interpreted as suggesting that the only option available after 31 December 2009 was for Lark BVI to redeem the immobilized bearer shares, the judgment did not deal with the question of whether conversion of bearer shares to registered shares was permissible after the transition date. Furthermore, the Court of Appeal was

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expressly not called upon to consider whether the conversion of bearer shares was still an option, counsel for the appellant having, in oral argument, expressly abandoned it as an option; and, furthermore, the Court's attention was not drawn to, nor was it asked to consider, the effect of section 38(2), as amended in 2012.

[29] Heavy reliance was also placed by the Claimant on the use of the future tense in sections 68 and 70 of the Act, in making it clear that the disablement of bearer shares, and its consequences, do not apply where the bearer share "*is to be*" converted to, or exchanged for, a registered share. Also, the use of the words - "*During the period*" and "*for any period*"- in sections 68 and 70, implies that the period of disablement is capable of coming to an end. It is to be noted, that section 68(1) expressly provides for the disablement of bearer shares and the consequences thereof. However, in relation to section 68, the Claimant relies on the provisions of subsection (3)(b), which expressly dis-applied subsection (1), in circumstances where the bearer share has been transferred or delivered to the company for the purpose of being "*converted to, or exchanged for, a registered share*". Likewise, the disablement imposed by section 70(1), where the share is being held by someone not an authorized or recognized custodian, is expressly not applicable where, by virtue of subsection(3)(b), the bearer share is to be or has been "*converted to, or exchanged for, a registered share*. I will return to these provisions and the arguments and counter-arguments in greater detail below. But first, the statutory framework applicable to bearer shares under the BVIBC Act.

The Statutory Framework – Bearer Shares

[30] Provision for the issuance of bearer shares in a company incorporated under the laws of the BVI, was first made by the IBC Act. By section 2(1) of the IBC Act, the term "bearer share" was defined to mean *"a share represented by a certificate which states that the bearer of the certificate is the **owner** of the share*." (emphasis added). Also, section 31 specifically provided for a bearer share to be "*transferable by delivery of a certificate relating to the share*."

[31] The IBC Act was repealed and replaced by the BVIBC Act brought into force on 1 January 2005. In section 2(1) of the BVIBC Act, the term "bearer share" is defined as meaning "*a share represented by a certificate which states that the bearer of the certificate is the **owner** of the share and includes a share warrant to bearer".* (emphasis added)

[32] Thus, the definition of 'bearer share' in the BVIBC Act, is virtually identical to the definition of bearer share in the former Act, the IBC Act. Also, "company" is defined in section 3(1) to include a "former Act company re-registered as a BVI business company under Schedule 2." A "grandfathered bearer share company" is defined in paragraph 9(b) of Schedule 1 to the BVIBC Act, as one which meets all of the five requirements therein specified. The fifth such requirement is that the memorandum of the company has not been amended at any time after 31 December 2004 "to prohibit it from issuing bearer shares, converting registered shares to bearer shares or exchanging registered shares for bearer shares."

[33] The Claimant submits that, in light of the deeming provision at paragraph 34A of the Transitional Provisions in Schedule 2 of the BVIBC Act whereby, with effect from midnight on the Transition Date (31 December 2009), the memorandum of a grandfathered bearer share company is deemed amended to prohibit it from issuing bearer shares, converting registered shares to bearer shares or exchanging registered shares for bearer shares, "and with effect from that time, the company shall cease to be a bearer share company", Lark BVI ceased to be a grandfathered bearer share company at midnight on 31 December 2009, since it no longer satisfied the fifth requirement. With this submission I am in total agreement. Learned counsel for the Defendants submitted in closing oral argument, that the definition of 'grandfathered bearer share company' in paragraph 9, only applies to paragraphs 10 to 12 of Schedule 1, and not to Schedule 2. This is obviously incorrect, since paragraph 1 of Schedule 2 expressly says that the term shall have the meaning specified in paragraph 9 of Schedule 1.

[34] By section 33 of the BVIBC Act, "shares" in a BVI company are "personal property". And section 34 expressly confers upon the holder of shares in a BVI company certain rights. These are the right to vote at meetings of the members or on resolutions of members of the company; the right to share equally with other members in any dividend paid by the company; and the right to an equal distribution of the surplus assets of the company upon winding up. These 'shareholder rights', are subject to the power of a company under its memorandum and articles of association to issue shares with more than one class and to negate, modify or add to the rights specified in subsection (1).

[35] By section 9(2)(b) of the BVIBC Act, the memorandum of a company limited by shares must state, *inter alia*, if the company is prohibited from issuing bearer shares, meaning that it is not authorized to (i) issue bearer shares; (ii) convert registered shares to bearer shares; or (iii)

exchange registered shares for bearer shares. It is to be noted that this provision does not prohibit a company registered under the BVIBC Act from providing in its memorandum or articles for the conversion or exchange of bearer shares for registered shares. Indeed, such a provision is to be found in article 23 of the Articles of Lark BVI.

Section 38(2)

[36] Specifically as to bearer shares, section 38(1)&(2) of the BVIBC Act states-

> (*1) Unless expressly authorized to do so by its memorandum in accordance with section 9(2)(b), a company has no power to, and shall not,*
>
> *(a) issue a bearer share;*
>
> *(b) convert a registered share to a bearer share; or*
>
> *(c) exchange a registered share for a bearer share.*
>
> *(2) Notwithstanding any provision to the contrary* ***in this Act or*** *in its memorandum or articles, a company may, at any time, convert a bearer share to a registered share or exchange a bearer share for a registered share.*(emphasis added)

[37] It is to be noted, as mentioned above, that the words in bold were not in the Act as originally passed and brought into force. They were added by virtue of an amendment in 2012. Further, on a literal reading of this provision as it currently stands, unless a company is authorized by its memorandum, it is expressly prohibited from not only issuing bearer shares, but from converting registered shares into bearer shares or exchanging registered shares for bearer shares. This is in keeping with basic company law principles, whereby a company is not empowered to do certain acts or to engage in certain activities, unless expressly so authorized by its memorandum or articles of association, or expressly empowered by applicable legislation. To do so, would be *ultra vires* the constitutional documents of the company itself or in breach of the relevant prohibition in the BVIBC Act.

[38] However, it is notable, that section 38(1) does not expressly prohibit the conversion or exchange of bearer shares for registered shares. Indeed, by subsection (2), the power or authority of a company to convert bearer shares into registered shares is expressly preserved and authorized, and the company so empowered, whether or not such steps are authorized by its memorandum or articles or prohibited by some other provision of the BVIBC Act. This power is unqualified by the specific words of subsection (2), and no distinction is drawn therein

between a company and a 'grandfathered bearer share company' as defined in paragraph 9(b) of Part III to the BVIBC Act. Furthermore, the conversion of a bearer share to a registered share, or the exercise of such power as reserved by subsection (2) of section 38, may be carried out or effected "**at any time**", and notwithstanding any provision to the contrary in the Act or in the memorandum or articles of the company. By the amendment in 2012, the legislature clearly decided, at a time when certain hardships with the operation of the transitional provisions were being or had been experienced, to expand on the ambit and scope of this provision, by also excluding any limitation on the power to convert or to exchange bearer shares for registered shares impose by any other provision in the Act, including bearer shares which have become immobilized or disabled under sections 68(1) or 70(1), or by the operation of paragraphs 34A or 35(1) the Transitional Provisions.

[39] Accordingly, I am not in agreement with and do not accept the reasoning and submissions advanced by the Defendants to counter the clear literal and contextual meaning and effect of section 38(2) of the BVIBC Act (as amended) with regard to immobilized bearer shares in a grandfathered bearer share company. They contend that section 38(2), on its proper construction, only applied to bearer shares which have not been disabled, because they have not been deposited with an authorized or recognized custodian. If this interpretation was correct, it would have been quite simple for companies in these categories or these parts of the Transitional Provisions, to have been expressly excluded. The Defendants also submit that to interpret section 38(2) in any other way, would "*completely undermine the policy that underlay the statutory disablement regime, because it would allow the continued obfuscation that that regime was designed to avoid*." Specifically, the Defendants' conclude in their submissions, that the 2012 amendment to section 38(2), could not have been intended to undermine paragraph 35 of the Transitional Provisions. In my view, this conclusion is clearly flawed.

[40] Firstly, the amendment in 2012 came into effect well after the Transitional Date of 31 December 2009 and must have been intended to effect some significant expansion in the scope and power of companies (including a former Act company) to convert or exchange bearer shares for registered shares. Secondly, the inserted words "**in this Act or**", and the entirety of subsection (2) itself, is clear, unambiguous, and incapable of more than one meaning. Section 38(2) states clearly, that the power in a company to convert bearer shares to or to exchange them for registered shares exists, and may be exercised at anytime, and notwithstanding any provision in the Act (which includes the Transitional Provisions and

paragraph 35 thereof) or in the company's constitutional documents, to the contrary. There is no such prohibition. This is in contrast to the prohibition on the issuance of new bearer shares or the conversion of or exchange of registered shares for bearer shares, in subsection (1). In my view, the clear intention by this amendment was to preserve the power of a company to convert bearer shares to registered shares even after the Transitional Date, and to grant such power to any company, even one where the power did not exist under its memorandum or articles of association, and even where some other provision of the Act may appear to take away or to limit that power.

[41] Secondly, this power is not circumscribed by the Transitional Provisions dealing with a 'grandfathered bearer share company'. If it was intended to be so limited or circumscribed in its application, it would have been easy for any such exception to be specifically carved out in section 38(2) of the BVIBC Act. Furthermore, section 38(2) expressly provides for this power to be exercised at "**any time**", that is, whether before or after the Transition Date. Accordingly, the power to convert bearer shares into registered shares is not limited in its applicability to certain types of companies or by time.

[42] Thirdly, as will be dealt with in more detail later in this judgment, paragraph 35 of the Transitional Provisions, properly construed, does not impose an absolute cut off date whereby bearer shares can be converted to or exchanged for registered shares. Fourthly, the clear intention of the Legislature was to ensure that all bearer shares are either immobilized (deposited with an authorized or recognized custodian) or converted to registered shares or redeemed and, if not, the company may be wound up by the courts upon the application of the Commission. In these different ways and through these different steps proscribed under the statutory regime, all bearer shares would either cease to exist, or companies which continue to have bearer shares not converted or exchanged or redeemed could be wound up.

[43] In this regard, I am guided by these sage words at paragraphs [44] and [45] of the judgment of the Court of Appeal in the **Bank of Nova Scotia Trust Company** case:

> "[44]*The effect of all of this was that the holders of the bearer share certificates were able to maintain their anonymity for almost 6 years after the expiry of the period permitted by the Act to regularize their status. It was this more than anything else which undermined the policy of the Act whose aim was to eliminate the opportunity for wrongdoing which the anonymity of bearer shares facilitated………Facilitating the*

*redemption of the appellant's bearer shares so long after the transition date created the possibility that the very activity which the new regime of bearer share regulation was designed to eradicate would have been **implicitly sanctioned**.*" (emphasis added)

"[45]*Again, the learned trial judge's reasoning, buttressed by Mr. Bompas' considerable advocacy, was made to appear attractive. But it contained a fatal flaw, namely, the failure to fully appreciate that no time limit was placed by the legislature on the exercise of the companies' power of redemption under paragraph 36*."

[44] While the Court in the **Bank of Nova Scotia Trust** appeal was dealing with the power to redeem bearer shares after the Transition Date, in my view those statements quite succinctly summarizes what is the clear intention of the legislature, and are equally apt in relation to the power to convert or to exchange bearer shares for registered shares in section 38(2). No time limit was placed on the exercise by a company of the power to convert or to exchange bearer shares for registered shares, and that power can be exercised whether it is contained in the memorandum or articles of the company, and in the face of any other provision in the BVIBC Act to the contrary. This is the most powerful and conclusive statement of the statutory intention, underscores the true nature and scope of the statutory regime imposed in relation to bearer shares, providing as it does two avenues, that of conversion or exchange, and that of redemption, both exercisable by the company, through which existing bearer shares may be eradicated or eliminated.

Section 68

[45] Division 5 of the BVIBC Act deals specifically with the immobilization of bearer shares. Section 68 reads-

*(1) **During the period in which a bearer share is disabled**, that share does not carry any of the entitlements which it would otherwise carry and, subject to subsection (3), any transfer or purported transfer of an interest in the bearer share is void and of no effect. (emphasis added)*

(2) Without limiting subsection (1), "entitlement" includes an entitlement to vote, an entitlement to a distribution and an entitlement to a share in the assets of the company on its winding up or on its dissolution.

(3) Subsection (1) does not apply to the transfer or delivery of a bearer share in a company

(a) to a custodian in accordance with this Division;

*(b) to the company where the share **is to be**, or had been*

(i) ***converted to, or exchanged for, a registered share****,*

(ii) redeemed, purchased or otherwise acquired by the company, or

(iii) forfeited and cancelled

and the company does not hold the bearer share for or on behalf of any other person; or

(c) to the registered agent of a company in accordance with section 73(1)(c), 73(4)(b) or 74(2).(emphasis added)

[46] This provision requires careful consideration and interpretation. The effect of section 68 is three-fold. First, by section 68(1), a disabled bearer share (one that was not deposited with an authorized or recognized custodian) does not carry the usual entitlements during the period it is disabled. Second, there is a general prohibition on the transfer of a disabled bearer share during the period it remains disabled, and any purported transfer of an interest in such bearer share during such period is void. Third, by subsection (3), the prohibition in subsection (1) does not apply where there is a transfer or delivery of the bearer share to the company for the express purpose of converting or exchanging the bearer share for a registered share, or for the bearer share to be redeemed, forfeited or cancelled by the company.

[47] Accordingly, section 68 does not, in its language and purport seek to exclude or prohibit forever, the conversion of a bearer share to, or the exchange of a bearer share for, a registered share. On the contrary, it expressly allows for its transfer or delivery to the company for the limited purpose its of conversion to, or exchange for, registered shares. Again, this is in keeping with the legislative intent, to be discerned from the language of these sections dealing specifically with bearer shares, and how they are to be treated going forward, so as to address the mischief which had been created under the IBC Act by the issuance of bearer share. Furthermore, it is clear that the legislature intended to have the power in a company to convert bearer shares to registered shares running in parallel, or in tandem, with the power, also vested in the bearer share company, to redeem existing bearer shares under paragraph 36 of the Transitional Provisions.

[48] It is clear from the words used in section 68(3) of the BVIBC Act that (i) a bearer share which is disabled, and, as such, the usual entitlements of a shareholder cannot be exercised or enjoyed, may nevertheless be delivered to the company for the purpose of it being converted to a

registered share in the company; and (ii) the prohibition on the transfer or delivery of a bearer share not deposited with an authorized or recognized custodian does not apply where the bearer share is to be or is being converted to or exchanged for registered shares in the company. The exceptions to the prohibition in section 68(1) on transfer and delivery, in circumstances where a bearer share is to be converted or exchanged for registered shares, are in keeping with the power in section 38(2) of the Act, whereby a company is authorized to convert or exchange a bearer share for a registered share, and to do so at any time, and notwithstanding any provision in the Act or in its memorandum to the contrary.

[49] To my mind, these provisions and this interpretation of the legislative intent and regime under the BVIBC Act, makes good and practical sense, as they too, like the power to redeem bearer shares in paragraph 36 of the Transitional Provisions, are intended to provide another option to ensure that bearer shares are no longer available or in circulation, by having them converted to or exchanged for registered shares. In so doing, this is but one of the two primary ways provided under the statute to address the mischief which had been created by the issuance of bearer shares under the IBC Act. I will return to section 68(3) when dealing with the further issue of whether its effect was to lift the disablement of the bearer shares (as submitted by the Claimant) so as to permit the Claimant to vote those shares in making the Foundation Resolution.

Section 70

[50] Section 70 provides for the disablement of bearer shares not held by a custodian. It reads--

> *(1) Subject to subsections (2) and (3), a bearer share in a company is disabled for any period during which it is held by a person other than a custodian.*
>
> *(2) Subject to section 74(7), subsection (1) does not apply to a bearer share in a company*
>
> > *(a) that is held by the registered agent of the company under section 73(1)(c), 73(4)(b) or 74(2); or*
> >
> > *(b) that is held by a person who received the share at a time when he was a custodian but who has ceased to be a custodian.*
>
> *(3) Subsection (1) does not apply where*
>
> > *(a) a bearer share in a company is held by the company;*
> >
> > *(b) a bearer share **is to be** or has been*

> *(i)* ***converted to, or exchanged for, a registered share****,*
>
> *(ii) redeemed, purchased or otherwise acquired by the company, or*
>
> *(iii) cancelled and forfeited; and*
>
> *(c) the company does not hold the bearer share for or on behalf of any other person. (emphasis added)*

[51] The Defendants, quite correctly in my view, make the point that the three limbs in subsection (3) to the exception from disablement in subsection (1), must be read conjunctively, and all three requirements must be satisfied in order for that specific exemption to be applicable. The exception in subsection (3) from disablement of bearer shares relates, first to a situation where the bearer share is "held" by the company itself and not by the company on behalf of someone else; and, secondly, to where the bearer share is to be converted to or exchanged for a registered share or the bearer share is to be redeemed or purchased by the company. Again, we see the consistency in the statutory regime whereby the two avenues of conversion/exchange and redemption are preserved as exceptions to the immobilization of bearer shares, either of which may be exercised after the Transition Date.

[52] However, section 70(3), raises a couple of difficult questions of interpretation. Firstly, whether a bearer share, which has been sent to the company for conversion to or be exchanged for registered shares, is being "held" by the company, prior to their actual conversion or exchange, for or on behalf of the owner or beneficial owner of the bearer share within the meaning of this word in section 70(3)(a)? Secondly, is sub-paragraph (a) referring to the company owning a bearer share in itself as a "treasury share", and therefore, this exception to disablement has no application to where the bearer share is owned by someone other than the company? In my view, this does not accord with the proper meaning and interpretation of subsection (3)(a) and (c).

[53] Section 70(3) is a peculiar provision in the sense that it seems to be predicated on a company holding a bearer share, and not "for or on behalf of any other person." It is permissible for a company to own shares in itself. Such shares are classified as "treasury shares", which term is defined in section 2 of the BVIBC Act to mean "*a share in a company that was previously issued but was repurchased, redeemed or otherwise acquired by the company and not cancelled*." A virtually identical definition was to be found in section 2 of the IBC Act. Treasury shares are specifically provided for in section 64 of the BVIBC Act, and relates to shares

purchased or redeemed by the company pursuant to section 59. There is provision in the BVIBC Act for bearer shares which were converted, exchanged or redeemed for registered shares, but not cancelled to be held by the company as treasury shares (see s. 59(1), 64(1),

[54] I construe these provisions as intending to apply to the situation where the bearer share certificate has been delivered to the company, not in the capacity of a trustee or agent for the holder or beneficial owner, but purely for the purpose of the company converting or exchanging the bearer share for a registered share or redeem it. In other words, once the bearer share certificate has been delivered to the company, the legal or beneficial owner is not in a position to demand its return, since the whole scheme of the Act is to immobilize bearer shares so they may ultimately be either converted or exchanged for registered shares or redeemed. This is achieved by taking the bearer share out of the hands of the legal owner (or their agent) and placing it, either in the hands of an authorized or recognized custodian, in which case by operation of paragraph 35(5) of the Transitional Provisions the bearer share ceases to be regarded as an existing bearer share, "and shall thereafter be treated as if it had been issued after the effective date" (1 January 2005). Or by delivering them to the company itself for conversion to or exchange for a registered share, or to be redeemed. Accordingly, I construe the words in section 70(3)(a) of the BVIBC Act, "is held by the company", to be applicable to a situation where the bearer share certificate has been delivered to the company, and not one where the company is the legal owner of a bearer share in itself, as a treasury share. If the latter was the intention of the legislature, it would have quite simply referred to them as "treasury shares" owned by the company.

[55] It follows that while I accept that the three requirements under section 70(3) are conjoint and all three must be satisfied for this exception to disablement to apply, I am also satisfied that the Claimant has met all three. Bearer Share Certificate No. 2 was delivered to Lark BVI on 18 February 2015 for the express purpose of it being converted or exchanged for registered shares. Thereupon, Lark BVI held those bearer shares, not for the Claimant, as the Claimant was not entitled to demand the return of the certificate, but for the sole purpose under the Act of effecting an exchange of them for registered shares in the company. If I am not correct in this interpretation of section 70(3), and sub-paragraph (a) has no application to this matter, then this would not render impermissible the Claimant's right to deliver Bearer Share Certificate No. 2 to Lark BVI (as it did), and to have those bearer shares converted or exchanged for registered shares pursuant to section 68(3). Once converted or exchanged for registered

shares, the disablement ceases, as it has no application to registered shares, and the Claimant would be entitled to vote those shares.

Section 69

[56] By section 69, where the company has issued a bearer share or transfers a bearer share which is a treasury share, it is prohibited from transferring it to anyone other than a "*custodian who has agreed to hold the shares*", and the company is prohibited from delivering the bearer share converted to a registered share to any person other than a custodian who has agreed to hold it. These provisions are intended to ensure that all bearer shares are immobilized, including those issued to the company itself.

[57] By sub-section (3), a custodian who has agreed to accept the bearer share, is not thereby constituted a member of the company, albeit he/she may exercise voting rights and other rights "**on behalf of the beneficial owner of the bearer share**." This underscores the position that where a bearer share is delivered to a custodian under the Act, it is not disabled and the custodian may vote those shares on behalf of the beneficial owner.

[58] The term "custodian" used in sections 68, 69 and 70, is defined at section 67 of the BVIBC Act to mean "*an authorized custodian or a recognized custodian*". Likewise, the term "authorized custodian" is therein defined to mean "*a person approved by the Commission as an authorized custodian under section 50A(1) or section 50A(2) of the Financial Services Commission Act*". For completeness, section 50A(1) deals with a BVI authorized custodian, and section 50A(2) with a foreign authorized custodian. Suffice it to be said at this juncture, that neither the bearer shares held by the Claimant by virtue of Certificate No.2, or the bearer shares held by the Second Defendant by virtue of Certificate No.3, where deposited with an authorized or recognized custodian at any time.

Article 23

[59] In this regard, it is timely to mention that article 23 of the Articles of Lark BVI expressly permits the conversion of bearer shares to registered shares, and does so in mandatory terms. It reads-

*The holder of a certificate evidencing shares issued to bearer may request that such shares be exchanged for registered shares and the directors **shall** cancel the certificate evidencing shares issued to bearer and instead issue a certificate evidencing registered shares and enter the name and address of the holder thereof in the share register with and subject to such evidence of intent as the directors may consider appropriate.*(emphasis added)

Section 73(1) & (4) and Sections 74 and 76A

[60] Interestingly, section 73(1) and (4) prohibits an authorized or recognized custodian who is holding a bearer share, from transferring it to persons, other than the category of persons specified therein. One such category, is the company itself, and in circumstances where the share is to be, or has been (i) converted to, or exchanged for, a registered share, (ii) redeemed or otherwise acquired by the company or cancelled and forfeited. Again this provision mirrors the common statutory thread of the exceptions to immobilization in sections 38(2), 68(3) and 70(3) of the Act. Another category is where the bearer share is being transferred to the registered agent of the company. Furthermore, section 73(1) must be read alongside sections 74 of the Act, which mandates what must be done where the appointment of an authorized custodian has been revoked. In such circumstances, these provisions do not contemplate possession of the bearer share certificate being handed back to the owner but, instead, either to another authorized or recognized custodian or to the registered agent of the company. Where the registered agent receives possession of the bearer share, they hold it "on behalf of the beneficial owner", subject to the restriction that they can only transfer possession to a custodian or to the company.

[61] Section 74(6) expressly provides that where a registered agent fails to transfer possession of a bearer share to another authorized custodian (under subsection (5)), "the Commission may apply to the Court for an order that the bearer share be **disabled**, notwithstanding section 70(3)." (emphasis added). In my view, this is further reason for concluding that section 70(3) does not relate to a situation where the company owns a bearer share in itself.

[62] It is notable, that on 18 February 2015, Appleby BVI, as lawyers for the Claimant, delivered Bearer Share Certificate No. 2 to both Lark BVI and PMA as its then registered agent, for the express purpose of converting the bearer shares into registered shares. From the documentary evidence, but in the context of the purported redemption of that share, this share certificate was

subsequently accepted by the First Defendant, Lark BVI, acting by the Second and Third Defendants purportedly as directors of the Company, and the Claimant was thereupon entered in the Register of Members as having been a member of the company with respect to the said bearer shares. I shall return to this later on.

[63] Also in this vein, by section 76A of the BVIBC Act, the registered agent of a bearer share company must maintain "a register of the company's bearer shares", which must specify, *inter alia*, the full name of the beneficial owner of the share, and the name and address of the custodian of the bearer share.

The Transitional Provisions - Schedule 2

[64] Section 248 of the BVIBC Act simply states: "*The transitional provisions set out in Schedule 2 apply*." Paragraph 1 (a definition section) of Schedule 2 provides that the expressions "bearer share company" and "grandfathered bearer shares company" have the meaning specified in paragraph 9 of Schedule 1. Thus-

> 9.(a) a *company is a bearer share company if*
>
> *(i) it is of a type specified in section 5(a), (c) or (e), and*
> *(ii) the company is not prohibited by its memorandum from issuing bearer shares, converting registered shares to bearer shares and exchanging registered shares for bearer shares;*
>
> *(b) a company is a "grandfathered bearer share company" if it is a former Act company that meets all of the following conditions:*
>
> *(i) as at 31 December 2004, it was on the Register of International Business Companies maintained under the International Business Companies Act;*
>
> *(ii) its memorandum, as at 31 December 2004, did not prohibit it from issuing bearer shares;*
>
> *(iii) it is a company that was re-registered automatically under Part III of Schedule 2;*
> *(iv) a notice to disapply Part IV of Schedule 2 has not been registered with respect to the company, and*
> *(v) its memorandum has not, at any time since 31 December 2004, been amended to prohibit it from issuing bearer shares, converting*

registered shares to bearer shares or exchanging registered shares for bearer shares.

[65] It is common ground that Lark BVI was, at incorporation, a "bearer share company", having been incorporated under the former IBC Act, with provision in its memorandum for issuing bearer shares, or, put differently, it was not prohibited by its memorandum from issuing bearer shares or converting registered shares to bearer shares or exchanging registered shares for bearer shares. It is also common ground that Lark BVI became a "grandfathered bearer share company" having been re-registered automatically under the BVIBC Act with effect from midnight on 1 January 2007 pursuant to paragraph 6(1)(a) of Part III of the Transitional Provisions.

[66] Part IV of the Transitional Provisions apply to every IBC that was automatically re-registered under Part III of Schedule 2 (para. 10). They provide a raft of provisions applicable to companies which were automatically re-registered effective 1 January 2007, unless the company had elected to dis-apply certain of these provisions. No notice to dis-apply Part IV (the Transitional Provisions Applying to IBCs that are Automatically Re-Registered Under Part III) of Schedule 2, was registered with respect to Lark BVI. Some of these provisions apply to all IBCs, whether grandfathered bearer share companies or not. Others apply only to IBC's which were not prohibited by their memorandum from issuing bearer shares. Certain provisions of Division 5 of Part IV – dealing with "**Bearer Shares in Grandfathered Bearer Share Companies**" - are of relevance to the arguments advanced by the Defendants on this first standing point. These are paragraphs 34 (definitions), 34A (deemed amendments to memorandum), 36 (redemption of existing bearer shares), and 37 (application by the Commission for appointment of liquidator).

[67] By paragraph **34**, "effective date" means 1 January 2005, and "transitional date" means 31 December 2009.

[68] Paragraphs **34A, 35, 36 and 37** state –

34A. (1) Subject to subparagraph (2), the memorandum of a grandfathered bearer share company is deemed to be amended with effect from midnight on the transition date to state that the company is not authorised to issue bearer shares, convert registered shares to bearer shares or exchange registered shares for bearer shares and with effect from that time, the company shall cease to be a bearer share company.

(2) A grandfathered bearer share company may, on or before 31st December 2009 elect to disapply subparagraph (1) by filing

(a) a notice to disapply subparagraph (1) in the approved form; and

(b) a declaration that, as at the date of the notice

(i) all the bearer shares in the company in issue have been delivered to a custodian, or

(ii) there are no bearer shares in the company in issue.

(3) Where a notice under subparagraph (2) is filed together with the required declaration, the Registrar shall register the notice with effect from the date that the notice was filed, and subparagraph (1) shall not apply to the company.

35. (1) Every existing bearer share of a grandfathered bearer share company shall, on or before the transition date

(a) be deposited with a custodian who has agreed to hold the share; or

(b) be converted to, or exchanged for, a registered share.

(2) Subparagraph (1) does not apply to a bearer share that, before the transition date

(a) is cancelled; or

(b) is redeemed, purchased or otherwise acquired by the company as a treasury share.

(3) An existing bearer share in a grandfathered bearer share company is deemed not to have been deposited with a custodian for the purposes of subparagraph (1) until the registered agent of the company has received

(a) in the case of a bearer share deposited with an authorised custodian, notification of the deposit from the authorised custodian in accordance with section 72(1); or

(b) in the case of a bearer share deposited with a recognised custodian, the proof of the deposit of the share and the notice required to be sent by section 71(3).

(4) The Court may, on the application of the company or of a person interested in a bearer share, extend the period specified in subparagraph (1) by such further period or periods not exceeding one year in total as it considers fit.

(5) On an existing bearer share being deposited with a custodian in accordance with subparagraphs (1)(a) and (3), it shall for all purposes of this Division cease to be

regarded as an existing bearer share and shall thereafter be treated as if it had been issued after the effective date.

(6) Section 70(1) shall not have effect with respect to an existing bearer share until after the transition date.

36. (1) Where an existing bearer share in a grandfathered bearer share company is not deposited with a custodian who has agreed to hold the share on or before the transition date, the company may, notwithstanding sections 59 to 62 or any provision in the memorandum or articles, in any shareholders' agreement or in any other agreement, redeem the share.

(2) Subject to subparagraph (3), sections 176(3) and 179 apply to the redemption of bearer shares under subparagraph (1).

(3) Where a grandfathered bearer share company is unable, on making reasonable enquiries, to ascertain the identity or address of the holder of a bearer share

(a) it is not required to give the member notice under section 176(3); and

(b) the company shall hold the proceeds of redemption on trust for the owner of the bearer share.

37. Where, after the transition date, a company to which this Part applies has one or more existing bearer shares that have not been deposited with a custodian in accordance with this Division, the Commission may apply to the Court for the appointment of a liquidator of the company under the Insolvency Act.

[69] The Defendants submit that the BVIBC Act, in particular, paragraphs 34, 35 and 36 of Schedule 2, "provides a clear cut-off date before which bearer shares in BVI companies were to be either converted or deposited with an authorised or recognised custodian", and this cut off date (31 December 2009) has not been amended or removed. Further, in relation to a grandfathered bearer share company, its memorandum was automatically amended by operation of paragraph 34A(1), as of the Transition Date, to prohibit conversion after 31 December 2009. Accordingly, after that date, the only option remaining is redemption of the bearer shares, the Defendants' reason. However, on a clear reading, the deeming provision in section 34A(1) applicable to a grandfathered bearer share company, applies only to the conversion of registered shares to bearer shares, and not bearer shares to registered shares.

[70] The Defendants, in advancing this line of argument, also rely upon certain dicta in the conjoin appeals in **The Bank of Nova Scotia Trust Company (Bahamas) Limited**. They submit that the absolute nature of the prohibition on conversion, is a "feature of the legislature's clear policy of immobilisation" of bearer shares not deposited with an authorised or recognised custodian. Further, "that it was always intended to prevent conversion after 31 December 2009, is amply demonstrated by the subsistence of paragraphs 34-37 of Schedule 2 of the Act, which would otherwise have been subject to amendment." The Defendants also assert in their submissions, that the absolute nature of the prohibition on conversion, "is moreover the generally accepted position", relying on or referencing certain correspondence from Mr. Grayson of the Commission addressed to the Third Defendant.[23]. Of course, it is a matter for the Court to properly interpret the relevant provisions of the BVIBC Act dealing with bearer shares and their immobilization or disablement, and to determine whether these provisions operate to, or are effective in, prohibiting, or making impermissible, the conversion of bearer shares to registered shares after 31 December 2009, as the Defendants submit.

Conclusions on Defendants' First Standing Point

[71] I respectfully disagree with, and do not adopt the interpretation and legal effect of paragraphs 34A and 35 of the Transitional Provisions, proffered by learned counsel for the Defendants. While it is correct that by paragraph 34A(1), the memorandum of all 'grandfathered bearer share companies' were deemed amended, with effect from midnight on 31 December 2009, to prohibit all such companies from issuing bearer shares, or converting registered shares to bearer shares, or exchanging registered shares for bearer shares, sub-paragraph (1), most notably, does not deem the memorandum of such companies to have been amended so as to prohibit the conversion of bearer shares to registered shares thereafter. Indeed, no such prohibition exists by way of a deeming amendment or otherwise to the memorandum of a grandfathered bearer share company. Accordingly, there is no prohibition, absolute or otherwise, in paragraph 34A(1) of the Transitional Provisions, on the conversion of bearer shares to registered shares after the effective date. Therefore, article 23 of the Articles of Lark BVI, which expressly provides for the exchange of bearer shares for registered shares, was not deemed amended by the operation of paragraph 34A(1) of the Transitional Provisions, and remained in full force and effect as a provision in the constitutional documents of Lark BVI, to be acted upon by its directors.

[23] see Vol. 1B Tab 37 pages 1295 to 1324

[72] Furthermore, paragraph 34A(1) did not create an absolute cut-off date whereby a grandfathered bearer share company could not convert or exchange a bearer share, not deposited with a custodian, for a registered share, is also made clear by sub-paragraph (2) of section 34A. By this provision, a grandfathered bearer share company may elect to disapply the prohibition in subsection (1) against the issuance of bearer shares and conversion or exchange of registered shares to bearer shares, by filing, on or before 31 December 2009, a notice in the approved form, together with a declaration to the effect, either that all issued bearer shares in the company have been deposited with a custodian, or there are no bearer shares in issue by the company. Thus, subsection (2) provides for the continuation of the very mischief which the statutory regime in relation to bearer shares was designed to bring to an end, albeit over a period of time. This can hardly be thought to impose a definitive cut-off date of any sort, even for the issuance of new bearer shares.

[73] The Defendants place heavy reliance upon paragraph 35(1) of the Transitional Provisions. This expressly provides that every existing bearer share of a grandfathered bearer share company shall, on or before the Transition Date, be deposited with an authorised or recognised custodian or be converted to, or exchanged for, a registered share. By sub-paragraph (6), section 70(1) (disablement of bearer shares) is to "*have no effect with respect to an existing bearer share until after the transition date*." An existing bearer share is by definition one which was issued as or converted to a bearer share prior to the effective date (1 January 2005) and remains a bearer share in the company on the effective date, and that has not, prior to the re-registration of the company, ceased to be an existing bearer share by virtue of section 37E(5) of the IBC Act (see s. 34). Accordingly, the bearer shares held by virtue of Certificate No. 2 are existing bearer shares to which section 70(1) would become applicable after the Transition Date. But section 70(1) is subject to the exceptions in subsection (3) and must also be read in conjunction with section 68(1) and the exceptions thereto in subsection (3) thereof.

[74] At paragraph [41] of the judgment of the Court of Appeal in **The Bank of Nova Scotia Trust Company (Bahamas)** case, Justice of Appeal Mendez concluded as follows:

> *The effect of section 70(1) and paragraph 35 is to deprive the holder of a bearer share certificate of any entitlement which the bearer share would otherwise carry.*

[75] By section 68(3) of the BVIBC Act, during the period of disablement created by section 70(1) the prohibition under subsection (1) does not ably where any one of the requirements in sub-paragraphs (a), (b) and (c) are satisfied. In the instant matter, Bearer Share Certificate No.2 was delivered to Lark BVI on 18 February 2015 for the express purpose of having the bearer shares converted to registered shares[24]). In those circumstances Lark BVI did not then hold Bearer Share Certificate "for or on behalf of" either the Claimant or any other person. In those circumstances, the Claimant was entitled, pursuant to section 68(3) and article 23, to have its bearer shares converted to or exchanged for registered shares, thereby lifting any remaining residual effects of disablement. Accordingly, paragraph 35(1), by its wording and literal meaning, does not create or establish, an absolute prohibition, after the transition date, on the conversion of or exchange of bearer shares for registered shares, as the Defendant contends.

[76] My conclusion, regarding the residual power of a grandfathered bearer share company or an existing company, to convert bearer shares into registered shares, is in keeping with, and not contrary to, sections the meaning and legal effect of sections 68 and 70, to which I have already alluded, and the Transitional Provisions, specifically paragraphs 34(1) and 35(1). Nowhere in these statutory provisions is the power in section 38(2) of the BVIBC Act, given to a company, which includes a former Act company re-registered under Schedule 2, (such as Lark BVI), to convert or exchange a bearer share for a registered share, and to do so at any time prior to the bearer shares being redeemed, expressly excluded. There is simply no absolute cut-off date, or prohibition on conversion after the transitional date, as there is similarly none relating to the right to redeem bearer shares held in a grandfathered bearer share company. To the contrary, in every instance under the scheme of the Act, the exclusion or prohibition relates to (i) the issuance of new bearer shares or (ii) the conversion of registered shares to bearer shares or the exchange or registered shares for bearer shares, and (iii) restrictions on the transfer and dealing with bearer shares during the period they are not deposited with a custodian.

[77] Accordingly, the true legislative intent to be garnered from paragraphs 34A(1) and 35(1) of the Transitional Provisions, and from a reading and construction of the other relevant provisions of the Act dealing with bearer shares, and the how they are to be treated in relation to grandfathered bearer share companies after the Transition Date, is to impose upon such

[24] Vol. 2, Tab 3 pages 1149 -1151

shares and such companies, a well-crafted statutory regime and process, designed to or aimed at immobilizing or disabling bearer shares not deposited with an authorized or recognized custodian by a date certain. Secondly, allowing for or facilitating the ultimate removal of all bearer shares issued by BVI companies under the former IBC Act, by permitting, or in some instances, mandating, the conversion or exchange of bearer shares for registered shares, or the redemption of bearer shares for cash; or, exceptionally, for the company to be wound up on the application of the Commission pursuant to paragraph 37 of Schedule 2.

[78] The Defendants have, in their submissions on this first standing issue, also placed some reliance upon the provisions of paragraph 36(1) of the Transitional Provisions in Schedule 2. This provision deals specifically with the power to redeem existing bearer shares in a grandfathered bearer share company, which have not been deposited with an authorized or recognized custodian on or before the transition date of 31 December 2009. It expressly reserves to such a company, the power to redeem such shares, notwithstanding sections 59 to 62 of the BVIBC Act or any provision in the memorandum of the company to the contrary. Sections 59 to 62 provides for the redemption of shares generally, and the process to be adopted to effectively redeem shares, including payment of a fair price.

[79] In my view, paragraph 36(1) of the Transitional Provisions does not assist the Defendants. This provision seeks to ensure the power of a grandfathered bearer sharer company to redeem bearer shares, as has been authoritatively confirmed and declared by the judgment of the Court of Appeal in **The Bank of Nova Scotia Trust Company (Bahamas) Limited v Registrar of Corporate Affairs** – see paragraph [37]. Paragraph 36(1) is in keeping with the statutory regime put in place to address the justifiable concerns (indeed mischief) regarding bearer shares, and the use of them, and to ensure that bearer shares do not continue to be freely transferred, except in certain very limited circumstances and for certain specific purposes, designed to lead to their ultimate demise, either by conversion to or being exchanged for registered shares, or redeemed by the company.

[80] Paragraph 37 of the Transitional Provisions is, in my considered view, meant to be the final statutory proverbial 'nail in the coffin' for bearer shares and bearer share companies. It expressly vests in the Commission, after the Transition Date, the power to apply to the Court to wind up a company which continues to have bearer shares which have not been deposited with

an authorized or recognized custodian, that is, bearer shares which have not been converted or exchanged for registered shares or redeemed by the company.

The Bank of Nova Scotia Trust Appeal Decision

[81] As mentioned, the Defendants have, in argument, placed some reliance on certain extracts from the judgement of the Court of Appeal in **The Bank of Nova Scotia Trust Company (Bahamas) Limited**. Specifically, the Defendants rely on certain passages in the judgment of Mendez JA at paragraphs [38], [39], [41] and [42]. I now turn to consider that judgment and the specific passages relied on by the Defendants. In doing so, I must record that, as both counsel agreed, the Court of Appeal was not asked to consider whether, after the Transition Date, it was permissible to convert bearer shares to registered shares in a grandfathered bearer share company. These conjoined appeals dealt purely with the question whether it was still permissible for such a company to redeem bearer shares after the Transition Date and whether the court ought to appoint a receiver of the company to effect such redemption.

[82] The Defendants rely on the following three passages in the judgment of Mendez JA in **The Bank of Nova Scotia Trust Company (Bahamas)**:-

> *[38] Moreover, while the provision of a certain cut-off date by which all bearer shares are to be deposited, converted, exchanged, cancelled, redeemed, repurchases or acquired by the grandfathered bearer share company would not doubt have conduced more definitively to the eradication of the mischief of bearer shares, there is nothing irrational, unreasonable or illogical in a construction of the Act which restricts the consequences of the failure to comply with paragraph 35(1) by the transition date to the immediate disablement of the shares, with the longstop provision of redemption in accordance with sections 176(3) and 179 as the only other available option. It is not unreasonable to ascribe to the legislature the judgment that such measures were a sufficient incentive to existing bearer shareholders to abandon anonymity.*
>
> *[41] The effect of section 70(1) and paragraph 35 is to deprive the holder of a bearer share certificate of any entitlement which the bearer share would otherwise carry.*
>
> *[42] The order, it will be recalled, entailed the appointment of a receiver specifically to redeem the shares and to replace then with registered shares. It seems clear that such an order, if intended to bind the receiver to that particular result, would conflict with the express terms of paragraph 35(1) which requires every existing bearer share to be deposited with a custodian or converted to or exchanged for a registered share "on or before the transition date." It could hardly have been the intention of the legislature to*

> *visit disablement upon the holder of a bearer share for failure to exchange a bearer share for a registered share before the transition date, but nevertheless to permit that to happen under the guise of redemption after the transition date.*

[83] Relying on these passages (dicta), the Defendants submit that "where an existing bearer share was not deposited with an authorized or recognized custodian before the 31 December 2009 transition date, it became disabled pursuant to paragraph 35(1) of Schedule 2 of the Act. Pursuant to section 68 of the Act, a disabled bearer share carries no entitlements which it would otherwise carry. It is clear from paragraphs 34A and 36 that the only available option is redemption."[25].

[84] While certain passages in the judgment of Mendez JA, particularly at paragraph 42, may, at first reading, seem to be supportive of the Defendants conclusion, the decision of the Court of Appeal was concerned purely with whether the company still retained, as a long stop power, the right to redeem such shares, a right which was clearly protected by paragraph 36(1) of Schedule 2. This is clear from paragraph [43] of the judgment with states (in part) -

> [43] *I agree with Mr. Bompas, QC that the conversion or exchange of a bearer share for a registered share is conceptually different from the redemption of a bearer share. As he submitted, sections 176(3) and 179 speak to the compulsory purchase of a bearer share at a redemption price or fair value and are inconsistent with the notion of exchange or conversion. It is not necessary for me to develop this point further since in the course of his oral submissions before us, Mr. Black, QC expressly abandoned any claim to have the receiver issue replacement registered shares for the bearer shares the appellant holds. He now wishes only that the receiver be appointed for the purpose of accepting the bearer shares and redeeming them.*

[85] Furthermore, the court did not have to consider, and its attention was not drawn to, section 38(2) of the BVIBC Act, as amended in 2012 which deals specifically with a company's power to convert or to exchange bearer shares for registered shares, and to do so at any time.

[86] Furthermore, paragraph 35(1) is not a disablement provision, but one which requires that all existing bearer shares must be deposited with a custodian or converted to or exchanged for registered shares "on or before the transition date." Disablement of such shares is in fact provided for in sections 68(1) and 70(1) of the Act, and not in the Transitional Provisions. By

[25] Defendants'. Written Submissions for Trial para. 91

paragraph 35(6), section 70(1) which deals with disablement of bearer shares, does not apply to "an existing bearer share" until after the transition date.

[87] Additionally, under section 70(1), disablement is only for the "period during which [the share] is held by a person other than a custodian." It is not stated to be for an indefinite period, and the disablement is therefore not necessarily permanent.

[88] I am of the view that the Defendants have overstated the legal effect of paragraph 35(1) and section 70(1) of the Act, and incorrectly conflated a suspension of entitlements with an absolute prohibition on the exercise of certain rights, including the right to have the bearer shares converted to or exchanged for registered shares. Likewise, they erroneously conflate disablement with there being no option after the Transition Date other than redemption of the bearer share. In my view, this interpretation does not sit well with the clear provisions of section 38(2) of the Act (as amended in 2012), which expressly preserves the power, in any company under the Act, be it a grandfathered bearer share company or not, to convert bearer shares to or exchange them for registered shares. And to do so, even in circumstances where there is a contrary provision in its memorandum or in some other provision of the Act, including paragraph 35(1) of the Transitional Provisions.

[89] Accordingly, I hold, as a matter of law, that it was permissible for the Claimant to deliver the bearer shares held by Certificate No. 2 to Lark BVI and to have them converted or exchanged for registered shares after the Transition Date. I also hold that the power to do so, existed on 15 August 2015 when Appleby BVI, on behalf of the Claimant, delivered Certificate No.2 to the registered office of the First Defendant company in BVI. Accordingly, I do not accept as sound, and decide the Defendants' first preliminary standing issue against them. I find that it is not a bar to the Claimant's standing to bring this Claim. I now move on to consider the second standing issue raised by the Defendants.

(2) Defendants' Second Standing Point – The Claimant did not become the legal owner of the Bearer Shares held by Certificate No.2 on or around 27 January 2004 and, accordingly, was not entitled to be registered as a shareholder in Lark BVI

[90] The second standing issue raised by the Defendants, involves a number of legal, factual and evidential issues. It involves a consideration of certain questions of BVI and Swiss law, and

conflict of law rules. It calls for a determination of what is the applicable law relating to the purported transfer to the Claimant, on or around 27 January 2004, of title in the bearer shares held by Certificate No. 2 by virtue of the Deed of Appointment was signed by Attendus, as trustee for the Winkelried Trust. Was it Swiss law as contended by the Claimant, or BVI law as contended by the Defendants? If Swiss law is the applicable law, was there an effective transfer of the legal ownership of the said bearer shares to the Claimant, or was the Deed of Appointment wholly ineffective in transferring the legal ownership and possession of Certificate No. 2 to the Claimant?

[91] Alternatively, if BVI law is the applicable law, what is the legal effect, if any, of the Deed of Appointment made by a Swiss company, Curatus, and governed by Swiss law? Furthermore, is the transfer of legal title in the bearer shares a prerequisite to their conversion to registered shares under the BVIBC Act, and the registration of the Claimant as a shareholder of Lark BVI? Furthermore, if conversion post the Transition Date of 31 December 2009 was legally permissible, was the transfer in 2004 of an interest in the shares held pursuant to Bearer Share Certificate No. 2 from Curatus, on behalf of the Winkelried Trust, to the Claimant, void pursuant to section 68(1) of the BVIBC Act, as the Defendants contend?[26]

[92] As to the latter question, it is to be observed, as the Claimant was at pains to point out in their written and oral submissions[27], that chronologically, at the time of the transfer to the Claimant in 2004, the bearer shares held by Certificate No. 2, were not disabled or immobilized as a matter of law, whether pursuant to section 68(1) or 70(1) of the BVIBC Act, since disablement dates for the Transition Date of 31 December 2009, some 5 years hence. Accordingly, there was at that time no effective prohibition on the transfer of bearer shares, and the holder was entitled to exercise and to enjoy all the usual entitlements of a shareholder in a BVI company.

Applicable law to the transfer of ownership of Bearer Shares held by Certificate No.2

[93] It is common ground that the applicable law in relation to the transfer of Bearer Share Certificate No. 2 is to be decided based on the conflict of law rules applicable in the British Virgin Islands (BVI). BVI conflict of law rules are the same as those applicable in England.

[26] Defendants' Opening Skeleton para. 82
[27] Claimant's Opening Submissions para. 36

[94] It is well established that disputes as to the ownership of shares are to be decided in accordance with the laws of the place of incorporation of the company, unless the shares are to be considered negotiable instruments. A share in a BVI company is by definition "personal property" – (section 31 BVIBC Act). Bearer shares are clearly chattels to which title passes by delivery (section 55 BVIBC Act). The transfer of title in bearer shares is not a matter subject to registration on a particular register held by the company. The very nature of bearer shares is that title thereto passes by delivery where the share is physically located, and no recording of such 'delivery' is required at the place of incorporation of the company.

[95] Accordingly, issues regarding title to bearer shares are to be decided in accordance with the place where the shares are physically located at the relevant time when it is said that title to them passed from one person to another. In short, it is the *lex situs* which applies, and not the *lex loci actus*, that is, the place of the transaction.. See ***Macmillan Inc. v. Bishopsgate Investments Trust Plc and Others (No.3)***[28]. Per Staughton LJ at page 399 F-H:

> "*The general rule, which is subject to exceptions, appears to be that issues as to rights of property are determined by the law of the place where the property is. That is shown in relation to land… The same applies to chattels…..As pointed out by Mr. Blair, for Swiss Volksbank, the law of the place of the transaction (lex loci actus), in the case of the sale of a chattel, will almost invariably be the same as the law of the place where the chattel is (lex situs). But the courts have chosen situs rather than locus situs."*

[96] The legal position is quite helpfully summarized at paragraph 22-44 of ***Dicey, Morris & Collins on the Conflict of Laws (15th ed)*** –

> "*The law of the place of incorporation of the company decides how shares in the company may be transferred. If they may be transferred only by registration on a particular register, they will be regarded as situate at the place where the register is kept. If they are transferrable on more than one register they will be situate at the place of the register on which they would be dealt with in the ordinary course of affairs by the registered owner for the time being. If under the place of incorporation the shares are not negotiable, but their transfer does not depend on registration on a particular register, their situs is the place of incorporation. If under the law of the place of incorporation, they may be transferred by* ***delivery*** *(with or without endorsement), i.e. if they are* ***bearer*** *or order shares, they will be regarded as situate where the relevant document (the share warrant) is situated*." (emphasis added)

[28] [1996] 1WLR 387

[97] This is also confirmed by **Palmer's Company Law Vol. 1 at para. 2.531 –**"*The situs of bearer shares is the place at which those shares are held because they are negotiable instruments which may be transferred by delivery*." Accordingly, Bearer Shares Certificate No.2 was, in January 2004, transferrable by 'delivery' pursuant to section 31 of the IBC Act. By the Custodian Holding Agreement, Attendus, which physically held Bearer Share Certificate No. 2, acknowledged the title of the Claimant thereto, and agreed to continue to hold the said certificate on behalf of the Claimant. The efficacy of the transfer of title and of possession of the certificate, whether ownership passed from Curatus to the Claimant, is a matter to be decided according to the laws of the place where the said certificate was located, that is, Switzerland.

Section 245 BVIBC Act

[98] That said, the Defendants' primary position, based upon section 245 of the BVIBC Act, is that BVI law applies to the transfer of ownership of shares held in a BVI registered company. Section 245 states-

> *For the purpose of determining matters relating to **title** and **jurisdiction**, but not for the purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of a company is in the Virgin Islands.*(emphasis added)

[99] The Defendants submit[29], as their "primary position", that the question as to who owns 'the legal interest" in a share in a BVI company, the *situs* of which is the BVI, is exclusively a matter of BVI law pursuant to section 245. In doing so, they argue that the general rule in *Dicey Conflict of Laws*, whereby in the case of bearer shares, which are considered personal property, one looks to, and applies the law of the place where the property is located in determining whether ownership thereto passed from the transferor to the transferee, is not applicable, or has been displaced by section 245. Accordingly, questions as to the meaning and effect of Swiss law and foreign law documents are irrelevant. This submission or line of argument, was not fleshed out in either the written or oral submissions of the Defendants, and remains a bald assertion. Furthermore, the Defendants have not cited any authority, whether of this jurisdiction or elsewhere, as to the correct meaning and effect of section 245.

[100] With respect, I do not agree with the Defendants' submission that the matter of the transfer of ownership to the Claimant of the bearer shares held by Certificate No. 2, from Curatus, as the

[29] para. 86 Opening Skeleton and para. 15 Defs. Closing Skeleton

trustee of the Winkelried Settlement, to the Claimant, in January 2004, is a matter governed by BVI law pursuant to section 245.

[101] In my view, the starting point is what is the correct meaning and effect of section 245 of the BVIBC Act. From a plain reading of this provision, it is clear that the genesis of section 245 is that for the purpose of determining issues relating to title and jurisdiction in relation to shares in a BVI registered company, the ***situs*** *or place* of the shares is the BVI. This is very different from saying or providing that all matters relative to the transfer of ownership and possession of bearer shares in a BVI company, must be decided in BVI as the place of incorporation, or must be decided according to the laws of the BVI.

[102] Section 245 does not proscribe the singular applicability of BVI law to determining issues regarding the "delivery" of or the transfer of ownership in bearer shares held in a BVI company. Indeed, section 55 of the Act stipulates the method by which ownership in a bearer share is to be transferred, that is, be "delivery" of the certificate relating to the share. Accordingly, what constitutes effective "delivery", is not usually a matter of BVI law, but of the place or country where the bearer share certificate is physically located. Also, it must be stated that, in the instant matter, there is no real "dispute" over the title to Bearer Share Certificate No. 2. The contention by the Defendants, as a preliminary point, that the Claimant did not acquire legal title to Bearer Share Certificate No. 2, is not a 'dispute', nor does not gives rise to a 'dispute', over the legal ownership to the said shares. This is especially so since none of the Defendants assert any claim to be the legal owner of the said shares.

[103] Moreover, having regard to the international character of these business companies, which are often used in foreign, international or multi-jurisdictional transactions and structures, in most instances, bearer shares are held by persons not resident or domicile in the BVI. It is clear that the transfer of ownership in bearer shares, by delivery of the certificate or otherwise, would more often take place outside the jurisdiction of the BVI. Accordingly, in my view, it could not have been the intention of the legislature that every transfer of ownership of a bearer share must be governed by BVI law, and not by the law where the actual or constructive delivery or transfer of the bearer shares has taken place. Accordingly, such issues will, of necessity and practicality, involve, and often do, questions of foreign law, and expert evidence as to the law of the applicable jurisdiction.

[104] The Claimant submits that as Bearer Share Certificate No. 2 was always physically located in Switzerland (a matter not in controversy between the parties), Swiss property law applies to the transfer of ownership and possession in those shares to the Claimant in January and February 2004, by virtue of the conjoint effect of the Deed of Appointment and the Custodian Holding Agreement. Accordingly, while the *situs* for determining disputes over the ownership of these bearer shares is BVI, the applicable law as to the transfer of ownership in those shares is not BVI, but the law of the country, namely, Switzerland, where the bearer share certificate was being held at the date of the purported transfer.

[105] The Claimant goes one step further. They submit that even if BVI law was the applicable law, the position would be no different[30] to that under Swiss law. This point seems to rest on the basis that BVI law would interpret the Deed of Appointment signed by Curatus, a Mauritius company, as effective in passing legal title in Bearer Share Certificate No. 2 to the Claimant, with Attendus continuing to hold the said certificate pursuant to the Custodian Holding Agreement for the benefit of the Claimant as the new legal owner.

[106] Having found, as a matter of BVI conflict of law rules, that Swiss law applies to the transfer or purported transfer on 27 January 2004 of ownership and possession of the bearer shares held pursuant to Certificate No.2 to the Claimant, I must go on to consider, what was the position under Swiss law and, alternatively, if BVI law applies, what is that position under BVI law. The former involves a consideration of the expert reports and evidence at trial of the two Swiss law experts, Dr. Gross, the Claimant's expert, and Miss Oehri, the Defendants' expert.

The Question posited to the Swiss law experts

[109] The question upon which Dr. Gross was required to opine, is set out at paragraph 18 of his first report in these terms:-

> "*As a matter of Swiss law, did the legal ownership of Certificate No. 2 transfer to [the Claimant] on or around 27 January 2004?*"

[110] In her First Report, Ms. Oehri, at paragraph 15.2, stated that her expert opinion was sought on the question-

[30] para. 41 Cl's Opening Skeleton

"*What is the meaning and effect of the Custodian Holding Agreement, in particular, under Swiss law, does the Custodian Holding Agreement transfer legal ownership of Bearer Share 2* ***from Attendus*** *to the Claimant?"* (emphasis added)

[111] As Ms. Oehri admitted in cross examination, this statement of the question, does not accord with the statement of the question upon which permission was given by the Court to adduce expert evidence as to Swiss law as set out at paragraph 3 of the Order of Justice Green Q.C. made on 15 February 2019. Additionally, it does not accord with any of the documents which were provided to Ms. Oehri by the Defendants' legal practitioners, when she was instructed by them as an expert witness, which documents were annexed to her First Report. In none of these documents or in the statement of the question for which expert evidence was to be adduced, was there a reference to the transfer of ownership of Bearer Share No. 2 by the Custodian Holding Agreement. Furthermore, as elucidated in cross examination, Ms. Oehri's First Report was dedicated primarily, if not exclusively, to opining on an issue, and to answering a question which she was not required to answer, namely, did the Custodian Holding Agreement transfer legal ownership of Bearer Share Certificate No. 2 to the Claimant.[31].

[112] While Ms. Oehri agreed in cross examination that when a lawyer is interpreting a document, the context of that document and the factual background are relevant and important considerations, she admitted that she had not been provided by those instructing her with any factual background, whether by way of affidavit or witness statement or otherwise. She also admitted that it was difficult for her to come to a sensible conclusion on the facts when writing her Frist Report[32]. Hence, that was why she "mainly came to the conclusion that [they] should be thinking [of] further evidence to assess whether there is a (sic) transaction under Swiss law."[33]. Not only did Ms. Oehri in her First Report focus entirely, as she admitted in cross examination, on the Custodian Holding Agreement and whether it was effective in transferring legal ownership of Bearer Share Certificate No.2 to the Claimant, but she had not been provided with, and hence did not address in that report address, the legal effect under Swiss law of the Deed of Appointment.

[31] see Transcript 3/10/19 pages 33-36; and pg.39 L 11-25, pg.40, 41 L 1-13 and 42
[32] pg. 37 L 3-20
[33] pg. 37 L 17-20

[113] In her Supplemental Report, Ms. Oehri surmised at paragraph 15.3, that the scope of the question which Dr. Gross was asked to address in his report, *"is wider than the question that was asked of me in the instructions of 12 June 2019. Accordingly, the [D]efendants sought and were granted by the court at the pre-trial review on 31 July 2019, permission to file a supplemental report".* Ms. Oehri's Supplemental Report purports to address the same question posited to Dr. Gross and which had informed his First Report. It is also, to some extent, a response to the analysis and conclusions reached by Dr. Gross in his First Report.

[114] At paragraph 3 of the case management order made 14 February 2019 by Green J[34], the parties were granted permission "*to adduce the evidence of an expert in Swiss law in relation to the meaning and effect of the **Custody Agreement** dated 5 February 2004….*" (emphasis added). Thus, the initial permission granted was with regard to the meaning and effect of the Custody Agreement only (in fact, the 'Custodian Holding Agreement'). However, at paragraph 4 of the orders made by Jack J at the Pre-Trial Review on 31 July 2019[35], the parties were granted permission to rely at trial upon the evidence of Swiss law in the reports of Dr. Gross and Ms. Oehri (respectively for the Claimant and Defendants) already produced and exchanged. At that stage in the proceedings, Dr. Gross had produced his written report dated 3 July 2019 in which he address the legal effect under Swiss law of both the Custodian Holding Agreement and the Deed of Appointment; and Ms. Oehri had produced her first written report dated 2 June 2019. The Order of 31 July 2019, also granted permission for the Defendants to adduce a supplemental report from Ms. Oehri "*in relation to whether, pursuant to Swiss law, legal ownership of Bearer Share Certificate No. 2 transferred to the Claimant on or around 27 January 2004*…". It also provided for both experts to meet and to produce "*a statement setting out the issues raised in their respective reports upon which they are agreed or not agreed, endeavouring to narrow the issues, by no later than 4pm on 18 September 2019*."

[115] I now turn to the documents on which the Claimant relies in support of the transfer of ownership and possession of Bearer Share Certificate No. 2 from Curatus to the Claimant on or around 27 January 2004.

Documents relied on by the Claimant as evidencing transfer of ownership and possession of Bearer Share Certificate No. 2 from Curatus to the Claimant

[34] Vol. 1A, Tab 15, pages 118-119
[35] Vol. 1A, Tab 17, pages 124-126

[116] The Claimant relies on two agreements and three written resolutions, executed or adopted in January and February 2004, to establish the transfer of ownership of the bearer shares in Lark BVI held by Certificate No. 2 from Curatus, as trustee of the Winkelried Settlement, to the Claimant. However, it is common ground with the two expert witnesses as to Swiss law, that only one of these documents, the Deed of Appointment, is capable under Swiss law of transferring ownership of the bearer shares held by Certificate No. 2 to the Claimant.

The Deed of Appointment

[117] The Deed of Appointment is dated 27 January 2004[36]. It was made, executed and sealed by two directors, on behalf of Curatus, as the then trustee of the Winkelried Settlement, a settlement or trust initially established by deed on 21 June 1993 under the laws of the Isle of Man[37]. The first trustee of the Winkelried Settlement was Attendus, a company incorporated under the laws of Switzerland which held Bearer Share Certificate No.2 in Switzerland for several years before it was sent to the Claimant in 2015. Pursuant to Schedule 5, the Protector of the trust was to be appointed in accordance with the Trust Deed.

[118] At the relevant time (January 2004), Attendus, was no longer the trustee of the Winkelried Settlement sincewith effect from 6 February 2002 Curatus was appointed as the new trustee. However, while no longer the trustee, Attendus continued to hold Bearer Share Certificate No. 2 in Switzerland, for and on behalf of the Winkelried Settlement. The Deed of Appointment recites that it is supplemental to both the deed dated 21 June 1993 by which the Winkelried Settlement was established, and "*to a declaration dated with effect from the 6th day of February 2002 and made by Curatus Trust Company (Mauritius) Limited and the other documents and events specified in the Schedule 1 hereto*." Schedule 1 lists a number of documents which are described therein as deeds. These include the Deed of Appointment and Retirement by which Attendus ceased to be the trustee and Curatus was appointed the new trustee of the Winkelried Settlement, effective from 6 February 2002.

[119] The recitals to the Deed of Appointment also state that Curatus is the present trustee of the Winkelried Settlement, and Curatus, as trustee, "***wishes to appoint and transfer the Whole***

[36] Vol. 3, Tab 2 page 314 - 315
[37] Vol. 3, Tab 2, pages 206 to 234

Trust Fund as listed in Schedule 2 hereof out of the Settlement to the Sempacher Foundation", the Claimant, whose address is stated to be in Liechtenstein. In fact, the Claimant Foundation was established by deed on 9 July 1999 under the laws of Liechtenstein[38]. Clause 2 of the Deed of Appointment states:

> *"2. The Appointors in exercise of their powers of appointment under Clause 5.2 of the Settlement hereby appoint* ***and transfer irrevocably all remaining assets*** *of the Settlement as listed in the Schedule 2 to the Sempacher Foundation".* (emphasis added)

[120] Schedule 2 lists as the remaining assets of the Winkelried Settlement, "all capital and income held by the appointors upon the Winkelried Settlement Trust"; and "***60% in Lark Investments I*****nc. (IBC NO. 149832, Cert. No. 002)**." Accordingly, this document, on its face, evidences a clear intention to transfer to the Claimant Bearer Share Certificate No. 2 and the 60 percent interest in Lark BVI held by Curatus, as trustee for the Winkelried Settlement, effective 27 January 2004 (clause 3). Indeed, Bearer Share Certificate No. 2 is specifically mentioned as one of the assets to be transferred to the Claimant.

[121] The Claimant was not 'party' to the Deed of Appointment, albeit the stated transferee of the "remaining assets" of the Winkelried Settlement. In my view, this is of no moment, as deeds of appointment are legal documents specifically recognized under Swiss law, as confirmed by both Swiss law experts in their written reports in this matter. As I understand it, the position under Swiss law is that deed of appointments are capable of transferring ownership and possession in chattels or other moveable objects from the appointor, as owner, to the appointee or transferee, provided certain legal requirements under Swiss law are fully satisfied. Furthermore, there is no legal requirement for the transferee to be a party to or to execute such documents, in order for it to be effective as a transfer of an interest in the chattel, the subject of the said instrument. In this regard, one may draw a parallel with a share transfer under English law, which, subject to any provision to the contrary in the articles, is require to be signed only by the transferor, in order for it to be effect in transferring ownership of the share or shares in a company from the then registered owner to the purchaser or transferee.

[38] Vol. 3, Tab 2, pages 267 to 281

[122] Additionally, the Deed of Appointment does not, on the face of the document, draw any distinction between the transfer of a beneficial interest or legal interest in the bearer share beneficially owned by the Winkelried Settlement vide Certificate No.2, nor does it specify that only the beneficial interest in those shares is being transferred to the Claimant. The question therefore which arises is what interest in Bearer Share Certificate No. 2 could have been transferred by Curatus, as trustee of the Winkelried Settlement, to the Claimant by and through the Deed of Appointment, a matter which will be address later on in this judgment.

Contemporaneous Written Resolutions of Curatus

[123] The Deed of Appointment is buttressed by two written resolution of the Winkelried Settlement, adopted by Curatus as trustee. By the first, adopted on 27 January 2004, it was resolved to "appoint and transfer **all** assets of the [Winkelried Settlement] to [the Claimant]" (emphasis added)[39]. This resolution further resolved "that any two of the [three] directors [of Curatus who signed the said written resolution] … be authorized to execute, sign and affix the seal of [Curatus] on behalf of [Curatus] to a DEED OF APPOINTMENT." Accordingly, by this resolution, Curatus had provided for the execution by it of the Deed of Appointment transferring all the assets of the Winkelried Settlement to the Claimant.

[124] By another written resolution of Curatus, as trustee of the Winkelried Settlement, adopted on 4 February 2004[40], some 8 days subsequent to the Deed of Appointment and the first resolution of Curatus, it was noted that the trust fund of the Winkelried Settlement was "negligible", and that no future additions to the Trust Fund were expected. This, presumably, reflected the position, as at 4 February 2004, following the transfer of the "remaining assets" of the Winkelried Settlement, including the bearer shares held by Certificate No. 2, to the Claimant. Accordingly, it was resolved to terminate the Winkelried Settlement as of 4 February 2004. The Winkelried Settlement, having disposed of what remained of the Trust Fund, and of its sole asset, the 60 bearer shares in Lark BVI held by Certificate No. 2, to the Claimant, ceased to exist. This begs the question, how then could Attendus continue to hold the legal title to Bearer Share Certificate No. 2 on behalf of an entity which had disposed of all its assets, and immediately thereafter was dissolved and ceased to exist under the laws of its place of formation.

[39] see Vol.3,Tab 2, page 316
[40] Vol. 3 Tab 2 pages 317-318

Written Resolution of the Claimant

[125] The Curatus resolutions, were preceded by a written resolution of the Claimant adopted 3 December 2003[41], whereby it was resolved "*to accept all **capital and income** of the Winkelried Settlement Trust as an accretion to the fund of [the Claimant]*." No specific mention was made in this resolution of the interest in Lark BVI or of the 60 bearer shares in Lark BVI held by Certificate No. 2.

The Custodian Holding Agreement

[126] The Claimant also relies on a Custodian Holding Agreement dated 5 February 2004 executed between itself, described therein as "the Client", and Attendus, described therein as "the Custodian". At the time this agreement was entered into, Attendus still held Bearer Share Certificate No. 2 in Switzerland.

[127] The Custodian Holding Agreement recites as fact that the Claimant is the "**owner** of the investments and other assets as set out in the [S]chedule to this agreement and wishes the Custodian [Attendus] to have **physical custody of such investments as Custodian for the account and risk of [the Claimant]**." (emphasis added). The investments and other assets described in the Schedule are the "**60 shares**" in Lark BVI – **IBC No. 149832, Cert. No. 002**". By clause 3.2, Attendus as Custodian of the 60 bearer shares in Lark BVI held by Certificate No. 2, "*undertakes to deliver the assets in his (its) possession to the [Claimant], or to any other person as directed by the [Claimant], always under the condition that the [Claimant's] financial obligations have been fulfilled*." The Custodian Holding Agreement is governed by Swiss law (clause 4).

[128] It is manifest that the Custodian Holding Agreement expressly relates to Bearer Share Certificate No. 2, and that the Claimant, as the then owner of the 60 bearer shares in Lark BVI held by virtue of Certificate No. 2, sought to constitute Attendus, not as legal owner or as holding any interest in Bearer Share Certificate No.2, but as "custodian" thereof for the Claimant as the legal owner of the bearer shares. It is equally manifest, that Attendus, by

[4141] Vo. 3 Tab 4 page 1125

executing this agreement, acknowledged and confirmed its status or engagement as "custodian" of Certificate No. 2, and that it physically held Bearer Share Certificate No. 2 as “custodian”, for the Claimant, at least as from 4 February 2004. If Attendus had continued to be the legal owner of Bearer Share certificate No. 2 it is very unlikely that it would have entered into the Custodian Holding Agreements upon the terms set out therein, which are only consistent with the Claimant being then the legal owner of the bearer shares and Attendus being a mere custodian of the certificate evidencing the said bearer shares.

The Swiss Law Experts and their evidence

[129] The Claimant's Swiss law expert is Dr. Balz Patrik Gross (Dr. Gross). He produced a written report dated 3 July 2019 ("the Claimant's Expert Report")[42]. Dr.Gross holds a licentistus juris degree and a Doctor of Jurisprudence from the University of Zurich, and a LLM from Harvard Law School in the United States. He is a partner with the law firm of Homburger AG in Zurich, and head of its dispute resolution group. He was admitted since 1994 to practice in all Swiss courts and is a member of the Zurich bar. He was also admitted to practice before the Singapore International Commercial Court in 2016. His practice focusses on litigation and arbitration, and includes the litigation of civil matters before the courts of the Canton of Zurich, the Swiss Federal Tribunal, and the Swiss Supreme Court where he has appeared as advocate in over 150 appeals. Throughout his 24 years of practice, he has appeared extensively before all courts in Switzerland, up to and including the Swiss Supreme Court.

[130] The Defendants' Swiss law expert is Ms. Carmen Oehri (Ms. Oehri). Her first expert report is dated 28 June 2019 ("the Defendants' Expert First Report")[43]. She hold Bachelors of law and Masters of Law degrees from the University of Lucerne in Switzerland. She was admitted to the Bar in Zurich, Switzerland in 2013 and to the Bar in Liechtenstein in 2017. She is a partner in the law firm, Gasser Partner, a leading law firm in Liechtenstein. She practices corporate and commercial law, civil law and civil procedure. Her practice is primarily, if not exclusively, in Liechtenstein where she lives. She has not had an extensive practice in Switzerland, and has appeared in very few cases there. She has never argued a case before the Swiss Supreme Court. Ms. Oehri also issued a Supplemental Report dated 11 September 2019 ("the Defendants' Expert Supplemental Report")[44].

[42] Vol. 1B, Tab 34, pages 720-739
[43] see Vol. 1B, Tab 35, pages 950-970
[44] see Vol. 1B, Tab 36, pages 972-1143

[131] The Joint Expert Report of Dr. Gross and Ms. Oehri is dated 25 September 2019 ("the Joint Expert Report")[45]. It sets out the matters of importance upon which both law experts are agreed, and also contains a 'Separate Opinion' from each of the two Swiss law experts.

[132] Both experts as to Swiss law were presented for cross examination during the trial, by means of video link. They were cross-examined extensively on the assumptions, reasoning and conclusions in their respective reports, and on the conclusions in the report(s) of their fellow expert. In this regard, I found Dr. Gross to be a considerably more knowledgeable, experienced, competent and compelling expert as to the applicable Swiss law. Dr. Gross has had a long and very extensive practice before all courts in Switzerland and is clearly a very knowledgeable and able Swiss lawyer and advocate.

[133] Ms. Oehri, by contrast, has had little or very limited practice before the courts in Switzerland. In cross examination she testified that she had never appeared before the Swiss Supreme Court. She has appeared as an advocate only once before the Court of Second Instance (the equivalent of the court of appeal), and she has "dealt with several cases on the District Court level".[46] In this regard, it is noteworthy, that certain decisions of the Swiss Supreme Court have been relied upon by both Dr. Gross and Ms. Oehri in support of their different positions on matters of Swiss law, as set out in their respective reports. Furthermore, Ms. Oehri's main experience as an advocate since being admitted as a lawyer in Switzerland in 2013, has been before the courts in Liechtenstein, where she is a partner in the law firm Gasser in Vaduz, which firm, as she admitted in cross examination, does not market itself as a litigation firm[47]. From 2013 when she qualified as a lawyer, Ms. Oehri lived in Zurich Switzerland and practiced law there until 2017, when she moved to live and practice in Vaduz, Liechtenstein (pg. 26 L 5-15). From June 2013 to December 2017, Ms. Oehri was a senior associate lawyer at the Gasser law firm.

[134] Ms. Oehri, in some instances, omitted from the extracts in her reports from Swiss case law, and from important Swiss authors and legal scholars, certain important statements or opinions on the current state of Swiss law, the effect of which would or could lead one to take an opinion or

[45] see Vol. 1B, Tab 38, pages 1327-1621
[46] Transcript 3/10/19 pg. 16, L 13-25
[47] Pg. 20 L 20-21

conclusion different from or at odds with the one which she drew in relation to the particular issue being considered. One such example, is the extract from SPOERLE at paragraph 32 of her Separate Opinion in the Joint Expert Report, dealing with the important issue of whether there is a fourth requirement under Swiss law for there to be a contract *in rem*, and whether that requirement must be fulfilled by an independent agreement or can be established by a tacit agreement and by the surrounding circumstances. Importantly, and perhaps tellingly, Ms. Oehri admitted in cross examination that had she been instructed to provide a legal opinion to the Claimant on this issue under Swiss law, she would have quoted the missing words of the extract in her Separate Opinion.[48].

[135] Another example, is in relation to the accepted principle of Swiss law that the transfer of ownership of a chattel requires, *inter alia*, "the transfer of possession to the purchaser", and her agreement with Dr. Gross that possession of an object can be acquired without physical transfer of it, if a third party remains in possession due to some special relationship with the transferee. Again, both Ms. Oehri and Dr. Gross agree that such an agreement can be established or proved by a "tacit agreement". However Ms. Oehri, in her Supplemental Report states that the tacit agreement must be "expressed"; and at paragraph 98 of her Separate Opinion, she concludes that it "is subject to strict requirements" and must be "clearly and unequivocally" communicated and agreed upon by the parties. In support of these statements as to Swiss law, Ms. Oehri cites a passage from SCHWANDER, at footnote 18[49]. However, she did not provide the full extract and omitted therefrom this illuminating portion: "***The agreement need not be made explicitly, but may also be tacit and result from the specific circumstances such as the further actions of the purchaser***" (emphasis added)[50]. When asked by learned counsel for the Claimant whether had she been advising the Claimant she would have included the omitted portion, she admitted it was at odds with the relevant part of her Supplemental Report, and that she would have included it[51].

[136] Also, there were moments during the cross examination of Ms. Oehri on important issues of Swiss law, where, in the face of clear statements of principle from Swiss courts or from respected authors on which she had relied to assert a different view, she appeared to be either unwilling to accept that she may have either gotten it wrong or overstated her position.

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[48] Transcript 3/10/19 pg. 55 – 57 L 5-8
[49] Pg. 984, Vol. 1B Tab 36
[50] Vol. 1B, Tab 38 pg. 1335 para. 40 Dr. Gross's Separate Report in the Joint Expert Report
[51] Transcript 03/10/19 pg. 67 L 7-19

Furthermore, in such instances she was unable to convincingly explain or justify the position which she had taken in her reports. In the face of these clear statements of legal principles, Ms. Oehri continued, nonetheless, to maintain her position and conclusions. One such example of this relates to the question of whether remuneration or consideration is another of the requirements of the acquisition of ownership of moveable property based upon the concept of "good faith". This was dealt with at paragraph 134 of her Separate Opinion. There she stated:

i. "*There is a dispute in legal literature with regard to the question whether an acquisition of ownership based on good faith can take place without remuneration (consideration). Pursuant to several opinions in legal literature, the transferee is not in a position of trust worth protecting if he has acquired the object free of charge and thus an acquisition based on good faith is not possible. The latter opinions are* ***absolutely justified*** *since the interest of the transferor is to be valued higher than the interest of the transferee in case of a gratuitous transfer of an object*." (emphasis added)

[137] In support of this statement of opinion, Ms. Oehri relied, at footnote 22 (page 1354), on ERNST (Exhibit 17). This issue was addressed by Dr. Gross at paragraphs 71 and 72 of his Separate Opinion where he states:

ii. 71."*I strongly disagree with that statement. Consideration is a common law concept that does not exist under Swiss law. Even the author cited by Ms. Oehri (ERNST) admits that "whether the transfer is made against payment or free of charge is not relevant according to the majority of commentators….The opinion of some commentators does not turn consideration into a requirement for the valid transfer of ownership*.

iii. 72."*It follows that [the Claimant] validly acquired ownership of Certificate No.2 regardless of whether the Deed of Appointment dated 27 January 2004 is a valid title of acquisition or whether Mr. Ruma Kissoondharry and Mr. Ian Trevor Smith were duly authorized to sign and affix the common seal of Curatus on the Deed of Appointment.*"

[138] When cross examined as to why she did not state in her Separate Opinion what the majority legal opinion was, instead of simply saying "there is a dispute in legal literature", Ms. Oehri resorted to saying: "I was not aware there was a majority, I think there is a dispute"[52]. However, Ms. Oehri was taken by learned counsel Mr. Hocking for the Claimant to paragraph 71 of the Separate Opinion of Dr. Gross, where he quotes from the passage in ERNST, which she had cited (at paragraph 134) in concluding that the view that remuneration or consideration was a requirement was "absolutely justified". Ms. Oehri was then asked how she can say she was not aware of the position of the majority of commentators, she responded: "Yeah but it still means that there is a dispute[53]. And "….*there is not a clear position and there is a dispute in the doctrine*." [54]There was clearly no justification, as an independent expert, for her omission to state in her Separate Report (or even in oral evidence) that her conclusion represented a gross overstatement or gross inaccuracy, in light of what was the clear statement from ERNST of the opinion of the majority of Swiss legal commentators.

[139] Furthermore, in some instances, both in her written reports and oral evidence, Ms. Oehri placed undue or unjustified emphasis or importance to her reasoning and conclusions, on speculative or irrelevant matters, including matters on which she was not asked to opine. Examples of this are issues of the law of Liechtenstein[55]; whether the directors of Curatus where validly authorized to sign the Deed of Appointment; and this statement at paragraph 103 of her Separate Report[56]: "***In view of the values at stake, the absence of documentary evidence suggests that the parties have simply forgotten to physically transfer Certificate No. 2 from Attendus to Curatus.***" Upon being questioned by the court as to whether this was "speculative" and not in keeping with her duty as an expert witness, Ms. Oehri responded, "this is my impression that I have gotten"[57]. When pressed further, she admitted to using this "impression" in arriving at her conclusion on this issue of Swiss law: "Yes. In this issue, I came to the conclusion that it could be that the parties simply have forgotten to physically transfer the Share Certificate." Again when pressed even further, she admitted "there could be a different explanation…"[58].

[52] Transcript 3/10/19 pg. 59 L 14-15
[53] pg. 60 L 14-15
[54] pg. 61 L 14-15
[55] Vol. 1B, Tab 36, pg. 983 – last para.
[56] Vol. 1B, Tab 38 pg. 1347
[57] pg. 79 L 22-24
[58] pg 80 L 11-22

[140] Finally, in a similar vein, falls her statement towards the latter part of paragraph 103 of her Separate Report[59], that the retrospective concluding of the Custodian Holding Agreement "also seems to indicate that there was uncertainty among the parties regarding the transfer of ownership and that the Custodian Holding Agreement was thus concluded to purportedly 'heal' the possibly deficient transfer of ownership with retrospective effect." [60] This is an entirely speculative statement. It is lacking, as are some of the other statements mentioned from Ms. Oehri's reports about with she was cross examined, in the necessary balance and objectivity and, with respect, ought not to inform any expert legal opinion regarding the effectiveness of a transfer of ownership in a chattel, not least of all in a matter of this kind. Needless to say, this approach to her reasoning and evidence served significantly, to undermine or to call into question the soundness of Ms. Oehri's understanding of Swiss law, and her independence and impartiality as a legal expert.

[141] Accordingly, on virtually every issue, I accept as correct, and rely on the opinions and conclusion as to Swiss law applicable to the question and issues of Swiss law under consideration in this matter, as provided by Dr. Gross in his written reports and oral testimony. In this regard, Dr. Gross impressed the Court as a confident, competent, very knowledgeable and sound Swiss lawyer of considerable relevant experience, fully conversant with the general approach of the Swiss courts to determining legal disputes and, specifically, issues of Swiss property law. He give his evidence dispassionately, independently, fairly, and in a well balanced way, as is required of any expert giving evidence of foreign law. Albeit at times he displayed, understandably, some frustration or disquiet with some of the positions taken or adopted by Ms. Oehri in her written reports, which clearly did not accord with the authoritative statements of legal principle in Swiss case law, and by well-respected Swiss legal authors and jurists.

[142] Ms. Oehri was cross examined with regard to her disagreement with this statement of Dr. Gross at paragraph 56 of the Joint Expert Report –

> "*Swiss courts take a practical and not formalistic approach to resolving disputes. In this, they mirror the approach of Swiss law, which is not formalistic in nature. One of the guiding principles is that all parties are expected to act in good faith. I*

[59] pg. 1348

[60] see Transcript 3/10/19 pg. 81 L 6-20

am persuaded that a Swiss court would conclude, based on these circumstances that Curatus must have understood, and agreed, that Certificate No. 2 would remain in the possession of Attendus, and that the ownership would be transferred by way of a deed of assignment. Any other behavior of Curatus would be contradictory and not protected."

[143] Ms. Oehri testified that Dr. Gross came to this conclusion as to what the Swiss Court would decide, contrary to the clear legal doctrine in case law and the main doctrine.[61]. In her view, "*Swiss courts usually follow the established practice, and the practice established by the Supreme Court and the main doctrine. And the opinion of Dr. Gross provides in this regard is not in line with the main doctrine and the practice of the Supreme Court of Switzerland*."[62]. Having heard and seen both expert witnesses, I have no reason to doubt the accuracy of this statement by Dr. Gross at paragraph 56 of the Joint Expert Report.

[144] I now turn to a more detailed examination of the specific legal issues and requirements of Swiss law for there to be a valid transfer of ownership and/or possession of a chattel by virtue of a deed of possession, as in the instant matter, and the respective opinions and conclusions reached by the experts thereon. But first, what are the matters upon which both experts are agreed, as set out in the Joint Expert Report.

Matters on which the Experts agree and disagree

[145] The primary matters upon which the experts agree are:-

(i) **Conflict of Laws**: That ultimately "it is for the conflict of laws rules of the *lex fori* to determine the applicable law", to the issues in this matter upon which they were required to opine; and that it is for the BVI Court "*to determine which law is applicable to the transfer of ownership of Bearer Share 2 according to BVI conflict of law rules*." (para.4). This position was confirmed by Dr. Gross in cross examination.[63]. The experts continue to disagree "as to which law would apply if Swiss conflict of laws were to determine the applicable law." [64]

(ii) **Transfer of Ownership in Moveable Property:**

[61] Transcript 3/10/19 pg. 18 L 12-15, pg. 19 L 7-10
[62] Pg. 19 L 19-24
[63] Transcript 30/09/19 pg. 113, L13-17
[64] para. 5

1A. Legal Requirements for a Valid Transfer

Both experts were in agreement that under Swiss law to transfer ownership in a moveable object based upon an agreement of the parties, the following three requirements must be fulfilled:

(a) a valid transaction (that is, a valid title of acquisition for the transfer);
(b) transfer of possession either physical or by deed of possession; and
(c) the seller is the lawful owner of the chattel.

The experts disagree as to whether "an *in rem* contract constitutes a fourth requirement for a valid transfer of ownership in a moveable object under Swiss law, and whether such requirement would make any difference in the present case."

1B. Legal Requirements for a Valid Transfer by Deed of Possession

Specifically, as to the second requirement above - a transfer of ownership by the deed of possession - both experts are in agreement that there are three necessary requirements:

(1) the seller is the owner and indirect possessor of the object (the moveable property being transferred);
(2) a third party is the immediate, but derivative, possessor of the object by virtue of a special legal relationship and recognizes the ownership of the seller; and
(3) there is an agreement between the seller and the purchaser that the third party continues to exercise possession on behalf of the purchaser instead of on behalf of the seller (*Besitzanweisung;* "deed of assignment")

While both experts agree on the third of the requirements of a transfer of possession by deed of possession, they disagree "as to the level of evidence required to prove the existence of such agreement." (para. 10)

1C. The Transfer of Certificate No.2:

Both experts are in agreement "that the question of whether the Deed of Appointment dated 27 January 2004 is a valid title to transfer ownership of Certificate No.2 is not subject to Swiss law." Likewise, the experts agree that whether Mr. Ruma Kissoondharry and Mr. Ian Trevor Smith were duly authorized to sign and affix the common seal of Curatus on the Deed of Appointment is not subject to Swiss law.

Fundamentally, both experts disagree on-

(1)"whether Curatus can be considered the owner and indirect possessor of Certificate No. 2 before the disputed transfer of Certificate No. 2 to [the Claimant]";

(2) "whether Attendus was the immediate but derivative possessor of Certificate No. 2 and recognized the ownership of Curatus before the disputed transfer of Certificate No. 2 to [the Claimant]";

(3) "whether there was an agreement between Curatus and [the Claimant] that Attendus would continue to exercise its possession on behalf of the purchaser after 27 January 2004"; and

(4) "whether a contract *in rem* has been concluded between Curatus and [the Claimant]".

(iii) **Other Acquisition of Ownership**: The experts discussed "what would be the consequences if, hypothetically, there was no transfer of ownership based upon a valid transaction and Curatus was not the owner of Certificate No. 2 when (sic) [the] Deed of Appointment was issued on 27 January 2004"; and, specifically, "whether [the Claimant] has acquired ownership in Certificate No. 2 based on **good faith or based on adverse possession**." (emphasis added)

(a) Good Faith: As to the legal requirements of acquisition by "good faith" under Swiss law, the experts agreed that "ownership [of a chattel] is acquired if the party who received a good believing in good faith to be the owner is protected in his possession by the rules of good faith (Art. 714(2) SCC)." Thus, the experts were in agreement as to the applicable Swiss statute law providing for acquisition of title based upon 'good faith'. However, they disagreed (para. 21) "on whether the conditions of an acquisition based upon good faith are fulfilled in case of Certificate No. 2."

(b) Adverse Possession: As to the acquisition of ownership based upon adverse possession under Swiss law, both experts agree that this is governed by Art. 728(1) SCC which states-

> "*if a person has possession of a chattel belonging to another person uninterruptedly and without challenge for five years believing in good faith that he or she owns it, her or she becomes its owner by adverse possession."*

The experts also agree that there are two requirements under Swiss law to becoming the owner by adverse possession of a moveable object. These are (1) unchallenged and uninterrupted direct and indirect possession for five years; and (2) the possessor has to possess the object believing in good faith that he is the owner of the object. However, they disagree "whether the conditions of an acquisition or ownership based on adverse possession are fulfilled in case of Certificate No. 2." [65]

[65] para. 24

[146] It is therefore apparent, that while these two expert witnesses as to Swiss law have agreed upon certain of the legal requirements of a valid transfer of ownership and a valid transfer of possession under Swiss law (if the applicable law), they disagree on whether these all of these requirements are borne out by the documentary evidence in this case, leading ultimately to their different answers to the primary question posed to them.

[147] Accordingly, the experts go on the address further their points of disagreement in their respective 'separate opinions" in the Joint Report, underscoring their disagreement and differing conclusions. I now set out their summary of the separate conclusions which they reached on the various issues of Swiss law, as set out in their individual first reports, Ms. Oehri's Supplemental Report, and in the Joint Expert Report

Summary of Conclusions reached by each Swiss law expert in their respective reports

[148] The conclusion of Dr. Gross in his Frist Report in answer to the question posted by the Court is as follows:-

> "19. A*ccordingly, under Swiss law, [the Claimant] became the legal owner of Certificate No. 2 on either 27 January 2004 or 5 February 2004.*"
>
> "20. *[The Claimant}, as the legal owner of Certificate No. 2, also has (independent but indirect) possession of Certificate No. 2 under Swiss law, whereas Attendus had direct but derivative possession*."

[149] The summary of conclusions reached by Ms. Oehri in her First Report are set out at paragraphs 18.1 to 18.6, as follows:

> 18.1 *From a Swiss law perspective, the choice of law of the parties in Art. 4 of the Custodian Holding Agreement cannot be regarded as a valid choice of law in respect of in rem rights.*
>
> 18.2 *Under the assumption that Swiss law also governed the in rem rights of the parties, the following requirements have to be met for the valid transfer of ownership in shares under Swiss law: The transfer of bearer shares requires (i) the conclusion of a valid basic transaction (normally a share purchase agreement), (ii) the transfer of ownership of the share paper or execution of a surrogate transfer and (iii) the seller's right of disposal.*

18.3 *In the present case, the conclusion of the Custodian Holding Agreement cannot be regarded as a sufficient basis for a (potential) transfer of legal ownership of Bearer Share 2 from Attendus to the Claimant, since the Custodian Holding Agreement does not contain any undertaking of the Custodian to transfer ownership of the shares o the Claimant (first requirement cf. 17.5, 17.18, 18.2)*.

18.4 *Similarly, the fulfilment of the second requirement (cf. 17.5, 17.18, 18.2) would also have to fail for lack of an in rem agreement between the parties, i.e. an agreement aimed at transferring ownership rights*.

18.5 *Finally, if it is assumed that Attendus was the legal owner of the shares at the time of the conclusion of the Custodian Holding Agreement, it can be assumed that only the third requirement (seller's rights of disposal), and therefore one out of three mandatory requirements, is fulfilled*.

18.6 *As the first and second requirement for the transfer of bearer shares under Swiss law are not fulfilled, Attendus cannot have transferred Bearer Share 2 to the Claimant from a Swiss law perspective as regards the Custodian holding Agreement*.

[150] At paragraph 18.1 to 18.5 of her Supplementary Report, Ms. Oehri summarizes her conclusions on the question posited to the experts, as follows:-

18.1 *To sum up, it cannot be concluded that the ownership of Bearer Share 2 was validly transferred from Curatus to [the Claimant]. Rather, on the basis of the information and documentation I have seen, ownership was not transferred under Swiss law*.

18.2 *The Deed of Appointment could be regarded as a* ***valid title of acquisition****, but first it must be assessed whether the Deed of Appointment has been validly established under Mauritian law. In particular, it is questionable whether the consent of the protector can indeed be dispensed with as Art. 20 and Art. 21 of the Trust Settlement explicitly require the consent of the protector for the appointment of the trust's assets; no evidence of such consent has been provided. (emphasis added)*

18.3 *The transfer of possession cannot be confirmed in the present case. In light of the uncertainties surrounding the legal relationship between Attendus and Curatus, it cannot be confirmed that Attendus was indeed the derivative and immediate possessor of Bearer Share 2 and that Curatus was the indirect possessor of Bearer Share 2*.

There is also insufficient evidence to suggest that there was the conclusion of a possessory contract in the present case. There is no documentary evidence proving that Curatus and [the Claimant] have exchanged declarations according to which a *transfer of possession shall take place and that Attendus shall continue to hold Bearer Share 2 for [the Claimant]. Therefore, contrary to the opinion of Mr. Gross, the* ***behavior of the parties*** *is insufficient to evidence the formation of a tacit possessory agreement. (emphasis added)*

The same principles apply to the conclusion of an in rem contract which is required according to Swiss case law. Even if the deed of Appointment could be regarded as a valid offer, the custodian agreement alone cannot be regarded as an acceptance of such offer, since it was only concluded with a third party (Attendus) and there was no (documentary) evidence that the custodian agreement was communicated to Curatus.

18.4 *Finally, as conceded by Mr. Gross, it cannot be confirmed that Curatus had the right of disposal over Bearer Share 2. Before it can be examined whether Curatus had the right of disposal over Bearer Share 2, it must be assessed whether Attendus had validly transferred the right of disposal in the course of the change of trustees of Winkelried Trust*.

18.5 *Summarized, as a matter of Swiss law, the legal ownership of Certificate No. 2 did not transfer to [the Claimant] on or around 27 January 2004*.

[151] Dr. Gross in his Separate Opinion in the Joint Expert Report, summarized his findings and conclusions under the headings dealing with each legal issue, and not by way of a concluding section. I will refer to his opinions and conclusions when dealing with each issue of Swiss law and making my findings thereon.

[152] Ms. Oehri, at paragraphs 140 and 141 of her Separate Opinion, summarizes her conclusions on each issue as follows:-

140. *The formation of a valid title cannot be assessed and therefore not confirmed under Swiss law. The transfer of possession by way of deed of possession cannot be confirmed, in particular due to the unclear legal relationship between Attendus and Curatus and since there was no (tacit) deed of possession (Besitzanweisungsvertrag) between Curatus and [the Claimant]. Due to the broad legal knowledge of the legal representatives of [the Claimant], [the Claimant] cannot be qualified as bona fide transferee at all*.

141. *As a result, the acquisition of ownership of Certificate No. 2 by [the Claimant] cannot be confirmed.*

[153] I must now go on to consider, in some depth, the analysis, reasoning and conclusions reach by each expert witness as to Swiss law on the important issues canvassed in the various reports

and, to some extent, in their oral testimony, in reaching my own findings as to Swiss law on each issue of relevance to the question of whether ownership of the shares held by virtue of Bearer Share Certificate No. 2 was transferred by virtue of the Deed of Appointment to the Claimant. I must also conduct a similar exercise with respect to the question whether the Claimant became, directly or indirectly, the possessor of Bearer Share Certificate No. 2 in January or February 2004. But first a few observations with regard to the legal position and degree of recognition of 'trusts' under Swiss law, Swiss conflict of law rules as they relate to moveable and immoveable property, and the legal status and effects of deeds of appointments and custody holding agreements under Swiss law, as gleamed from the reports of both experts.

Recognition of Trusts under Swiss Law

[154] At paragraph 22 of his First Report, Dr. Gross states unequivocally that Switzerland does not have its own trust law and, consequently, it is not possible to establish a trust in Switzerland. This notwithstanding, by virtue of Switzerland having ratified the HCCH Convention on the Law Applicable to Trusts and on their Recognition in 1985, and having added, by amendment, Article 11 to the Swiss Private International Law Act enacted on 18 December 1987, "*Switzerland does recognize the legal form of trusts and its effect in the Swiss jurisdiction*."[66] This position seems to be supported by the extract, at paragraph 23, from *Volt/Pannatier*, where the author opines that "*trusts must be recognized as such in the ratifying countries. What is meant in this regard is not the recognition in the procedural sense, i.e. the recognition of judgments abroad, but the recognition of the legal form of the trust and its effects in civil jurisdictions."* Dr. Gross was also questioned about this in cross examination, and confirmed, in essence, what was stated at paragraph 23 of his First Report.[67]

[155] At paragraph 17.3 of the Defendants' First Expert Report, Ms. Oehri alludes to the Swiss Federal Code on private international law, categorizing it as "a legal Act governing, in an international context, the jurisdiction of the Swiss judicial and administrative authorities, the applicable law, the conditions for recognition and enforcement of foreign decisions, bankruptcy and composition agreements and arbitration."

[66] para. 24

[67] see Transcript 30/09/19 pg. 151 L 14-25, pg. 152 L 23-25, and pg. 153 L 1-5

[156] The upshot of this all, as I understand it, is that while the legal form known as a 'trust' in common law countries is not provided for under Swiss law, trusts created under the laws of foreign states will be given recognition as a legal form under Swiss law, for certain purposes, as a direct consequence of the conjoint effect of Switzerland having ratified the HCCH Convention on the Law Applicable to trusts on 1 July 2007, and having amended the Federal Swiss Private International Law Act enacted 18 December 1987 by adding Article 11. The relevance of this to the instant matter, is that Swiss law would recognize the Claimant, as a Liechtenstein established trust, for the purpose of taking or receiving title to Bearer Share Certificate No. 2.

Nature of Custody Holding Agreements under Swiss Law

[157] Dr. Gross surmises, at paragraphs 29 and 30 of his First Report, that 'custody holding agreements', (such as the one being relied on in this case), "fall within the category of "*Hinterlegungsvertrage"*, which are codified in Article 472 et seq. of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911." He goes on to state that, if the depositor is the legal owner of the object, then he/she does not lose legal ownership by virtue of the custody holding agreement, and transfer of ownership only occurs where all the requirements of Swiss property law have been satisfied (para. 30). Ms. Oehri, in referring at paragraph 17.2 of her First Report to the Swiss Code of Obligations as being part of the Swiss Civil Code that regulates contract law and companies limited by shares, stipulates that the most relevant provisions for the purpose of her legal opinion "are the provisions on deposit agreements". In this regard, Ms. Oehri references Article 472 et seq.

Swiss Conflict of Laws Rules – moveable and immovable property

[158] Dr. Gross addressed this issue at the outset in his First Report. He opined that, as a matter of both Swiss substantive law and Swiss conflict of law rules, a distinction is drawn between moveable and immoveable objects or things. According to Swiss conflict of laws, anything other than real property is considered 'moveable' property. This is provided for in the Swiss Civil Code dated 10 December 1907 ("SCC"), Article 655 stating that "immovable property" includes "*parcels of land and buildings thereon*".[68]. Therefore, 'shares' in companies are considered moveable property for the purposes of Swiss conflict of law rules.

[68] Claimant's Expert First Report - para. 25

[159] As to Swiss conflict of law rules, Dr. Gross concludes that "the acquisition and loss of an interest in movable property is governed by the law of the place where the property was located at the time when the facts or the transaction is said to have occurred giving rise to the acquisition or loss of an interest in such property." In this regard, reliance was placed by Dr. Gross particularly on Art. 100(1) PILA. [69]

[160] Applying this principle or rule to this case, Dr. Gross concludes that Bearer Share Certificate No. 2 is to be considered moveable property. Moreover, Certificate No. 2 was physically located in Switzerland with Attendus from when it received that certificate on 24 June 1998. Accordingly, as at 27 January 2004, when ownership of Bearer Share Certificate No. 2 is said to have been transferred to the Claimant from Curatus, that certificate was physically located in Switzerland. Accordingly, Swiss law applied to the transfer of possession of Certificate No. 2 by the Deed of Appointment, and to the question whether legal title to that certificate transferred to the Claimant. These are the conclusions reached by Dr. Gross at paragraphs 27 to 28 of his First Report, which I accept as a matter of fact.

Is Swiss Conflict of Laws relevant to whether there was a transfer of Bearer Share Certificate No.2?

[161] Dr. Gross's primary opinion is that principles of Swiss conflict of law rules (as discussed by Ms. Oehri in her First Report) are irrelevant to the determination of the issue of the transfer of ownership in Bearer Share Certificate No. 2, as this is purely a matter of the general rules of property in Switzerland. He maintains that, "*in any event, Swiss law would govern the question of whether legal ownership of Certificate No. 2 transferred to [the Claimant] on or around 27 January 2004 if Swiss conflict of law rules were to determine the issue." Further, Swiss law would be the "logic law" to be applied based on the fact that the object in question (Bearer Share Certificate No.2) was located in Switzerland at all relevant times, and still is. Contrary to Ms. Oehri's opinion, I am convinced that the presence of Certificate No.2 in Switzerland is a very strong connecting factor to Switzerland*."[70] Accordingly, Dr. Gross places great emphasis and importance on where Bearer Share Certificate No. 2 was physically located, when determining whether Swiss law would be applicable to the transfer of ownership in Certificate

[69] Claimant's First Expert Report -para. 26.
[70] para. 28

No. 2 to the Claimant on or around 27 January 2004, and which rule or aspect of Swiss law would be applicable. In doing so, he opined that Swiss property law would be the applicable law.[71].

[162] Ms. Oehri, having accepted that the issue of which law applies to the transfer of ownership of Certificate No.2 is to be determined by this Court applying BVI conflict of law rules, comes to a different take on this issue. She puts it this way at paragraphs 87 of her Separate Opinion in the Joint Expert Report:

> "*However, if the BVI conflict of law rules were to declare Swiss law applicable to the transfer of ownership of Certificate No. 2 and if the reference to Swiss law is to be regarded as a* ***global reference*** *(i.e. a reference to the substantive rules including the conflict of law rules), it would have to be assessed whether the Swiss conflict of law rules would also declare Swiss law applicable* ***or whether they would refer to the law of another state***." (emphasis added)

[163] Specifically with regard to Article 100 of the Swiss IPRG dealing with the applicable law relating to moveable property, Ms. Oehri opines at paragraph 88 of her Separate Opinion in the Joint Report, as follows:-

> "*With regard to the transfer of ownership of bearer shares, the question arises whether such transfer would be subject to Art. 100 of the Swiss IPRG governing the law applicable to the acquisition and loss of an interest in moveable property or whether such transfer would be subject to Art. 154 et seq. IPRG governing the company statute (the law of incorporation of a company).* ***This question is disputed in legal doctrine****. While some authors contend that the transfer of ownership of bearer shares has to be assessed under the law of the state where the bearer share is located (Art. 100 IPRG), there are several authors who regard the lex chartae as inappropriate, in particular since the location of a share certificate is completely random. With that said, these authors contend that the company statute (the law of incorporation of the company, Art. 154 et seq. IPRG) should determine the law applicable to the transfer of ownership of shares in a company wherever possible. It is noteworthy that authors of the Zurich Commentary of the IPRG have even changed their opinion. In the first edition of the commentary, they held that the lex rei sitae should be applicable. In the second and third edition, they have changed their mind and now hold that Art. 154 et seq. IPRG should be applicable."* (emphasis added)

[166] And at paragraph 89 dealing with Art. 15 IPRG, Ms. Oehri states –

[71] see Transcript 30/09/19 pg. 134 L 1-4, 5-16, pg. 135 L 10-25 referencing Arts. 98, 99 and 100 of CPIL, and pg. 136 L 2-9

> 89. "*Furthermore, pursuant to Art. 15 para. 1 IPRG, the law designated by the IPRG shall not be applied in those* ***exceptional*** *situations where, in light of all circumstances, it is* ***manifest*** *that the case has only a* ***very limited connection*** *with that law and has a* ***much closer connection*** *with another law. In the present case, the* ***only connection*** *with Swiss law is the fact that Certificate No. 2 has been held by Attendus. Apart from that, there is no connection to Swiss law at all. As a result, it would be appropriate to apply BVI law to the transfer of ownership of Certificate No. 2 as BVI law has a much closer connection with the case at hand*." (emphasis added)

[167] As to the question of whether the applicable law to the transfer of the bearer shares held pursuant to Certificate No. 2 is to be determined by Swiss law based upon where the certificate evidencing the shares is physically located, Ms. Oehri concludes that whether Article 100 or Article 154 of the Swiss IPRG governs, is "disputed in legal doctrine" among certain authors. She opines that some authors come down in favour of the position under Art. 100 (the place where the certificate is located), and there are some "*who regard the lex chartae sitae as inappropriate, in particular since the location of a share certificate is completely random*" (para. 88). She goes on to state that the latter group of authors "*contend that the company statute (the law of incorporation of a company, Art 154 et seq. IPRG) should determine the law applicable to the transfer of ownership of shares in a company wherever possible*." After referring to Art 154 para. 1 IPRG (dealing with where the case has its most close connection, as an exception to the general rule), Ms. Oehri opines at paragraph 89 of the Joint Report-

> "*In the present case, the only connection with Swiss law is the fact that Certificate No.2 has been held by Attendus. Apart from that, there is no connection to Swiss law at all. As a result, it would be appropriate to apply BVI law to the transfer of ownership of Certificate No. 2 as BVI law has a much closer connection."*

[168] Learned counsel for the Defendants put to Dr. Gross, Ms. Oehri's analysis and conclusion on this issue, including the applicability thereto of Articles 154 and 15 IPRG.[72]. In his responses, Dr Gross vehemently disagreed with Ms. Oehri as to the applicability of Articles 15 and 154. In doing so, he provided, in my view, a complete answer to the notion that the matter of the transfer of Bearer Share Certificate No. 2 has a limited connection with Switzerland.

[169] In his responses during cross examination, Dr. Gross:-

[72] see Transcript 30/09/19 pgs. 153-160

(i) Underscored that the most important factor under Swiss law to the transfer of ownership in bearer shares, was possession of the bearer share certificate in Switzerland;

(ii) Pointed out that in her First Report Ms. Oehri relied upon Article 104 of the Swiss Federal Act on Conflict of Laws (and not Art. 154 or 15 IPRG) which is a conflict of law rule in property law and not a rule in relation to the law of companies, as she now refers;

(iii) As to Ms. Oehri's reliance on Article 154 (the law of incorporation of the company), Dr. Gross points out that in her First Report she contended for a different position and the Supreme Court case on which she relies in her Second Report "*very clearly says that Article 100 of the IPRG under the Act applies. And that is the lex rei sitae*." (pg. 157 L 7-12)

(iv) As to Ms. Oehri's reliance on the fall back position in Article 15 IPRG, Dr. Gross while agreeing that Art. 15 is "an escape clause" to be used only where the application of the conflict of law rule is inadequate (pg. 157 L 19-21). He states categorically that her conclusions are incorrect based on Art. 15.

(v) Referring specifically to Ms. Oehri's conclusions of inadequate connection with Switzerland based upon the application of Art. 15, Dr. Gross opines as follows:-

> "*Of course what we have in our case is that Swiss law says that bearer shares, for bearer shares the law at the place where they are located will govern questions of ownership and possession. And that's exactly what we have in our case, because Swiss law, for Swiss law possession is important for the transfer of ownership and possession in Switzerland and so that's a very heavy and typical connection for these issues. And therefore I can't see why Article 15 would apply*." (pg. 158 L 16-25).

(vi) Specifically on the matter of limited connecting factors with Swiss law, Dr. Gross first draws the distinction between the Deed of Appointment (which is a document between a Liechtenstein and Mauritius entities), and the importance of transfer, possession and ownership under Swiss law. (pg. 159 L 12-21) "But the most relevant element under Swiss law is the location of the asset."

(vii) As to the assertion by Ms. Oehri that the location of a bearer share certificate is a random matter, Dr. Gross makes the point that this criticism may have some justification in relation to assets "***that are in transitu so they are passing in. There might be exceptions but the share here, my understanding is that they were held in Switzerland for an extended period of time. So under Swiss law this would be***

very strong connecting factor. Yes, it's the only and the most important connecting factor that there is for any question of issue of possession and ownership." (emphasis added).

(viii) Her reliance in her Supplemental Report to a decision of the Swiss Federal Supreme Court (Vol 1B, Tab 36 Exhibit H, pg. 1096 –note no translation into English of this documents was provided), was misplaced, as the approach of the said court to shares that were held in Switzerland was that the law of the place where the shares are located governs the transfer of ownership in those shares, unless the parties have agreed on a different choice of law in their documentation. He pointed out that the Supreme court decision cited by Ms. Oehri, "refers for the validity of the choices of law to Article 104 of the Conflict of Law or Rules Act …..*And there is a section 7.3 in the lower part of the case and the very last sentence of the Supreme Court's reasons says that without the choice of law of the parties, the question of transfer of ownership is governed by Swiss law as the law at the place where the shares were held. And then it refers to Article 100, first paragraph of the Act*."[73]

[170] Ms. Oehri was not specifically cross examined on her statements and conclusions at paragraphs 87, 88 and 89 of the Joint Expert Report and her reliance therein on Articles 15 and 154 of IPRG.

[171] In fact, Certificate No. 2 has been present in Switzerland in the physical control of Attendus, a Swiss trust company, for many years, and even after Attendus ceased to be the trustee of the Winkelried Settlement and Curatus was so appointed in 2001. The factual chronology shows that, upon its incorporation in BVI in 1995, Lark BVI, initially issued one bearer share certificate No.1, which was held by Froriep Renggli in Switzerland. Upon the cancellation of bearer share certificate No.1 in 1998, and the issuance of two new bearer share certificates Nos. 2 and 3, Certificate No. 2 remained for some time with Froriep Renggli, until it was delivered to Attendus (as trustee), who then held that certificate until February 2015 in Switzerland, when it was released to the Claimant's BVI lawyers, Appleby, and deposited with Lark BVI on 18 February 2015 for conversion of the 60 shares to registered shares, pursuant to the power granted under section 38(2) of the BVIBC Act and article 23 of the Articles of association of the Company.[74]. Accordingly, from 1998 to 2015, a period of some 17 years, Bearer Share Certificate No. 2 was physically in Switzerland and held, for most of that period, by Attendus, a Swiss trust company.

[73] pg. 154 L 20-25, pg. 156 L 1-2
[74] Vol. 3, Tab 4 pg. 1149-1151

[172] While this opinion by the Defendants Expert witness, at first blush, seems to accord with the submission of learned counsel for the Defendants based upon section 245 of the BVIBC Act, upon closer examination, it is clear that no such reliance on 'forum' considerations and principles of closer or closest connection, has been made by counsel in making this 'primary' submission. His submission, as I understand it, relies upon the meaning of section 245, which itself does not directly address issues or considerations of the appropriate forum. In short, it is my view that Ms. Oehri, while still recognizing the force and clarity of Art 100, is simply being thorough in putting forward the view of a limited number of respected authors, which are contrary to the express terms of Art. 100 IPRG, that the physical location of the share certificate is determinative. In doing so, Ms. Oehri has not pointed to any authoritative or conclusive statement of Swiss statutory or case law in support of that contrary view, and it certainly does not appear from the materials before me to be a widely held view among respected legal scholars and authors there. Accordingly, I do not accept this as being the prevailing position under Swiss law, and I accept the position to be as stated by Dr. Gross.

[173] With respect, I do not accept Ms. Oehri's opinion on this fundamental issue, the effect of which, in my view, does not accord with the legal position with regard to the application of the laws of the *lex fori*, and could lead to an absurdity. The effect of Ms. Oehri's opinion on this issue, is to apply the conflict of law rules of two different countries (BVI and Switzerland) to the same question of which law applies to the purported transfer, having agreed that this is solely a matter for determination under BVI conflict of law rules. Accordingly, I accept the position taken by Dr. Gross on this issue. I agree that any discussion and application of Swiss conflict of law rules, is irrelevant to this issue. If one was to adopt, as a correct statement of legal principle, the position as expounded by Ms. Oehri on this issue, it could, potentially, lead to a circuitous result, with the conflict of law rules of each country determining that the laws of another country applies, and so on and so on.

[174] Furthermore, matters relative to the legal effect of the Deed of Appointment (albeit made by Curatus, a Mauritius company) on the transfer of ownership of Certificate No. 2, and the issues of transfer of ownership of Certificate No. 2, whether as a direct or indirect possessor, and the additional issues of good faith, adverse possession of Certificate No. 2 under Article 728(1) Swiss Civil Code, and the effect of the Custody Holding Agreement between Attendus (a Swiss company holding Bearer Share Certificate No. 2) and the Claimant as it relates to or affect the

change of indirect possession from Curatus to the Claimant in Switzerland, all fall to be determined under the laws of Switzerland.

[175] I accept the position under Swiss law as stated by Dr. Gross.

Whether a Contract in Rem is a fourth legal requirement of a valid agreement under Swiss law and, if so, is an independent agreement necessary to establish it?

[176] Dr. Gross accepts (both in his first report and in the Joint Report) that the requirement of a separate "contract *in rem* is controversially discussed in Swiss doctrine" (see paras. 55 and 56 Gross Report, and para. 30 Joint Report). His understanding of the position taken by Ms. Oehri's on this aspect, is that a contract *in rem* is one of the requirements of a valid transfer of ownership in a moveable object, including bearer shares. In coming to this conclusion, she relies on an extract from SPOERLE[75]. When translated into English, it reads –

i. "*In addition to the transfer of possession, part of the doctrine and case law of the Federal Court require the conclusion of a contract in rem for the transfer of ownership of a chattel and thus also of securitized bearer shares. This is to be understood as an agreement in rem between the parties which aim to transfer ownership of the Chattel. This agreement usually – but not necessarily – coincides with the underlying transaction.* ***Accordingly to the view held here, however, and as agreed by the other important commentators, the parties also agree on the transfer of ownership when they agree on the underlying transaction. For this reason, the independent requirement of a contract in rem for the transfer if securitized bearer shares can be dispensed with***." (emphasis added)

[177] Accordingly, Dr. Gross concludes that: (1) there is no separate requirement of, or necessity for, a contract in rem, since "as a pure hypothetical additional agreement that is always included in the underlying agreement relating to the transaction;" (2) "even if a separate contract in rem is required, such contract coincides with the underlying transaction"; and (3) such a contract in rem does not have to be in written form, the parties may conclude such a contract tacitly".[76]

[75] see para. 32 Joint Report
[76] paras. 33 and 34 Joint Report

[178] As to whether a contract *in rem* is one of the legal requirements under Swiss law, Ms. Oehri, at paragraph 17.13 of her Supplemental Report states:-

> "*Furthermore, it needs to be pointed out that pursuant to a part of legal doctrine and case law of the Swiss Federal Court, the conclusion of an explicit in rem contract is required for the valid transfer of possession, i.e. an agreement between the parties aimed at transferring ownership rights. The contract in rem is controversially discussed in legal literature,* ***but Swiss case law clearly insists on this requirement****.*" (emphasis added)

[179] In support of these statements of principle, Ms. Oehri cites, at footnotes 17 and 18, (pg. 984) SPOERLE [77] and SCHWANDER. At paragraph 106 of her Separate Report, Ms. Oehri, while admitting that this issue is "controversially discussed in legal literature", opines that "there is no doubt that this requirement has to be fulfilled in order to confirm a transfer of ownership of Certificate No. 2."[78]

[180] It was concerning that, in the face of the clear words in SPOERLE highlighted above, Ms. Oehri, when pressed on this issue in cross examination by learned counsel Mr. Hocking for the Claimant, continued to insist that a separate contract in rem was an absolute requirement. It is only when asked by the Court whether in light of those words the requirement for a contract in rem could be "dispensed with", she answered: "*Yes, according to the opinion of SPOERLE…But his personal opinion is that a in rem contract is not necessary but this is his personal opinion*". [79] However, Ms. Oehri does go on in her Separate Opinion to conclude that, in the present case, a separate contract *in rem* is clearly necessary, "because the purported underlying transaction is not an agreement, but rather a unilateral declaration of Curatus (the Deed of Appointment). Furthermore, it cannot be confirmed that there was a (possessory) agreement between Curatus and [the Claimant]. As a result the requirement of an *in rem* contract plays an important role in the present case." (para. 107)

[181] On the matter of whether there is a 'tacit contract' or 'tacit agreement', Ms. Oehri concludes that "a tacit agreement cannot be affirmed". This is because "there is no evidence that [the Claimant] communicated the Custodian Holding Agreement to Curatus and in any event, in

[77] Exhibit 16 - omitting the portion of the passage highlighted above
[78] para. 106
[79] Transcript 3/09/19 pg. 58 L 7-18

light of the case law of the Swiss Federal Tribunal, the conclusion of an agreement could not be affirmed even if [the Claimant] had communicated the Custodian Holding Agreement to Curatus. In particular, an unequivocal meeting of minds between Curatus and [the Claimant] cannot be derived from the documents provided." (para. 108)

[182] In my view, having considered carefully the reasoning and conclusions reached by both experts on this issue, while the existence of a contract *in rem* may be a requirement of Swiss law for the transfer of ownership of an 'object' or chattel, there is no strict legal requirement under Swiss law for there to be an independently concluded contract *in rem* in order to transfer ownership in shares. This is the clear position as expressed by in the respected Swiss legal author SPOERLE, in the highlighted portion of the passage cited by and relied upon by both experts, and I so find. Furthermore, such an agreement, if required, can be part of the underlying transaction, whether termed a 'tacit agreement' or otherwise.

[183] As to the question of whether such an underlying or tacit agreement exists based upon the Deed of Appointment, I am inclined to and accept the opinion expressed and conclusion reach by Dr. Gross in his expert reports, as buttressed by his oral evidence at trial. As I understand it, a contract *in rem* is simply one which speaks clearly to the parties intention to transfer ownership of the moveable property (the shares), the subject matter of the transaction, from the transferor (or seller) to the transferee (or buyer).

[184] In the instant matter, such an intention can be, and in my view is, manifest from the terms of the Deed of Appointment, and the related written resolutions, made respectively in December 2003 and January and February 2004, by both the Claimant and Curatus, as trustee of the Winkelried Settlement. The Deed of Appointment clearly evidences in its provisions, in particular clause 2 and the Schedule thereto, an intention on the part of Curatus to transfer Bearer Share Certificate No.2 from the Winkelried Settlement, to the Claimant. Furthermore, this was backed-up by three written resolutions of Curatus, as trustee of the Winkelried Settlement, two made on 27 January 2004, contemporaneous with the execution of the Deed of Appointment, by which Curatus authorized the transfer of all of the assets of the Winkelried Settlement to the Claimant, and authorized any two directors to execute the Deed of Settlement, on behalf of Curatus, so as to give effect to such transfer.

[185] Even though the Claimant was not a 'party' to the Deed of Settlement in the legal sense, as traversed earlier in this judgment, that is not a legal requirement under Swiss law in order for the Deed of Appointment to be effective as a transfer of ownership of moveable property (the shares) to the Claimant, as at 27 January 2004. Moreover, by its written resolution dated 3rd December 2003, the Claimant resolved to accept "all capital and income of the Winkelried Settlement… as an accretion to the fund of the Foundation."[80] This resolution, while is does not refer specifically to the 60 shares in Lark BVI or to Bearer Share Certificate No. 2 evidencing those shares, as an asset of the Winkelried Settlement which the Claimant had resolved to 'accept', it is clear from the Custodian Holding Agreement between the Claimant and Attendus dated 5 February 2004 (stated to be effective as of 27 January 2004), that the Claimant had accepted the transfer from Curatus to it of Bearer Share Certificate No. 2 evidencing the 60 shares in Lark BVI, which had been effected by the Deed of Appointment. The Custodian Holding Agreement recites, as an existing fact, that the Claimant "is the owner" of the said 60 shares and Certificate No.2. Accordingly, by the terms of the Custodian Holding Agreement, the intention of Curatus to transfer Bearer Share Certificate No. 2 to the Claimant (via the Deed of Appointment), and the intention of the Claimant to accept the said transfer and asset, is clearly evidenced and acknowledged. In executing both the Deed of Possession and the two written resolutions, Curatus is also acknowledging that it is no longer the owner of Bearer Share Certificate No.2.

Did the legal title to Bearer Share Certificate No. 2 transfer from Attendus to Curatus in 2001 after Curatus was appointed the trustee of the Winkelried Settlement?

[186] It is the Defendants' submission that Attendus, the first trustee of the Winkelried Settlement, continued to hold the legal title in Bearer Share Certificate No.2 even after Curatus was appointed the new trustee, as Attendus continued to physically hold Certificate No.2 in Switzerland. Accordingly, Curatus never obtained legal title to Certificate No.2 and could not transfer legal title therein to the Claimant by virtue of the Deed of Appointment on or around 27 January 2004. In the circumstances, even if conversion or exchange for registered shares was permissible after the Transition Date, the Claimant could not be registered as the holder of the 60 shares in Lark BVI, and has no standing either to be registered as a shareholder of Lark BVI or to bring these proceedings.

[80] Vo.3, Tab 2, pg. 309

[187] In making this second standing point, the Defendants rely, in particular, upon the original wording of paragraph 5(i) of the Amended Statement of Claim by which it was first pleaded that Attendus held Bearer Share Certificate No.2 "on trust" for Curatus. They also rely on certain statements at paragraphs 9, 14 and 20 of the First Affidavit of Mr. Lance Dorian Ranger ("the Ranger Affidavit") filed in these proceedings on 14 November 2018.[81]. Dr. Gross stated at paragraph 4 of his First Report that he had prepared the his report "[p]roceeding on the assumption that the facts stated in the First Affidavit of Lance Dorian Ranger……as well as the facts provided to me by Counsel for the Claimant are true…" Important to the surrounding facts in this matter, is that Mr. Ranger, who is a solicitor, was, at the material times, both managing director of Attendus and a member of the board of the Claimant Foundation, including when the Deed of Appointment and the Custodian Holding Agreement were entered into.[82]. These facts are not controversial. [83]

[188] At paragraph 3 of the Ranger Affidavit he deposes –

> "*I am told that it has been suggested in these proceedings that Attendus continues to hold the legal title to the bearer share certificate no. 2 (Certificate No. 2) issued by [Lark BVI]. As I will explain, that is not correct. Title to Certificate No. 2 (and the shares which that certificate represents) transferred:*
>
> *(iv) to Curatus….. on or around 28th December 2001*
> *(v) and then from Curatus to the Claimant (the Foundation) on or around 27 January 2004.*
> (vi) *[not relevant]*"

[189] This is a clear and concise statement of certain facts, made on oath by the managing director of Attendus, who also happens to be a lawyer, a matter which counsel for the Defendants was careful to point out. He was not called or presented as a witness at the trial, but suffice it to be said that both sets of parties have relied on statements in his affidavit at the trial, as factual and legal matters upon which to mount certain submissions in support of their respective cases. Accordingly, Attendus is saying in these proceedings, by the affidavit of its managing director, that it divested itself of the legal title to Bearer Share Certificate No. 2 around 28 December 2001, to Curatus, who retained the legal title thereto until it divested itself of the legal title to the Claimant, on or around 27 January 2004, by appointing and transferring those assets to the Claimant under the Deed of Appointment. Essentially, this version of the facts

[81] Vol. 1A, Tab 26
[82] see para. 11 Ranger Affidavit – Vol. 1A, pg. 562
[83] Transcript 3/10/19 pg. 90 L 11-15

would appear, at first blush, to be contradicted by certain statements by Mr. Ranger at paragraphs 9 and 20 of the Ranger Affidavit.

[190] At paragraph 9 of the Ranger Affidavit, the deponent specifically addresses the transfer of legal and beneficial ownership from Attendus (of which he was at the material time the managing director) to Curatus (a company with which Attendus and him have worked closely –see para. 7). Paragraph 9 reads -

> "*It follows that with effect from that date, Curatus became the legal and beneficial owner of the shares issued by Lark BVI, and of Certificate No. 2, albeit that Attendus continued to hold them on behalf of Curatus* ***on a bare trust*** *for Curatus*." *Throughout all of this time, Certificate No.2 continued to be held by Attendus for the benefit of the Winkelried Trust*." (emphasis added)

[191] Dr Gross was cross examined on his assumptions as gleamed from the Ranger Affidavit and, in particular, paragraphs 3, 9,14 and 20 thereof. Specifically, it was suggested to Dr. Gross by learned counsel for the Defendants, that paragraph 9 is confirming by the use of the term "bare trust", that Attendus remained the legal owner of Bearer Share Certificate No. 2, notwithstanding it ceased to be the trustee of the Winkelried Settlement, and that the legal title did not pass to Curatus. In my view, the language used at paragraph 9 of the Ranger Affidavit is not conclusive or determinative that Attendus continued to be the legal owner of Bearer Share Certificate No. 2. It is open to the interpretation that, notwithstanding that the legal title in fact passed to Curatus in 2001, Attendus continued to hold Bearer Share Certificate No. 2, not as legal owner, but as a form of 'custodian' under a bare trust for Curatus, as the new trustee of the Winkelried Settlement and legal owner of Share Certificate No.2; and, further, that Attendus held Certificate No. 2 for and at the direction of Curatus.

[192] As to paragraph 3 of the Ranger Affidavit which states, in essence, that the bearer shares were transferred to Curatus "on or around 28th of December 2001", Dr. Gross makes clear that while the transfer to Curatus is part of the assumptions coming from the Ranger Affidavit, it is not a necessary element for his conclusion. [84]

[193] In cross examination [85]Dr Gross states-

[84] Transcript 30/09/19 pg. 137 L 24-25; pg. 238 L 1
[85] Transcript 30/09/19 pg. 138 L 4-17

"*..what is necessary for my conclusion is the fact that Attendus holds physical possession of the share. And that Attendus holds the physical possession of the share not for itself but for Curatus. And ….. that subsequently Attendus holds the asset, the share certificate for Sempacher Foundation [the Claimant]. And then the documents that are attached to Mr. Ranger's affidavit, they are to a certain extent important to my conclusions. But the fact that the share certificate [sic] were transferred to Curatus Trust Company in the first place, that's part of the assumptions that's correct. But my conclusions would still hold if there was an ambiguity around there."*

[194] In expounding on the principle of Swiss law that there is a legal presumption, albeit one which can be displaced, that the physical holder of an asset is the legal owner, Dr Gross, in cross examination states [86]-

"*Again, that's part of the assumptions, but the assumption that there was a transfer from Attendus to Curatus is not necessary for my conclusion [as] (a) the fact that Attendus immediately holds the asset [the shares] and it does hold the asset first not for itself, but for Curatus. That's important. Because from that fact under Swiss law you can derive that there is a presumption that Curatus ………holds legal title in the share, that's a necessary element."*

"*Under Swiss law, ……there is a presumption that the person or the entity holding an asset is the owner of that asset. And if a person holds an asset on behalf of somebody else, then there is a presumption that that somebody else is the owner of that asset. That's a presumption that can be reversed but it's possible to prove otherwise.*"

"*And here Attendus, I understand that Attendus is the physical possessor of the share here in Switzerland and under Swiss law, then there will be a presumption of the ownership of Attendus. But since Attendus says it does not hold the share for its own behalf but first on behalf of Curatus, and subsequently on behalf of Sempacher Foundation, there is a legal presumption under Swiss law that first Curatus was the legal owner and then subsequently Sempacher was the legal owner*."

"*If Attendus stated that it holds the certificate for its own benefit, then the presumption in favour of Curatus and Sempacher Foundation would no longer exist*"

"*Again there are presumptions. So if Attendus says that, if Attendus has physical possession of the asset and says that it is the owner and nobody else has another rank above ownership, then there will be [a] presumption under Swiss law that Attendus is the owner. That is not how I read Mr. Ranger's affidavit, but more importantly, that is not how I read the documents that were attached to his affidavit*."

[86] Transcript 30/09/19 pgs. 139 beginning a L 2 to pg. 141 ending at line 14

[195] Specifically with regard to the statement at paragraph 9 of the Ranger Affidavit, Dr. Gross, in cross examination, stated [87] –

> "*Just looking at the language in [paragraph] 9 here, Attendus says, I can say that this is Attendus speaking here, Attendus says that Curatus as from that point in time on, that's December 28th 2001, that Curatus was, in the view of Attendus, the legal and beneficial owner of the shares, and that Attendus continued to hold them on behalf of Curatus based on a special legal relationship.*"
>
> *"That would be a transfer under Swiss law of the ownership and that would create the presumption that Attendus is the immediate possessor of the good and since it holds it on behalf of Curatus, that Curatus would be the owner of the shares."*

[196] At paragraph 20 of the Ranger Affidavit he deposes –

> *"To avoid any doubt, on behalf of Attendus, I confirm that Attendus considers itself to have no legal or beneficial interest in the shares issued by Lark BVI or in Certificate No. 2,* ***with effect from the date that Attendus delivered up Certificate No. 2 as requested, discharging its obligations under the Custodian Agreement****. I have enquired of my colleagues at Curatus and confirm that they share the same view: i.e. that neither of Curatus not Attendus have any continuing legal or beneficial interest in Certificate No. 2 and that the legal and beneficial interest in those shares and the associated certificate passed to [the Claimant], as the Custody Agreement* ***records***." (emphasis added)

[197] Dr. Gross was cross examined by learned counsel for the Defendants about the above highlighted portion of paragraph 20, which counsel for the Defendants surmised was inconsistent with paragraph 9 (which speaks to the existence of a 'bare trust') since paragraph 20 states that legal title passed from Attendus "as of the date that Attendus delivered up Certificate No. 2 as requested". This would have been in 2015 well after the Deed of Appointment and the Custodian Holding Agreement of 2004. Dr. Gross responded by stating that the starting point is paragraph 16 of the Ranger Affidavit, which speaks to disputes between the holders of bearer shares certificate Nos. 2 and 3 in Lark BVI arising in 2015, and the Claimant taking steps to deliver Certificate No. 2 to Lark BVI for conversion to registered shares. Dr. Gross also responded that paragraph 9 is very clear "*where it says that Attendus holds the share on behalf of Curatus and that Curatus is the legal owner of the shares. So whether true or not, Attendus believes that the shares are owned by Curatus and holds them in*

[87] Transcript 30/09/19 pg. 142 L 8-20

*a **so-called tier possession relationship** on behalf of and for Curatus, which again under Swiss law would create that presumption of ownership of Curatus*." (emphasis added)

[198] Having considered the various opinions as to Swiss law and, in particular, the statements by Mr. Ranger in the Ranger Affidavit as to what occurred in 2001 when Curatus replaced Attendus as the trustee of the Winkelried Settlement, I find as a fact that legal title to Bearer Share Certificate No. 2 did transfer from Attendus to Curatus on or about 28 December 2001 when a separate 'Deed of Appointment and Retirement' was entered into pursuant to which Attendus and Brompton resigned as trustee of the Winkelried Settlement. Thereafter, Attendus continued thereafter to hold Bearer Share Certificate No. 2, in an administrative capacity, for an on behalf of Curatus, effectively as its custodian of the said certificate. This is in keeping with the clear statements of fact by Mr. Ranger deposed to as paragraphs 3 and 9 of the Ranger Affidavit. Furthermore, it would, in my view, be passing strange for Attendus, who from 2001 had no legal connection or status with the Winkelried Settlement, having ceased to be the trustee thereof, to continue to hold legal title to the Winkelried Settlement's trust property, having resigned from its role as trustee or co-trustee, pursuant to which or in performance of which it had originally held legal title to bearer Share Certificate No.2 with the Winkelried Settlement as its beneficial owner.

[199] I come to this conclusion notwithstanding the statement at paragraph 20 of the Ranger Affidavit, which seems to offer a different position. In my view, what that statement is really addressing is that from the date when Attendus sent Certificate No. 2 to the Claimant (as the new legal owner) it ceased to have any 'interest' in that certificate. It is not saying that it necessarily retained legal ownership after Curatus was appointed trustee in 2001 until when it delivered the certificate to the Claimant in 2015.

Did legal title in Bearer Share Certificate No. 2 transfer from Curatus to the Claimant in January 2004 and did Attendus become the direct possessor and the Claimant the indirect possessor?

[200] As to the transfer of Certificate No. 2 from Curatus to the Claimant, Mr. Ranger deposes at paragraph 10 of the Ranger Affidavit as follows:-

> "*On 27th January 2004 Curatus took the decision to appoint the entirety of the assets of the [Winkelried Settlement] including, specifically, the shareholding in Lark BVI, to [the*

Claimant]. I exhibit at page [3] a copy of the Deed of Appointment, and at [1-2] the relevant documents which effected that appointment."

[201] Indeed, the clear evidence of this decision taken by Curatus, as the trustee of the Winkelried Settlement, is to be found both in the written resolution of Curatus made 27 January 2004 resolving "**t*o appoint and transfer*** *all assets of the Trust out of the Trust to [the Claimant]*"[88]; and in the terms of the Deed of Appointment by which Curatus, as trustee of the Winkelried Settlement, purported to transfer, specifically, Bearer Share Certificate No.2, representing the 60 shares, to the Claimant.

[202] It is somewhat curious that, when cross examined about the relevant chronology of facts, documents, and knowledge, and what they clearly demonstrate, that is, (i) that both the Claimant and Curatus knew that Curatus was trying to transfer Share Certificate No. 2 to the Claimant; (ii) the Claimant must have known that Attendus had the Share Certificate; and (iii) Attendus must have known that Curatus was trying to transfer the Share Certificate to the Claimant, Ms. Oehri, while accepting these facts, retorted: "*I cannot say if they are true or not*."[89]

[203] These salient facts and clear terms of the specific agreements have not been seriously challenged by the Defendants themselves. The only person who has sought to cast some doubt on them and their 'truthfulness', is Ms. Oehri. In my view, it was not open to Ms. Oehri, as an expert on Swiss law, to seek to cast a shadow of doubt on the accuracy of and truthfulness of these facts and documents, especially when none of the parties to this litigation, including the Defendants, have done so. Instead, she ought to have assumed, for the purpose of her expert reports on Swiss law, there accuracy and authenticity, that the agreements mean what they say in their clear and unambiguous language, and to opine on the consequences and legal effect of them under Swiss law.

[204] Ms. Oehri was also cross examined about this passage at paragraph 17.12 of her Supplemental Report [90] dealing with the transfer of possession of Bearer Share Certificate No.2 to the Claimant: "*However, the Deed of Appointment and the behavior of Curatus or [the Claimant]* ***obviously*** *do not indicate either that the parties did intend that Attendus exercises*

[88] Vol. 3 Tab 2 pg. 316
[89] Transcript 3/10/19 pg. 91 L 6-21
[90] Vol. 1B pg. 982

possession of Bearer Share 2 on behalf of [the Claimant] after the transfer of ownership." (emphasis added). Again, this was demonstrably speculative and patently wrong. To describe her conclusion as 'obvious', was quite a stretch, as no such intention can reasonably and fairly be garnered from either the Deed of Appointment or the 'behaviour' of Curatus. To the contrary, the language of the Deed of Appointment clearly and unequivocally speaks to an intention by Curatus to transfer ownership of Bearer Share Certificate No. 2 to the Claimant. Furthermore, the Custodian Holding Agreement is clear evidence of Attendus' acknowledgement of the Claimant's title to Bearer Share Certificate No. 2, and of Attendus' holding of it as custodian for the Claimant, at least from 5 February 2004.

[205] Curiously to say the least, when learned counsel for the Claimant suggested to Ms. Oehri that, in light of the clear documentary evidence and facts, what else could possibly have been intended, this was met with a prolonged silence from Ms. Oehri[91], leaving the Court with the impression that she really had no answer or no proper contrary position thereto. When finally pressed for an answer by counsel, she resorted to asking for the question to be repeated, and then, essentially, repeating in answer thereto, what she had said at paragraph 17.12 of her Supplemental Report, underscoring that such a conclusion was "obvious".

[206] In further cross examination on whether an intention by Curatus to transfer possession of Certificate No. 2 to the Claimant was evident, Ms. Oehri's [92] drilled down on her conclusion that it is "not clear" from the Deed of Appointment -

> "*My answer is that in the Deed of Appointment, Curatus did not mention to the Claimant that the Certificate No. 2 was held by Attendus and following from this, it's not clear to me whether Curatus intended to transfer Certificate No. 2 [via] a deed of possession for [the Claimant].*"

And in answer to a question from the Court[93] –

> "*Yes, and since Curatus did not mention it [that the Share Certificate was with Attendus] to [the Claimant] it is my conclusion that Curatus [did not intend] to transfer the Share Certificate.*"

[91] pg. 92 L 4-24
[92] pg. 94 L 6-11
[93] pg. 95 L 14-25, pg. 96 L1-5

[207] In my view, Ms. Oehri's statement at paragraph 17.12, and her conclusion, is entirely speculative, without any proper basis or foundation, either in the documentary evidence or the surrounding circumstances, and is plainly wrong and erroneous. There was a clear intention from the Deed of Appointment (particularly clause 2 thereof) that Curatus, as the legal owner of Bearer Share Certificate No. 2, intended and was trying to appoint and to transfer it to the Claimant. The fact that the Claimant was in possession of the Deed of Appointment even though strictly not a party executing the document, is itself an indicator that the Claimant knew of it and what Curatus intended to and had done. This intention to transfer both legal ownership and possession, can also be deduced from the Claimant's written resolution of 3 December 2003. If indeed there was any doubt about this and that Attendus intended to hold Certificate No. 2 as 'custodian' for and on behalf of the Claimant, those doubts were put to rest by the Custodian Holding Agreement. By its terms, Attendus (i) acknowledged the ownership of Share Certificate No. 2 by the Claimant and implicitly the intention of Curatus as the then legal owner to transfer ownership and possession of the shares to the Claimant; (ii) the effectiveness of the Deed of Appointment in doing so; and (iii) that henceforth it held Certificate No. 2, not as legal owner, but as custodian on behalf of the Claimant.

[208] Dr. Gross was also cross examined in relation to paragraph 14 of the Ranger Affidavit where the deponent states-

> "*On any view, I believe, that the Custodian Agreement would have acted to transfer title to Certificate no. 2 and the shares to [the Claimant]* ***with effect from that date*** *even if (for some reason which I do not understand) title was not previously transferred by the appointment of the assets of the Winkelried Trust*." (emphasis added)

[209] Here, Dr. Gross confirms his opinion that under Swiss law the transfer of legal title in Bearer Share Certificate No. 2 from Curatus to the Claimant would have taken place by virtue of the Deed of Appointment and hence, earlier than when the Custodian Holding Agreement was executed by Attendus and the Claimant. [94] Dr. Gross puts his position on this aspect beyond any doubt –

> "*Legal title is transferred by the Deed of Appointment. So even before the, before Attendus as the company holding the asset is being informed of the Deed of Appointment, and if the Custodian Agreement is not, could be such notification of the Deed of Appointment. I believe that Mr. Ranger, if my memory serves, was on the*

[94] see Transcript 30/09/19 pages 144 L 23-25 and 145 L 1-9; and pg. 151 L 6-13) . At page 146 (L 14 to 25

board of Attendus and on the board of [the Claimant] Foundation. So Attendus would have known of [the Claimant]. So Attendus would have known immediately that the share certificate was being transferred from Curatus to [the Claimant]. And the Custodian Agreement is simply an after the fact agreement that confirms that relationship."

[210] Specifically on the question of the kind and quality of evidence necessary before a Swiss court to prove or to establish 'legal ownership' of an asset, Dr. Gross states in cross examination [95]-

"*If you talk about ownership, our special features in Swiss law that would ease the burden of [the] court to find ownership with a particular party, and if that was your question, then I would like again to reiterate that………under Swiss law it is not necessary to trace ownership of a good until the time it was manufactured… The fact that I possess [my] tie would be sufficient for a Swiss court to conclude ownership unless there was conclusive evidence that it's not correct. And if you speak about a bearer share then possession of that bearer share would indicate great presumption on behalf of legal possession, of legal ownership in that bearer share.* ***And if you talk about our Act here, a Swiss court, in my experience, would be satisfied in finding ownership in [the Claimant] if the person holding the asset, say Attendus, says it hold the asset on behalf of [the Claimant]*** *unless there was conclusive evidence that something went wrong, say that the shares had been stolen or whatever. But the legal presumption would be sufficient for the Swiss court to find legal ownership in the person holding the asset* ***or in the person on whose behalf the asset is being held by somebody else****, in our case, Attendus*." (emphasis added)

[211] In support of this statement of Swiss law, Dr. Gross relies on Article 930 of the Swiss Civil Code[96], which states: "*The possessor of a chattel is presumed to be its owner*."

[212] The Defendants also raise a technical point based on the definition of "bearer share" in section 2(1) of the BVIBC Act, which states-

"bearer share' means a share represented by a certificate which states, that ***the bearer of the certificate is the owner of the share*** *and includes a share warrant to bearer.* (emphasis added)

[213] Accordingly, the Defendants submit that the person in physical possession of the bearer share certificate is the legal owner of the bearer share represented by that certificate. Since Attendus retained possession of Bearer Share Certificate No. 2 until 2015 when it was sent to the

[95] Transcript 30/09/19, pg. 147 L 11-25 and pg. 148 L1-12
[96] Vol. 1B, Tab 38, pg. 1371

Claimant, Attendus was the legal owner of those shares, legal ownership never passed to Curatus in 2001, and thus Curatus could not have transferred legal ownership to the Claimant on or around 27 January 2004 when the Deed of Possession was entered into by Curatus.

[214] In response to this technical point, the Claimant's submit that (i) any question of the transfer of legal ownership in January 2004 was governed by the IBC Act, as the BVIBC Act was not then in force, and the definition in section 2(1) was not then applicable; (ii) that possession of a bearer share certificate is not synonymous with ownership of the bearer share represented by that certificate; (iii) Bearer Share Certificate No. 2 does not "state that the bearer of the certificate is the owner of the share" as is required by section 2(1); (iv) the requirement under the BVIBC Act for bearer share certificates to be deposited with a 'custodian' does not make that custodian the legal owner of the bearer shares; (v) if possession is to be equated with ownership, then it would not be possible in law to create a trust over a bearer share in favour of the beneficial owner, a matter which is entirely possible in law (see ***Merlo v Duffy***)[97]; (vi) bearer shares are chattels and are in the nature of negotiable instruments, the fundamental characteristic of bearer shares being that they are transferrable by 'delivery' (s.31 IBC Act), which includes both physical delivery and 'constructive delivery', as in the case where upon the sale of goods in a warehouse from A to B, the warehouseman acknowledges that he now holds the goods not for the transferor 'A', but for the transferee 'B'. Another example of constructive delivery is where a solicitor holds a bearer share for his client, the solicitor is not the legal owner of the bearer share, and where his client sells the bearer share to another, the solicitor continues in possession of the bearer share certificate on behalf of the transferee and not as the legal owner of the bearer share.

[215] I do not find any merit in the submissions of the Defendants based upon the definition of 'bearer share' in section 2(1) of the BVIBC Act. That definition is wholly inapplicable for all the reasons advanced on behalf of the Claimant in their Trial Written Submissions at paragraphs 43 and 44, and in their Closing Written Submissions at paragraphs 16 and 17. I therefore conclude that, subject to the issues of Swiss law regarding the effectiveness of the transfer of legal title in Bearer Share certificate No. 2 on around 27 January 2004 from Curatus to the Claimant, the physical possession of bearer shares certificate in a BVI company is not always synonymous with legal ownership of those shares, and the physical delivery of such certificate

[97] [2009] EWHC 313 Ch (at paragraph 4)

from one person to another is not the only way to effectively transfer legal ownership in those shares.

Where the Legal Requirements under Swiss Law for a Valid Transfer of Ownership and Possession of Certificate No. 2 from Curatus to the Claimant satisfied?

[216] Under Swiss law, as is common ground with both experts, there are three requirements for a valid transfer of ownership in a chattel. These are:-

(1) there must be a valid transaction;
(2) transfer of possession either physically or by deed of possession; and
(3) the transferor is the lawful owner.

[217] As to requirement No. 2, the experts are agreed that for there to be a transfer of possession by deed of possession, the following elements must be established:-

(a) that the transferor is the owner and indirect possessor of the object;
(b) a third party is the immediate but derivative possessor of the object by virtue of a special legal relationship and recognizes the ownership of the transferor;
(c) there is an agreement between the transferor and the transferee that the third party continues to exercise its possession on behalf of the transferee instead of on behalf of the transferor (*Besitzanweisung;* "deed of assignment").

[218] It is to be noted that both experts disagree on the "level of evidence' required to prove the third requirement for a valid transfer of possession by deed of possession. It is also noted, that the experts agree that "*the question of whether the Deed of Appointment ….is a valid title to transfer ownership of Certificate No. 2 is not subject to Swiss* law." This is supposedly so, because the Deed of Appointment is not governed by Swiss law, it having been made or entered into by Curatus, a Liechtenstein company. Likewise, both experts agree that whether Mr. Ruma Kissoondharry and Mr. Ian Trevor Smith was duly authorized to "sign and affix the common seal of Curatus on the Deed of Appointment", is also not subject to Swiss law. I shall consider each of the requirements for a valid transfer of ownership and for a valid transfer of possession by deed of possession.

Important Principles of Swiss Property Law – Transfer of Ownership and Possession

[219] The 60 bearer shares in Lark BVI are "certified" bearer shares under Swiss law, that is, they are incorporated into a document, that is, Certificate No. 2. This is uncontroversial. I accordingly accept that under Swiss law the transfer of 'certified' bearer shares is governed by

Swiss property law. Accordingly, ownership of them is transferred by transferring the ownership in Certificate No.2 in accordance with the requirement of Swiss law.

[220] It is a fundamental principle or characteristics of Swiss law, that the Civil Code differentiates between ownership (*Eigentum)* and possession (*Besitz*). The former grants to the owner full rights *in rem* and powers over the moveable object, and acts against everyone (*erga omnes*); and the latter, 'possession', is the "effective control of a person over an object. Article 919(1) of the Swiss Civil Code[98] states: "***Effective control over a thing constitutes possession of it***." Thus, it has been authoritatively stated that possession is "*neither a mere fact not a right, but a fact determined by the legal relationships, from which different legal consequences result depending on these legal relationships*"[99]. My understanding of these principles is that possession of an object is not limited to or circumscribed by physical possession of it, but importantly by the exercise of "effective control", in the legal sense, over it, albeit the object is in the actual physical custody of another who acknowledges the title or possession of the owner.

[221] Swiss law recognizes the principle of "tiered possession", that is, the possibility that several persons, not equal to each other (co-possessors), can in the legal sense be possessors of the same object. Article 920 SCC states- (1)"*Where a possessor transfers an object to a third party in order to confer on him or her limited right in rem or a personal right, both are considered to have possession*"; and (2) *"The owner of the object has direct possession and any other possessor has derivative possession*." This means that both "are legally equal as possessors."[100]. Accordingly, pursuant to Article 920(2) SCC, the owner of an object is called the "independent possessor", and any other possessor is called the "derivative possessor".

[222] In this matter, Dr. Gross surmises that Attendus first held Certificate No. 2 as the independent possessor, until 2001 when Curatus became the trustee of the Winkelried Settlement and a Deed of Possession and Retirement was entered into by Attendus. Thereafter, Curatus became the independent possessor and Attendus the derivative possessor, until January 2004 when Curatus transferred legal ownership in Certificate No. 2 to the Claimant and the Custodian Holding Agreement was signed on 5 February 2004 between Attendus and the

[98] Vol. 1B, Tab 34 pg. 764
[99] see Stephanie Hrubesch-Millauer –Exhibit BG-8 Dr. Gross First Report
[100] Dr. Gross Frist Report para. 36, pg. 728

Claimant. Thereupon, the Claimant became the legal owner and independent possessor, and Attendus the derivative possessor of Certificate No.2.

[223] Furthermore, pursuant to Swiss property law, possession can be 'immediate" (*unmittelbarer) or* "indirect*' (mittelbarer*). The former applies were a person exercises immediate control over an object, and the latter exists where the person does not exercise immediate control over the object himself, but through another person ("the possessor agent") who has a limited right *in rem* or a personal right. Thus, in Dr. Gross' view, the Claimant became the indirect possessor and Attendus the direct possessor of Certificate No. 2, when ownership was transferred to the Claimant by Curatus in January or February 2004.

[224] Article 921 SCC stipulates: "*Possession is not lost if the exercise of effective control is impeded or interrupted by occurrences of a temporary nature*." As to the transfer of possession, Article 922 SCC provides-

> (1) *Possession is transferred by the delivery of the object itself or of the means by which the recipient may gain effective control of it.*
> (2) *Transfer is complete once the transferee is able to exercise effective control over the object with the consent of the prior possessor*.

[225] As to a transfer of possession without the physical transfer of possession of the object, Article 924 (10) and (2) provides-

> (1) *Possession of an object may be acquired without physical delivery if a third party or the transferor himself retains possession of it in terms of a special legal relationship*.
> (2) *The transfer is not binding on the third party who retains possession of the object until he or she has been notified thereof by the transferor.*

[226] These are important provisions of Swiss property law, to be applies in the context of the instant matter to determine whether, by virtue of the conjoint effect of the Deed of Appointment by which Curatus transferred title to bearer Share Certificate No. 2 to the Claimant, and the Custodian Holding Agreement by which the Attendus as the physical possessor of Certificate No. 2 acknowledged the ownership of the Claimant, there was an effective transfer of possession of Certificate No. 2 to the Claimant as the independent indirect possessor, albeit Attendus remained the derivative direct possessor.

1. A Valid Title of Acquisition

[227] This first requirement relates to the validity of the underlying transaction, by which it is said ownership in the object or chattel was transferred from a person who is the owner to a person who is either the purchaser or transferee. The underlying agreement must be of a contractual nature, though the requirement for 'consideration' is not one which is recognized under Swiss law, and hence is not a legal requirement for the validity of the underlying agreement.

[228] It is essential that the seller or transferor must have the "power of disposition" of the object or, in the absence of such a power, the purchaser or transferee must have acted in 'good faith' with regard to the legal competence of the transferor. As this relates to bearer shares in a BVI company, which are transferrable by 'delivery' of the share certificate, the power of disposition is clear where the person physically holding the certificate is the legal owner, or where that person, though not the legal owner, is duly authorized to effect a transfer of ownership of the bearer shares, either by physical delivery of the certificate to the transferee or to his custodian who accepts the title of the legal owner, or by the person in possession of the certificate acknowledging the new owner as the legal owner and that he holds the certificate under some special relationship with the new owner.

[229] Having considered the evidence of both Swiss law experts, I am satisfied that the Deed of Appointment can and does constitute a valid transfer of legal title in Bearer Share Certificate No. 2 from Curatus, as the indirect possessor to the Claimant, which then became the indirect possessor. In this regard, I accept the evidence of Dr. Gross that the Deed of Appointment dated 27 January 2004 "could represent a valid title of acquisition" of Bearer Share Certificate No. 2 by the Claimant, [101]

[230] In my view, this is clearly made out by Recital B and clauses 1,2, 3 and Schedule 2 of the Deed of Appointment, which are set out above and do not bear repeating here. As to the power or authority of Curatus to enter into the Deed of Appointment and to transfer the assets of the Winkelried Settlement to the Claimant under the Deed of Settlement and Retirement or otherwise, these are matters which are clearly governed by the law of Mauritius, upon which neither expert was required to opine. Such authority must therefore be presumed or assumed, unless there is clear evidence of lack of such authority, of which none has been presented in

[101] Vol. 1B, Tab 34, First Report para. 61.

this matter. Furthermore, there is no evidence before me to suggest that the Claimant accepted the transfer of ownership of Certificate No. 2 knowing that Curatus either did not own the said bearer shares or had no authority to effect the transfer thereof from the Winkelried Settlement to the Claimant. I therefore agree with Dr. Gross that the Deed of Appointment evidenced a clear intention on the part of Curatus to transfer ownership of Bearer Share Certificate No. 2 to the Claimant (para. 64), and "*constitutes a valid title of acquisition within the meaning of Swiss law*." (para. 67)

2. Transfer of Possession

[231] As the physical transfer of possession of Bearer Share Certificate No.2 from Curatus to the Claimant did not take place, it is accepted that the principles of Swiss law relating to a 'tradition surrogate' must be satisfied in order for this second requirement to be met. Swiss law on 'tradition surrogates' (addressed at paragraphs 44 to 54 of Dr. Gross' Separate Opinion) specifically identified one such tradition surrogate, namely, by deed of possession. Of specific interest is the characterization of a 'deed of possession' by Stephanie Hrubesch-Millauer/Barbara Graham-Siegenthaler/Vito Roberto, Sachenrecht 5th Ed. 2017 n.05.52 (Exhibit BG-15):–

> "*In the case of a deed of possession, the object is in the possession of a third party*, *where it is to remain. The only difference is that in future the third party will no longer hold the property on behalf of the seller but on behalf of the buyer. For the transfer of ownership, it is therefore sufficient for the seller and the purchaser to have the common intention of such transfer*." [102]

[232] The operation of a deed of possession relates to a tiered possession, whereby an independent indirect possessor who has derivative immediate possession of the object, transfers the object to the custody of a third party who has derivative immediate possession of it. In such a situation, possession of the object passes *"as soon as this has been agreed between the seller and the purchaser. Notification of the third party is not necessary for the transfer of the object to the purchaser as a new independent and indirect possessor. On the other hand, it is necessary that the third party (as the derivative immediate possessor) recognizes the dominion of the seller. He must own for the seller. If this condition is not (no longer) met, the possession of the indirect possessor is lost – irrespective of the lawfulness of the third party's actions*." [103]

[102] Translation at para. 47, First Report Dr. Gross

[103] para, 48, decision of the Swiss Federal Court - Exhibit BG-16 pg. 913

[233] Have the three requirements under Swiss property law for there to be an effective transfer of possession of Bearer Share Certificate No. 2 from Curatus to the Claimant been made out as a matter of Swiss law I conclude that they have been met. In doing so, I accept the analysis and conclusion reached in relation to each of these three requirement by Dr. Gross, as set out at paragraphs 68 to 77 of his First Report, and in his Separate Opinion.

[234] As to the first requirement that Curatus must have been the "owner and indirect possessor" of Certificate No. 2 as at the date of the Deed of Appointment, I have already concluded that legal title in the said bearer shares transferred from Attendus to Curatus in 2001 when Attendus and Brompton retired as the trustees, and Curatus became the sole trustee, of the Winkelried Settlement. Thereafter, Attendus became under Swiss law the derivative and immediate possessor of Certificate No. 2, subject to the order and direction of Curatus, and Attendus therefore recognized the dominion of Curatus over Certificate No. 2. This change of legal relationship by Attendus is sufficiently evidenced by the First Affidavit of Lance Ranger (paras. 7,8 & 9), who at the material times was the managing director of Attendus and a member of the board of the Claimant. In my view, it would be passing strange for Attendus to cease to be the trustee of the Winkelried Settlement, but nevertheless to continue to hold the legal title to the sole remaining or most valuable asset of the Winkelried Settlement, namely, Bearer Share Certificate No. 2. Accordingly, from December 2001, Curatus became the owner and indirect possessor of Certificate No. 2. Thus, Curatus could in January 2004 transfer legal title in the bearer shares to the Claimant.

[235] I also accept the evidence of Dr. Gross that "parties can by their actions tacitly show their intention that the third party will remain the derivative and immediate possessor of the to be transferred object." [104]The clear recognition by both Attendus and the Claimant of the Claimant's title to Bearer Share Certificate No. 2 and the intention that Attendus would continue, certainly from 5 February 2004, to hold Certificate No. 2 as the derivative and immediate possessor on behalf of the Claimant, is conclusively evidenced by the Custodian Holding Agreement executed by both Attendus and the Claimant[105]. By the Custodian Holding Agreement, Attendus clearly recognized the ownership of the Claimant and its status as 'custodian' of Bearer Share Certificate for and at the direction of the Claimant.

[104] para. 71
[105] paras. 71 and 72 First report Dr. Gross

3. Contract in rem

[236] As to the requirement for a contract in rem, as found above, I am satisfied that under Swiss law such agreement need not be separate from the underlying transaction. Further, in the instant matter this requirement, to the extent that it need to be satisfied as a requirement of Swiss law, has been met by the terms of the Deed of Appointment which evidences a clear intention on the part of Curatus to transfer ownership of Bearer Share Certificate No. 2 from Curatus to the Claimant. The intention for the Claimant to receive or to become the owner of Certificate No. 2 is evidenced by the surrounding circumstances, including the Custodian Holding Agreement whereby the Claimant and Attendus declared and acknowledged the Claimant to be the owner of Certificate No. 2, and from the written resolution of the Claimant passed in September 2003 to acquire all the assets of the Winkelried Settlement. I therefore agree with and adopt the conclusion reached on this aspect by Dr. Gross at paragraph 81 of his First Report: " *Accordingly, a valid contract in rem between Curatus and [the Claimant] tacitly existed*."

[237] Accordingly, I conclude that, based upon Swiss law, all three requirements for a valid transfer of possession of Bearer Sharer Certificate No. 2 by virtue of a tradition surrogate, namely, a deed of possession or deed of assignment, have been met. Likewise, I conclude and I so find, that all three requirements of a valid transfer of ownership under Swiss law have been met.

Acquisition by Good Faith

[238] As to the acquisition of ownership by 'good faith', in circumstances where 'hypothetically' ownership had not been transferred to the Claimant by virtue of the Deed of Appointment[106], I agree with and adopt the conclusion reached by Dr. Gross as to the applicable Swiss law. Thus, a party who has received a chattel believing in good faith that it is the owner of that chattel, is protected in its possession of that chattel by the rules of 'good faith' pursuant to Article 714(2) SCC, which states-

> "*A person who in good faith receives possession of a chattel as owner will become the owner even if the transferor is not authorized to alienate it as soon his or her possession of it is protected according to the provisions governing possession*."

[106] see para. 59 to 74 Separate Opinion of Dr. Gross in the Joint Expert Report

[239] Reliance was also placed by Dr. Gross at paragraphs 61 to 63 on Article 3(1) (presumption of good faith), Article 930(1) (the possessor of a chattel is presumed to be the owner), Article 933 (person who takes possession in good faith in order to become the owner is protected even where the transferor had no authorization to effect to transfer). In this regard, I respectfully do not accept, and reject entirely, the speculative statement by Ms. Oehri that the conclusion by Attendus and the Claimant of the Custodian Holding Agreement, is somehow proof that the Claimant was unsure that ownership of Certificate No. 2 had been transferred to it. To the contrary, the terms of the Custodian Holding Agreement clearly shows that the Claimant had become the owner of Certificate No. 2 and had thereby established and formalized a 'special relationship' with Attendus, being that of the derivative and direct possessor of its (the Claimant's) property. I can find no evidence of lack of good faith on the part of the Claimant and none has been put before me. Accordingly, I conclude, as a matter of Swiss law, that even if the Claimant did not validly acquire ownership of Bearer Share Certificate No. 2 by virtue of the Deed of Appointment, it had acquired legal ownership of the said Share Certificate in 'good faith' or pursuant to the principles of good faith under Swiss law.

Acquisition by Adverse Possession

[240] With regard to the acquisition of legal title to Bearer Share Certificate No. 2 based upon the principles of 'adverse possession', Article 728(1) SCC states-

> "*If a person has possessed a chattel belonging to another person uninterruptedly and without challenge for five years believing in good faith that he or she owns it, he or she becomes its owner by adverse possession*."

[241] Both experts agree that in order to acquire title to a chattel by adverse possession, one must satisfy two requirements. These are (i) unchallenged and uninterrupted direct or indirect possession for five years; and (ii) the possessor has to possess the object believing in good faith that he is the owner of the object. However, the experts do not agree as to whether the requirements of adverse possession have been made out. Ms. Oehri postulates that the 5 year requirement did not start to run because the Swiss court did not have jurisdiction based upon Bearer Share Certificate No.2 being in Switzerland. I am afraid I cannot accept this statement of Swiss law by Ms. Oehri. Furthermore, I have already concluded that Swiss law applies to determine whether there was an effective transfer of ownership of Certificate No. 2 from Curatus to the Claimant. Dr. Gross counters by relying on Article 98(2) PILA which provides for

the Swiss court to have jurisdiction over claims concerning interests in moveable property such as bearer shares.[107].

[242] Again, there is no evidence to suggest a lack of good faith on the part of the Claimant with regard to the acquisition of ownership of Bearer Share certificate No. 2. I therefore accept the opinion of Dr. Gross, and conclude that the Swiss courts clearly had jurisdiction and, accordingly, the 5 year period necessary to establish title by adverse possession under Swiss law did begin to run as from 27 January 2004 (at minimum 5 February 2004) when the Claimant became the indirect possessor of Bearer Share Certificate No. 2. Accordingly, I find that the Claimant would also have acquired good title to Bearer Share Certificate No. 2 on or about 27 January 2009 (or at latest by 5 February 2009).

[243] I therefore answer the Defendants' second standing point by saying that the Claimant became the valid legal owner of the bearer shares in Lark BVI evidenced by Bearer Share Certificate No. 2 on or around 27 January 2004. I also conclude that the position would be the same under BVI law, if the transfer of ownership in Bearer Share Certificate No. 2 had taken place here, in the circumstances in which it did, with a document executed by the legal owner Curatus transferring the said certificate and shares to the Claimant, and with Attendus acknowledging the ownership of the Claimant and agreeing to hold Bearer Share Certificate No. 2 as custodian or agent for and to the order of the Claimant, and not as a trustee retaining legal title thereto. Accordingly, the Claimant had standing to bring this Claim, and was entitled to have its 60 bearer shares converted to 60 registered shares in Lark BVI when its BVI lawyers, Appleby, delivered Certificate No. 2 to the registered agent of Lark BVI on 15 February 2015.

The Claimant's Standing Points

[244] The Claimant has raised two 'standing' points (see paragraphs 25 to 35 Claimant's trial Skeleton Argument) which they contend disentitles the Defendants' from denying its title to the bearer shares held by virtue of Certificate No. 2. I will deal with each of these separately.

1. **The Defendants were not parties or privy to the transactions by which the Claimant became the Legal Owner of and they have no proprietary interest in Certificate No. 2**

[107] para. 78 Separate Opinion

[245] The Defendants' contend that the essential characteristic of bearer shares is that ownership thereof is freely transferable by delivery of the relevant bearer share certificate. Indeed, this is manifest from both section 31 of the IBC Act and section 55 of the BVIBC Act. Accordingly, a company, such as Lark BVI, would be compelled to recognize the legal title of the holder of a bearer share certificate, and would not be in a position to properly deny the title of the holder of the certificate. These are all basic principles relating to bearer shares (putting aside the issues relating to disablement and its consequences as stipulated in the BVIBC Act), which comport with the nature and characteristic of bearer shares, and the ease with which title thereto can change hands.

[246] The Claimant also submits that the Defendants (or any of them) have no legal basis or standing in law, to challenge, as they do in these proceedings, the Claimant's legal title to Bearer Share Certificate No. 2, as they were not parties to, nor were they privy to, the relevant transactions and agreements in January and February 2004 by which the Claimant became the legal owner of the Bearer Shares Certificate No. 2. These documents are the Deed of Appointment and the Custodian Holding Agreement. Furthermore, as the Defendants (or any of them) do not have, and have not asserted any, actual or proprietary interest in Certificate No. 2 or in the said bearer shares, and neither has Attendus (see the Ranger Affidavit), the Defendants have no basis in law to challenge the Claimant's legal title to Certificate No.2. With these submissions I am in complete agreement.

[247] I accept as a matter of fundamental principle, that a person who is not privy to a transaction or the underlying contractual agreements, has no basis in law to challenge the validity or effectiveness of such transactions. Furthermore, a person who claims no proprietary or other legal interest or entitlement to certain property, has no legal basis or standing to challenge another's title thereto, unless they are claiming ownership of the same property or chattel. The instant matter is not a scenario whereby the Defendants', or any of them, have some particular statutory power or duty which permits them to question the Claimant's legal title to the bearer shares held by virtue of Certificate No. 2. Furthermore, this is not a matter in which there are conflicting or contending claims to the bearer shares and the Defendants, or any of them, in the proper exercise of some statutory power or duty in relation to Lark BVI, must adopt a neutral position until the conflicting claims have been fully resolved.

2. The Defendants are bound by previous versions of the Register of Members of Lark BVI

[248] The Claimant submits that a company's register of members is a statutory document, which can only be validly altered in two circumstances, namely, (i) to reflect a change in the company's shareholding, as where such change has been effected by allotment, transfer or redemption; or (ii) pursuant to a successful action for rectification of the register pursuant to section 43 of the BVIBC Act.

[249] By section 41(1) of the BVIBC Act, a company is required to keep a register of members containing certain specific information, including the name of members and their shareholding in the company. Specifically, as to bearer shares, the register of members must specify "the total number of each class and series of bearer shares held"; and, with respect to bearer share certificate issued by the company, the register must identify the number of the certificate, date of issue, number of each class or series of bearer shares specified in the certificate, and the name and address of the "custodian" (that is, an authorized or recognized custodian (s.67 of the BVIBC Act)) of the certificate. Furthermore, the register of members may be kept in various forms, including magnetic, electronic or other data storage form (s. 41(2) of the BVIBC Act).

[250] Specifically in relation to the power to make changes to the register of members, other than by court proceedings, section 41(4) enables regulations to be made under section 240 of the Act (by Cabinet, on the advice of the Commission), which "may provide for the circumstances in which information relating to persons who are no longer members of a company, and to bearer shares that have been cancelled, may be deleted from the register of members." It is to be noted that this provision for regulations to be made, does not include empowering the company or its directors to unilaterally delete from the register of members a person who has been registered as a member, on the basis that they had been incorrectly or wrongfully entered in the register as a member. That power is reserved for the courts pursuant to section 43 of the Act. It does, however, allow for regulations to be made whereby the company may delete the entry in the register in circumstances where bearer shares have been cancelled by the company (for example, where they have been converted or exchanged for registered shares pursuant to s. 38(2) or redeemed pursuant to paragraph 36 of the Transitional Provisions).

[251] By section 42 of the BVIBC Act, "*the entry of the name of a person in the register of members as a holder of a share in a company is prima facie evidence that **legal title** in the share vests in that person*." (emphasis added). It is to be noted, that legal title to shares in a BVI company is the basis for registration as a member of the company. Thus, beneficial ownership does not entitle one to be registered as a member.

[252] Section 43 of the BVIBC Act, provides for "any member of a company or any person aggrieved" by an omission or inaccuracy in the company's register of members, or by any delay in entering information on the register of members, to apply to the court for an order that the register be rectified. Accordingly, a register of members (which, pursuant to section 43A, the company may elect to file a copy thereof with the registrar for registration), may only be rectified by the court, and only upon an application by a member or person legitimately aggrieved. There is no provision enabling the register of members of a company to be unilaterally rectified or altered by the directors or shareholders of the company, without the permission of the member concerned (and presumably all other members). Accordingly, it is not open to the directors of the company (or shareholders) to 'correct' any entry in the register of members, and certainly not by unilaterally deleting the name of a person who has been entered therein as a member of the company. This would be tantamount to taking away, without due process, a person's proprietary interest or depriving them of their property, other than by way of the statutory power of the court to order rectification, and with all the safeguards therein provided, including the right to fair compensation as guaranteed under the BVI Constitution.

[253] This position in law is well established. At paragraph 7.120 of Vol. 2 of **Palmer's Company Law** the learned authors put it this way-

> "*If there is some error in the contents of the register [of members], it has been a long principle of company law that this cannot be rectified by the company, but must be effected by making application to the court." **J & W.G. Gardner v. Victoria Estates Company, Limited***[108]

[254] The Claimant relies on the various versions of the Register of Members of Lark BVI listed at paragraph 30 of their Trial Skeleton Argument, which I do not propose to replicate here. Suffice

[108] (1885) 13 R 80 IH (1 Div)

it to be said that the Claimant's rely, in particular, on the version of the register of members filed by Lark BVI (acting by the Moe Directors) with the Registrar of Corporate Affairs on 24 May 2017.[109]. This version reads, with regard to Bearer Share Certificate No. 2 and the 60 shares in Lark BVI: "TO BEARER Member: Sempacher Foundation" [the Claimant]. The date of transfer of Certificate No. 2 from the Winkelried Settlement to the Claimant is therein shown as January 27, 2004, the date of the Deed of Appointment. Apparently, this version of the register of members of Lark BVI was later appended to the Second Defendant's submissions in the Norwegian Proceedings on 15 May 2018.[110]. Also listed, is a version of the register of Members filed with the Commission on 8 June 2017 which, in relation to Bearer Share Certificate No. 2, listed the Winkelried Settlement as the previous "member", with Curatus as the "custodian", and the Claimant as the new member, with Administal Anstalt as "custodian", and with the effective date of the transfer to the Claimant being shown therein as 27 January 2004, the date of the Deed of Appointment. Again, this version of the register of members was included as an addendum to the Second Defendant's submissions in the Norwegian Proceedings dated 16 June 2017. Yet a third version[111], also included by the Second Defendant as an addendum to his submissions in the Norwegian Proceedings dated 16 June 2017, shows the Claimant as the member holding Bearer Share Certificate No. 2 effective as of 27 January 2004, the date of the Deed of Appointment.

[255] This consistent position on these versions of the Register of Members of Lark BVI, changed somewhat when another version was created by or at the instigation of the Moe Directors on 20 July 2018 (approximately 1 year subsequent), and filed with the Commission on 25 July 2018 (Vol. 1A pg. 546). With respect to Certificate No. 2, this version shows the "member' as the Winkelried Settlement and Attendus as the "custodian". By this version the Defendants had unilaterally deleted the Claimant as the member holding Certificate No. 2 in the Register of Members of Lark BVI. The Claimant points out that this latter version of the Register of Members, was first produced by the Defendants in support of their application for summary judgment filed 5 October 2018[112], which application was dismissed.

[109] Vol. 1A pg.546
[110] see Second Affidavit of Betel Nathhorst filed herein on 13/11/2018 - Vol. 1A pg. 495
[111] Vol. 1A pg. 534
[112] Vol. 1A pg. 487

[256] The Claimant contends that the correct position is as stated in the version of the Register of Members of Lark BVI filed by Lark BVI with the Commission on 24 May 2017.[113]. They submit, in my view correctly, that neither the Second and Third Defendants or Lark BVI, had the power to make the subsequent alterations to this version of the Register of Members which had showed the Claimant as the holder of Bearer Share Certificate No.2, and to subsequently unilaterally delete the Claimant's name therefrom as a member of Lark BVI. They also submit (which will be addressed later in this judgment), that the purported redemption of the 60 shares evidenced by Bearer Share Certificate No. 2 by the Moe Directors purporting to act for Lark BVI, was invalid and wholly ineffective. However, they make the point that on the undisputed facts of this case (the Defendants' own pleaded version), Certificate No. 2 was redeemed to the Claimant (not the Winkelried Settlement), which amounts, implicitly, to an admission by the Defendants, that the Claimant became the legal owner of Bearer Share Certificate No. 2 and the 60 shares in Lark BVI represented thereby. Accordingly, it is wholly inconsistent and contradictory, that the Defendants would be seeking, in the same proceedings, to impugn the Claimant's title to Certificate No. 2.

[257] I agree entirely with the Claimant's submissions on this issue. In my view, the Defendants (specifically the Second and Third Defendants, purportedly as the then directors of Lark BVI) or Lark BVI itself, cannot alter the Register of Members of Lark BVI dated 24 May 2017, by unilaterally removing the Claimant as the shareholder holding legal title to Bearer Share Certificate No. 2. Any changes or alterations to the Register of Members can only be made by the Court, upon an application for rectification pursuant to section 43, and by a person having the requisite standing to make such an application. No such application was made, and as a result, no such order has been made by the court. Accordingly, all versions of the Register of Members subsequent to the 24 May 2017 version, to the extent that they show any alterations or changes, are invalid, null and void and of no legal effect. Furthermore, the Defendants, including Lark BVI, cannot, in these proceedings, seek to deny the accuracy of the Register of Members of Lark BVI dated 24 May 2017.

[258] However, in my considered view, the matter does not end there since section 41(1) of the BVIBC Act does not require, in relation to bearer shares, that the name and address of the legal owner/holder of the bearer share certificate be entered in the register of members of a

[113] para, 33 Trial Skeleton Argument

company incorporated under the Act. This requirement only applies in the case of registered shares (s. 41(1)(a)). This is in keeping with the very nature and characteristic of bearer shares which are transferrable by delivery of the certificate, and was authoritatively stated by Mendes JA at paragraph 52 of the decision in **Bank of Nova Scotia Trust Company Ltd** appeal: "*In the case of shares issued to bearer……..there was no requirement to note the name of the bearer of the shares*.".

[259] It would not only be impractical, but would make no sense, for the name and address of any current holder of bearer shares, even if known to the company, to be entered in the Register of Members, only to have this shown to be incorrect or for the directors of the company to have to updated the register every time the holder of the certificate changes, a fact which may not be know to the company, as there is no legal requirement for this information to be relayed to the company and entered in the register. Likewise, there is no requirement for the name and address of a 'custodian' of a bearer share certificate issued by the company, other than an authorized or recognized custodian, to be entered in the register of members.

[260] Accordingly, it cannot be said that the version of the Register of Members of Lark BVI dated 24 May 2017 is *prima facie* evidence that the Claimant is the legal owner of Bearer Share Certificate No. 2 or the 60 shares held thereby. This presumption or protection in section 42 of the BVIBC Act, can only apply, in my opinion, to the owner of registered shares in a company, which by section 41(1)(a) is required to be entered on the register of members of a company.

[261] However, this position with regard to the statutory presumption of legal ownership, does not detract from the force and soundness of this 'standing' point raised by the Claimant. That is that the Defendants, having accepted the validity of the transfer of legal title in Bearer Share Certificate No. 2 to the Claimant and entering that information in the Register of Members dated 24 May 2017 and, further, having subsequently purported to redeem those bearer shares in favour of the Claimant and tendered payment of 'compensation' therefor to the Claimant, cannot in these proceedings now seek to challenge the various underlying transactions and documents (of which they were not a party and are not privy to), and to thereby deny the Claimant's legal title to Bearer Share Certificate No. 2. My conclusion on this point does not take account of whether the Redemption Resolution purportedly passed by the Moe Directors, whereby they sought to have Lark BVI redeem the said bearer shares owned by the Claimant, is valid.

[262] That said, I must go on to consider whether the Claimant was entitled by virtue of article 23 of the Articles of Association of Lark BVI and the relevant provisions of the BVIBC Act, to have its 60 bearer shares converted to registered shares upon presentation of bearer Share Certificate No. 2 in 2015, that is, prior to the purported redemption of said shares on 2 May 2017 by the Moe Directors. Put differently, in light of the clear power to convert bearer shares into registered shares, and to do so after the Transition Date of 31 December 2009, was Lark BVI compelled to convert the bearer shares to registered shares upon presentation to it in 2015 of Certificate No. 2 by the Claimant? I must also consider which, if any, of the various written resolutions purportedly passed the PMA Directors or the Foundation Directors or the Moe Directors, were valid. Furthermore, if the Moe Directors were not validly appointed as directors of Lark BVI, were they, in law, nevertheless *de facto* directors of the Company, such as to render their resolutions and actions to effect the redemption of the bearer shares held by virtue of Certificate No. 2, and other resolutions purportedly passed by them, valid.

Was the PMA Resolution made 26 January 2015 valid to appoint anyone as directors of Lark BVI?

[263] It is pelucidly clear that the PMA Resolution made 26 January 2015[114]) was wholly invalid in appointing any of the four named persons as "new" directors of Lark BVI.

[264] Articles 60 , 62 and 69 of the Articles of Lark BVI provides –

> 60.*The first director or directors shall be elected by the subscriber(s) to the Memorandum. Thereafter, the directors,* ***other than in the case of a vacancy****, shall be elected by the members for such term as the members may determine.* (emphasis added)
>
> 62. *A vacancy in the board of directors may be filled by a resolution of members or of a majority of the remaining directors*.
>
> 69. *The office of director shall be vacated if the director:*

[114] Vol. 3 pg. 78-79

(a) is removed from office by a resolution of members or by a resolution of directors, or

(b) becomes bankrupt or makes any arrangement or composition with its creditors generally, or

(c) becomes of unsound mind, or of such infirm health as to be incapable of managing his affairs, or

(d) resigns his office by notice in writing to the Company.

[265] It is common ground, that at the relevant time there were two directors of Lark BVI, namely, Oriel F. Kennnion V and Asterio Caballero Ibarra, and that there was no vacancy on the board of directors of the Company within the meaning of Article 69. Thus, the existing two directors had no power under Article 62 to fill any vacancy or to appoint new directors as they purported to do by this resolution. Accordingly, this resolution was ultra vires and wholly invalid.

[266] The Defendants have in their written submissions asserted that the PMA Resolution was valid to the extent that it appointed the Second and Third Defendants as directors of Lark BVI, since their names came first in order in the minutes of the meeting and there was an intention to appoint them. I wholly reject this submission as being erroneous as a matter of law. The simple answer to it is that, in any event, there was no vacancy to be filled, since Messrs. Kennion and Ibarra were, as at 26 January 2015, still in office as directors of Lark BVI, and there is no power under the articles or in the statute for the existing directors to elect an entirely new board on the basis that they will be demitting office immediately thereafter. Accordingly, I hold that the PMA Resolution was wholly invalid in appointing anyone, specifically, Jan-Erik Moe and Knut Iwan Heyerdahl-Larsen (the Moe Directors) and Natco Trading Atkierbolag and Rille Aktiebolag (the Foundation Directors), as directors of Lark BVI. This position was subsequently accepted by the Defendants based upon the legal opinion of an English Barrister, Mr. Andrew Westwood.[115].

[267] I am also of the opinion that section 117 of the BVIBC Act does not operate to validate the invalid appointment of these four persons as directors of Lark BVI. This is not a "defect" in their appointment where the power to appoint clearly existed, but a purported appointment which was ultra vires under the Articles of Association of Lark BVI, as such power rests solely with the

[115] Vol. 3 pg. 1334

members (see **Morris v Kanssen** [1946] AC 459). Accordingly, when the resignations of Messrs. Kennion and Ibarra as directors took effect on 26 January 2015[116], after they had met to pass the PMA Resolutions, there were no directors of Lark BVI. Thereafter, only the members/shareholders of the Company could validly elect new directors pursuant to Article 60.

The Validity of the Foundation's First Resolution – 23 February 2015

[268] The precursor to the written resolutions made by the Claimant on 23 February 2015, ostensibly as the then sole member/shareholder of Lark BVI[117], is that on 18 February 2015 the original of Bearer Share Certificate No. 2 was delivered by the Claimant's lawyers, Appleby, on behalf of the Claimant, to Lark BVI and to PMA, its then registered agent.[118]. In its cover letter, Appleby requested that Certificate No. 2 be immediately exchanged for registered shares in Lark BVI, citing article 23 of the Articles of Lark BVI. They referenced that PMA had previously pointed out that the disablement of the bearer share by the operation of the Transitional Provisions in the BVIBC Act *"does not operate to prevent [Lark BVI] exchanging this share for a registered share (see section 38(2) of the [BVIBC Act])."* I am in agreement with that interpretation of section 38(2) of the BVIBC Act.

[269] However, Lark BVI did not act to exchange Bearer Share Certificate No. 2 for registered shares. In this regard, it is clear from article 23 and section 38(2) of the BVIBC Act, that the power to convert or to exchange bearer shares to registered shares in a company, lies not with the registered agent of the company, but with the company itself, acting by and through its directors. However, at the time of presentation of the original of Bearer Share Certificate No. 2 to Lark BVI, the Company did not have any directors, in light of the invalidity of the PMA Resolutions and the resignation of the PMA directors.

[270] This notwithstanding, the Claimant, acting upon their perceived entitlement under article 23 to have the bearer shares converted to registered shares as of 18 February 2015 and to be entered as a member in the Register of Members of Lark BVI and, further, on the basis that,

[116] Vol. 3 pg.82
[117] the Foundation Resolution – Vol. 3 pg. 86-87
[118] Vol. 3 pg. 400-402

pursuant to their interpretation of section 70(3) of the BVIBC Act, the bearer shares held by virtue of Certificate No.2 were no longer disabled, adopted the Foundation Resolution. [119]

[271] By the Foundation Resolution, it was resolved to (1) remove all persons who may currently be directors or alternate directors of the Company with immediate effect; (2) instruct the registered agent to exchange Bearer Share Certificate No. 2 for registered shares in the Company registered in the Claimant's name and to instruct that the Register of Members be updated accordingly; (3) to appoint Natco Trading Atkiebolag and Rillie Aktiebolag as directors of the Company; and (4) to authorize and instruct the registered agent to update the Register of Members and the Register of Directors to give effect to these resolutions.

[272] Perhaps, *ex abundante cautela*, the Foundation Resolution was signed not only by the Claimant, but also by Attendus and Curatus. I assume, without more, that this was an attempt by the Claimant to 'cover all bases', and to put any question as to its entitlement to Bearer Share Certificate No. 2 beyond doubt, by demonstrating that both Attendus and Curatus were *ad idem* with the Claimant, or were acknowledging that the Claimant was now the legal owner and holder of Bearer Share Certificate No. 2. Alternatively, if Attendus or Curatus still held the legal ownership of Bearer Share Certificate No. 2 and the Claimant was the beneficial owner of the said share certificate and the 60 bearer shares represented thereby, then the legal owner, by its signature on the Foundation Resolution, had effectively consented to the conversion of the bearer shares into registered shares and to the Claimant being registered as the owner of 60 registered shares in Lark BVI. Indeed, the First, Second, and Third Defendants seem to have subsequently accepted that the Claimant had become the legal owner of Bearer Share Certificate No. 2, as confirmed by the various versions of the Register of Members of Lark BVI which they produced and registered with the Registrar of Corporate Services in 2017, beginning with the version dated 24 May 2017.

[273] The question for determination is whether the Foundation Resolution was validly made or adopted as a shareholder's resolution of Lark BVI and, if so, what are the consequences under the law of the BVI for Lark BVI, and the subsequent actions and purported resolutions of the Moe Directions, including the Redemption Resolution? Put differently, upon delivery of Bearer Share Certificate No. 2 to Lark BVI, did those shares become disabled so that any one of the

[119] para. 33 Claimant's Closing Written Submissions

Claimant or Curatus or Attendus could not vote those shares as a member and adopt the Foundation Resolution?

[274] For the avoidance of doubt, it is my considered opinion, and I so find as a matter of law, that the Claimant having delivered Bearer Share Certificate No.2 to Lark BVI for the express purpose of having the 60 bearer shares converted to registered shares, the Company was not in a position to challenge the validity of the underlying transactions giving rise to the Claimant being then in possession of Bearer Share Certificate No. 2, as such certificate is transferrable by delivery. Moreover, Lark BVI would have been obligated, by article 23 and section 38(2) of the BVIBC Act, to immediately exchange the bearer shares for registered shares in the Company, albeit, at 15 and 23 February 2015, there were no directors of Lark BVI who could then, on behalf of the Company, act in accordance with their mandate under Article 23, and effect the conversion or exchange of the bearer shares for registered shares.

[275] In my view, the validity of the Foundation Resolution turns on whether the Claimant (or Curatus or Attendus) were, as at 23 February 2015, entitled to vote their shares and adopt a written resolution of Lark BVI, when it was not then registered as a member of Lark BVI, that is, not registered in the Register of Members of the said Company. At paragraph 34 of the Claimant's Written Closing Submissions, two grounds are advanced to address this issue and to satisfy the Court that the Foundation Resolution was not invalid because the Claimant was not registered as a member of the Company.

[276] The first, is that in the decision of the Court of Appeal in the **Bank of Nova Scotia Trust Company** case, it was found that, in the context of a disabled bearer share, the term 'member' is construed as extending to the holder of the bearer share. (para. 34(i) Claimant's Closing Written Submissions). This is a reference to the conclusion reached at paragraph [53] of the judgment of the court: "*It is clear that the holder of a share issued to bearer was considered a member of the company (see sections 62A(1), 64(1)(b) and 64(2))*." Furthermore, the definition of "member" in section 2 of the IBC Act (the former Act under which Lark BVI was incorporated) is "a person who holds shares in a company", with no distinction being made between registered shares and shares issued to bearer.

[277] Lark BVI was incorporated under the IBC Act which expressly permitted the issuance of shares to bearer, therefore, the holders of Bearer Share Certificates Nos 2 and 3 are members or

shareholders of Lark BVI, and the requirement under section 79 of the BVIBC Act that a company must have at least one member, is satisfied where a company has only issued shares to bearer. Accordingly, upon the transfer of the legal ownership of Bearer Share Certificate No. 2 to the Claimant on or about 27 January 2004, the Claimant became a shareholder/member of Lark BVI, notwithstanding that its name was not, or could not, be entered on the Register of Members as the holder of bearer shares, and notwithstanding that, at the time of the making of the Foundation Resolution, it was not the holder of registered shares in Lark BVI.

[278] However, the Claimant goes one step further. It argues that, having delivered Bearer Share Certificate No.2 to Lark BVI on 23 February 2015 for the specific purpose of having them converted to or exchanged for registered shares, the disablement was lifted by operation of sections 68(3) or 70(3) of the BVIBC Act to the extent that the Claimant, as the holder of those bearer shares, could then exercise the 'entitlement' to vote. They also reason that, since, at that time, Bearer Share Certificate No.3 continued to be disabled and the entitlement to vote continued to be suspended, as that bearer share certificate had not been delivered to either a custodian or to Lark BVI for the purpose of being converted to or exchanged for registered shares, the Claimant was the only shareholder/member of Lark BVI entitled to vote and to pass resolutions. In fact, Certificate No. 2 was being held by Cary Olsen, apparently, as security for payment by the Second Defendant of his indebtedness to them for outstanding legal fees. It was never subsequently delivered to Lark BVI, even up to the time of the trial, albeit, the Moe Directors, by their Redemption Resolutions of April 2017, purported to have Lark BVI redeem the bearer shares held by virtue of Certificate No. 3.

[279] The Defendants disagree with these submissions. They submit that, properly construed, the 'carve out' in section 68(3) only applies to transfers, and not to voting. At first blush there would seem to be much force in this submission. Section 68(1) states that, during the period of disablement of a bearer share, "that share does not carry any of the entitlements which it would otherwise carry". It then goes on to state "and, subject to subsection (3), any transfer or purported transfer of an interest in the bearer share is void and of no effect." The Defendants' submit that, clearly, sub-section (3) was intended only to apply to transfers and not to the entitlements listed in subsection (2) as normally attaching to ownership of shares in a company, such as the right to vote those shares. They submit further, that properly construed, the exemption in section 68(3) to the applicability of sub-section (1) only applies to "the transfer or

delivery" of a bearer share, and not to the disablement applicable to the 'entitlements' as a shareholder in the company.

[280] If this interpretation is correct (and there is much to commend it), it would mean that, while the Claimant was entitled to have its bearer shares held by virtue of Certificate No. 2 converted to or exchanged for registered shares, thereby lifting the disablement with regard to both entitlements and transfers generally, until conversion or exchange actually took place, the bearer shares remained otherwise disabled pursuant to both section 70(1) and 68(1). It would then follow that the Claimant was not entitled to exercise the right to vote its bearer shares and to adopt the Foundation Resolution.

[281] This is a somewhat difficult issue of interpretation, and one must put sections 68(3) and 70(3) in their proper statutory context when applying the literal meaning to the words used in each provision. I say difficult, because section 69(3) does not sit squarely with the interpretation contended for by the Defendants. Section 69(3) reads-

> "The delivery of a bearer share to a custodian in accordance with this Division does not constitute the custodian as a shareholder of the company, in relation to the bearer share, **notwithstanding that the custodian may exercise voting and other rights on behalf of the beneficial owner of the bearer share**." (emphasis added)

[282] The short point here is that while section 68(3)(a) would permit the transfer or delivery of a bearer share to a "custodian in accordance with the Division", thereby dis-applying the voiding effect of subsection (1), but not the prohibition on the exercise of shareholder entitlements, the same custodian under section 69(4) would be entitled to exercise voting and other shareholder rights on behalf of the beneficial owner of the share, something which, accordingly to the interpretation proffered by the Defendants, the owner of the bearer share could not do. This interpretation would lead to some confusion, and to an absurdity in the legal meaning and effect of these two provisions, which could not have been what the legislature intended. This is so, because, as regards the exception granted by section 68(3), this applies equally to the delivery of a bearer share certificate to the company in sub-paragraph (b) as it does to a delivery to a custodian in subparagraph (a).

[283] Perhaps the correct meaning lies in the opening words of section 68(3) - "Subsection (1) does not apply". In other words, the intention of the framers of the Act was to disapply the entirety of subsection (1) where the bearer shares are either delivered to a custodian or to the company for conversion or exchange for registered shares, thus permitting the holder to exercise the usual entitlements of a shareholder, including the right to vote those shares. It could not have been the intention of the legislature that while in one section a custodian cannot vote those bearer shares, but by virtue of another they can, on behalf of, and presumably at the direction of, the beneficial owner. This interpretation accords with the statutory regime which was intended to disable, and to bring into or under the physical control of a custodian or the company or the registered agent, bearer shares, thereby effectively removing them for circulation as negotiable instruments; resulting ultimately in their demise, either by conversion or exchange for registered shares, or by redemption by the company (ss. 68(3), 70(3), 73(1) and para. 36 Transition Provisions). Furthermore, even if the interpretation contended for by the Defendants is the correct one, it would mean that as at 15 February 2015 when the Claimant delivered the original of Bearer Share Certificate No. 2 to Lark BVI, it be came entitled to the issuance of 60 registered shares in Lark BVI, and to vote those shares. The fact that it could not then be entered on the Register of Members as the owner of the 60 registered shares ought not and should not prevent the Claimant from being able to exercise its full rights and entitlements as a holder of registered shares in Lark BVI.

[284] I therefore hold that at the time the Claimant was entitled to vote the 60 shares in Lark BVI and to adopt, as the sole shareholder entitled to vote at the time, the Foundation Resolution. Accordingly, the Foundation Resolution was validly passed as a binding resolution of Lark BVI appointing new directors of the company and providing for the conversion or exchange of Bearer Share Certificate No. 2 for registered shares in the Company.

[285] For the avoidance of doubt, I also hold that it was wrong for PMA (albeit acting upon the advice of their lawyers, HP Anderson) to return Bearer Share Certificate No. 2 to Appleby (note they did not sent it to either Attendus or Curatus) on 26 October 2015 (some 8 plus months after they received it). This was done on the mistaken belief or erroneous assumption that the shares represented by that certificate could not be exchanged or converted for registered shares pursuant to section 38(2) of the BVIBC Act.

[286] The Claimant also relied on the applicability of the *Duomatic* principles (para. 34(iii)), to say that a unanimous decision of the shareholders entitled to vote at the time of passing a resolution of the company, or by the beneficial owners of shares in a company (see ***Shahar v Tsitsekkos et al***[120]) per Mann J at para. 67), is effective to validly pass or adopt that resolution, and in such circumstances, the holders of the non-voting shares are to be disregarded. As to whether the *Duomatic* principles apply to beneficial owners of shares in a company, the reasoning seems to be based largely on an analogy with principles relative to agents and their principals, or nominee shareholders and beneficial owners, but the application of those principles clearly depends upon the particular facts of the matter under consideration. The Claimant relies, in particular, on this passage at page 373C in *Duomatic*-

> "*I proceed on the basis that where it can be shown that all shareholders who have a right and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. The preference shareholder, having shares which conferred upon him no right to receive notice of or to attend and vote at a general meeting, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights….*"

[287] It is the Defendants' submission that the *Duomatic* principle can have no applicability because the Foundation Resolution is a resolution made by the holder of immobilized bearer shares which carry no rights and, in particular, no voting rights (para.48 Defs. Closing Written Submissions). This formulation is an overstatement of the prohibition in section 68(1) on the exercise of 'entitlements' as the holder of disabled bearer shares, which is only operative during the period in which the bearer share is disabled. Once the disablement has been lifted, all the entitlements of a shareholder which, effectively, were only suspended, are fully reinstated. As stated above, I am not in agreement with the Defendants that the Claimant's bearer shares held by virtue of Certificate No. 2, could either not have been converted to or exchanged for registered shares by Lark BVI upon presentation of the original of the certificate on 23 February 2015, or that the said shares remained disabled, such that the Claimant was not entitled to vote those shares or to adopt the Foundation Resolution. Accordingly, in those circumstances, the *Duomatic* principles, which are predicated on a specific right to vote or to consent to a

[120] [2004] EWHC 2659 (Ch)

resolution or decision of the company, are or were applicable to the adoption of the Foundation Resolution by which any current directors were removed, new directors were appointed and the conversion or exchange of the bearer shares owned by the Claimant and then held by Lark BVI to registered shares, are valid and binding resolutions of Lark BVI.

The Validity of the Moe Directors' Removal Resolutions of 28 September ("the Removal Resolution") and 30 September 2015 Resolutions for Lark BVI to commence claims in Norway against Thermtech and Nathhort

[288] The Moe Directors (the Second and Third Defendants) purported to pass resolutions of Lark BVI on both the 28 and 30 September 2015.[121]. At the time of both resolutions, neither of them had been validly appointed directors of Lark BVI, as the PMA Resolutions were wholly in effective and invalid. As such, both of these resolutions are invalid and wholly ineffective as a matter of law, since they had no legal status or authority to make such decisions for Lark BVI. This position in law is not altered in any way by sections 109(6) and 117 of the BVIBC Act.

[289] By these two resolutions, the Moe Directors recorded what they saw as the invalidity of the Foundation Resolution dated 23 February 2015. and resolved to remove the two companies, Rillie AB and Natco Trading AB, as directors of Lark BVI with immediate effect[122].This was done on the basis that they (the Second and Third Defendants) were validly appointed as directors of the Company by the PMA Resolution, but not Rille AB and or Natco Trading AB.

[290] First, it is passing strange to say the least, that if the correct position is that the Foundation Resolution by which these two companies were appointed directors of Lark BVI was "null and void" and a "fake resolution" as characterized by the Moe Directors, why would still it have been necessary to pass a resolution removing the said two companies as directors of Lark BVI. Perhaps this was done purely out of an abundance of caution. Second, and most importantly, the Moe Directors were in fact then not directors of Lark BVI and, therefore, could not exercise the power under article 69(a) of the Articles, to remove directors. Accordingly, I hold that this attempt to remove these two companies as directors of Lark BVI by virtue of the resolution on 28 September 2015 was invalid and ineffective as such. Third, even if the PMA Resolution was

[121] Vol.3 pages 97-98 and 101-105
[122] Pg. 98

somehow effective in appointing the Moe Directors on 26 January 2015, they were removed by the Foundation Resolution made 23 February 2015.

[291] The Claimant raised one other issue with regard to the validity of the meeting held on 28 September 2015. Article 88 of the Articles of the Company specifies that a director shall be given not less them 3 days notice of a meeting of the directors. It is argued that notice of this meeting having been given by the Third Defendant during the afternoon of Friday 25 September, for a meeting on 28 September 2015 in another country, this notice requirement had not been satisfied as, effectively, the Claimant's directors only received 2 clear days notice. The Claimant says this was a deliberately orchestrated to create difficulties for the Claimant's directors in attending the meeting on 28 September 2015.[123]. Indeed, the Third Defendant was cross examined about this and admitted that this was a strategic move on their part.

[292] Article 89 provides that where there has been a failure to give the requisite notice under article 88, a meeting of the directors would be valid "if a majority of the directors entitled to vote at the meeting have [waived] the notice of the meeting." In the instant matter, even assuming that both sets of directors had been validly appointed by the PMA Resolutions, there was no majority to waive the inadequate notice and, in any event, there is no evidence before me of such a waiver. Accordingly, article 89 cannot be press in aid to validate the 28 September 2015 meeting, not for that matter can article 90 dealing with where there was an inadvertent failure to give notice, which is not the case here.

[293] The 30 September 2015 resolutions, purportedly passed by the Moe Directors, were to formally engage attorneys for the commencement of civil and criminal proceedings in Norway against Thermtech Holding AS and Mr. Bertel Nathhorst and other members of his family, making certain claims for retrieval of royalties and interest under a license agreement in 1992, as well as rights in the TCC Technology patents. These resolutions suffer from the same legal impediments as the 28 September 2015 resolutions, and are likewise invalid and wholly ineffective, and I so declare. Put bluntly, the only way that the 28 and 30 September meetings could be validly called and the resolutions passaged therein valid, is if only the Moe Directors were, at the time of each of these meetings, directors of Lark BVI (of which they were not), thereby rendering the giving of notice to the Foundation Directors totally unnecessary and

[123] Claimant's Trial Skeleton para. 91

irrelevant, and permitting them, as the directors, to validly pass the resolutions which they purported to so pass.

The validity of the Foundation's Second Resolution – 16 October 2015

[294] On 16 October 2015, the Claimant purported to adopt a second written resolution of Lark BVI [124]by which it resolved to appoint "with immediate effect" the same Natco Trading Aktiebolag and Rillie Aktiebolag, which companies they had previously appointed on 23 February 2015, as directors of Lark BVI. It is apparent from the recitals in the resolution itself, that this was being done because "it is purported that such appointments may have not been duly authorized." It seems to me that this may have pertained to these companies not having consented in writing to being appointed directors of Lark BVI, in advance of the prior resolution appointing them. In any event, for the reasons expressly in relation to the 23 February 2015 resolution, I hold that this Second Foundation Resolution was also valid, since the Claimant was the only shareholder entitled to vote its shares in Lark BVI, having presented Bearer Share Certificate No. 2 for conversion or exchange for registered shares in the Company.

The validity of the Moe Directors' Series of Resolutions on 21, 22, 23, 24 & 25 March 2016 ("the Validation Resolutions")

[295] The Moe Directors purported to pass several resolutions of the board of Lark BVI dated respectively 21, 22, 23, 24 and 25 March 2016.[125]. These resolutions, which are in similar vein, recite, correctly, the defectiveness and invalidity of the PMA Resolutions in appointing any one of them as a new director of Lark BVI, with either Mr. Heyerdahl-Larsen or Mr. Moe resigning as a "director' in light of the invalidity, and acknowledging that the board is then comprised of only one of them. This is followed in each instance by a separate set of minutes dated the following day, recognizing that there is now a 'vacancy' on the board, and declaring that the board now comprises both of the Second and Third Defendants as directors.

[296] As a sample, the minutes of the purported meeting of the directors on 21 March, recited that the Third Defendant had resigned as a director, and that his reason therefor was "the defective appointment of four new directors by the former nominee directors on January 26, 2015, which

[124] Vol. 3 pg. 111
[125] Vol. 3 pgs. 117-139

was in conflict with Regulation 60 and 62 of the Memorandum of Association, reference also section 113(4) of the BVIBC Act, 2004 (as amended), because no vacancies were filled." The Third Defendant's letter of resignation as a director of Lark BVI dated 21 March 2016 is at page 116. A similar letter of resignation signed by Mr. Moe dated 23 March 2016 forms part of the agreed documentary evidence before me.[126].

[297] Accepting that the Third Defendant had not been validly appointed (as is also the case with the Second Defendant), he not only tendered a resignation for an office which did not hold, but also attended the meetings follow-up meetings on 21 and 22 March 2016 and is shown in the minutes thereof as a "director" and appointed as "secretary" of both meetings. Moreover, the minutes of both meetings declare that a quorum was present, which was patently incorrect, as neither the Second or Third Defendants were then directors of Lark BVI, capable of constituting a quorum for the purpose of meetings of its board. Further, none of the minutes demonstrate or evidence the actual passage of any "resolution" appointing anyone as a director of Lark BVI.

[298] As an example, the minutes of 21 March 2016 state - "[*p]ursuant to the above, the Board of directors of the Company is now composed by the following persons: Jan Erik Moe –director; Second Seat on the Board – Vacant*." In the minutes of 22 March 2016, the names of both the Second and Third Defendants are listed as directors, without any formal resolution of appointment. In any event, even assuming that First or Second Foundation Resolutions to be invalid in appointing the Foundation Directors as directors of Lark BVI (which is not the case), there would as at 21 to 25 March 2016 no validly appointed directors of Lark BVI. It follows, therefore, that all of the meetings purportedly held during that period were not validly constitute meetings of the board of directors of the Company, and the resolutions purported to be passed in each such meeting, were wholly ineffective, null and void.

[299] Accordingly, I hold and declare that each of these resolutions are invalid and wholly in effective in appointing either the Second or the Third Defendant as a director of Lark BVI.

[126] Vol.3 pg.126

The Validity of (1) the Share Transfer Resolution ("the STA Resolution"); (2) the Share Transfer Agreement ("STA") both made 25 March 2016; and (3) the Co-operation Agreement dated 25 July 2016

[300] By resolution purportedly made 25 March 2016 ("the STA Resolution") by the Moe Directors, it was resolved to transfer all the assets of Lark BVI, said to comprise claims against Thermtech and the Nathhorts for royalties and interest, various patents, and the TCC technologies, to Lark Norway, a company in which neither the Claimant or Mr. Bertel Nathhorst had an interest. They also purported to resolve that Lark BVI enter into a Sale and Transfer Agreement with Lark Norway, to effect the transfer of these assets of Lark BVI.[127]. The stated consideration was "all the costs covered to get [Lark BVI] restored and back in business so that the company can carry on a business based on the TCC technology applicable to chemical pulp and bitumen and residue reference… Patents 322684 (Norway)…..[and] Patent 990650 (Norway)…." In this regard, reference was made in the STA Resolution to a sum in excess of $100,000 owed as a debt to the law firm Carey Olsen in BVI, for the restoration of Lark BVI to the register after it had been struck off for not having a registered agent, following the resignation of PMA becoming effective. In fact, this was not a debt owned by Lark BVI, but one incurred and billed to the Second Defendant.

[301] That same day (25 March 2016), the Second and Third Defendants caused Lark BVI to enter into the Sale and Transfer Agreement with Lark Norway.[128]. By the STA, Lark BVI, purporting to act through the Moe Directors, transferred a number of listed assets, including patents registered in Norway, Canada, USA and other countries, the sole right to the TCC technology applicable to thermal treatment of cuttings and drilling waste, claims to license fees from any users of the TCC technology in that field, and any claim to unpaid royalties from Thermtech AS as from 1998 to 2007 and from 2207 to 2012 "totaling NOK 40,483, 485 (including penal interest till today NOK 67,860,654)"; and "any claim to unwarranted (stolen) shareholding of 43.5% of Thermtech AS on April 11,1996 NOR 14,281,700 (including penal interest till today NOK 44,531,055)." Lark Norway undertook to pay the debt of US$103,247.12 to Carey Olsen. The stated effect of the STA is to transfer all these assets as of the date of the STA. The STA is said to be governed by the laws of Norway.

[127] Vol. 3 pg. 1224-1226

[128] Vol. 3 pgs. 1219-1222

[302] At the time of passage by the Moe Directors of the STA Resolution and execution of the STA on behalf of Lark BVI, neither the Second or Third Defendants were directors of Lark BVI. Accordingly, they had no power or authority to act for or on behalf of Lark BVI, and the Second Defendant's bearer shares Certificate No.3 continued to be disabled.

[303] In my view, the STA Resolution is clearly invalid and not binding on Lark BVI, it having been made by persons who have in essence hijacked the Company and used it to their benefit and to the exclusion of the sole shareholder, the Claimant. They have effectively excluded from its governance the duly elected directors, elected in accordance with the Foundation Resolutions. I am also of the opinion that the acts of the Second and Third Defendants in purporting to act as directors of Lark BVI, in the face of legal advice that neither of them had been validly appointed directors by virtue of the PMA Resolution, cannot be made binding on Lark BVI by virtue of section 109(6) or 117 of the BVIBC Act. Indeed, learned counsel for the Defendants, Mr. Nader, has conceded in his Closing Written Submissions (para. 37) in relation to section 117 (*de facto* directors) that the tenner of the English authorities on this issue is "unhelpful to the Defendants", indicating that de facto directors cannot appoint directors or allot shares. I will address that issue in greater detail later on.

[304] The Defendants produced at trial for the first time the Co-operation Agreement dated 25 July 2016[129]. This purports to be an agreement between Lark BVI and Lark Norway. It is signed by the Second and Third Defendants on behalf of Lark BVI, and by the Third Defendant, in his capacity as both a director and managing director, of and on behalf of Lark Norway. It is governed by the laws of Norway. In brief, the Co-operation Agreement, having recited the entering, by Lark BVI and Lark Norway, into the Sale and Transfer Agreement, provides that Lark Norway "shall be committed to, upon success in the future lawsuit(s) against Thermtech Holding AS, Bertel Sten Nathhorst, et al., to fund Lark BVI so that Lark BVI can establish a new company, Bores Petroleum, to invest in a plant with TCC units along with the previous plans developed by the former Norwegian company Boreas Petroleum AS in order process residue from oil refineries world-wide." This agreement goes on to stipulate that the funding can be done either by grants or by share issue, or a combination of both. It also provides that once Lark Norway has obtained a judgment against the named parties, it "shall start initial planning on behalf of Lark BVI regarding the future co-operation between the parties hereto to once a

[129] Vol. 3 Tab 6 pgs. 1364-1366

legally binding judgment from the Gulating Court of Appeal is reached in order to shorten the planning phase." It went on to envisage that the transfer of the patents regarding the TCC technology can be done after the judgment in Bergen District Court is reached.

The Witnesses of Fact and Proper Purpose

[305] It is common ground that the lawsuits initiated or brought by Mr. Moe (the Second Defendants) and by Lark Norway against Thermtech and the Nathhorst family in Norway, were all dismissed, but are subject to pending appeals. I do not propose, nor do I consider it necessary or relevant to my conclusions and ruling on the issues in this case, to detail any of the alleged background facts and circumstances upon which these claims are said to be based. Suffice it to be said, that the Second Defendant was cross-examined extensively, and so was the Third Defendant, about such matters at the trial. Indeed, Mr. Nathhorst as likewise cross-examined on such matters by learned counsel for the Defendants.

[306] In this regard, and to the extent that such facts are of relevance to any of the issues before me, most of which are technical issues of law not turning on the veracity of witnesses or on findings of fact, I accept the truthfulness of the responses and evidence given by Mr. Nathhorst on these matters, which are primarily the subject of litigation in Norway between the relevant parties, and are not issues upon which this court ought or is required to pronounce or decide. Moreover, there seemed to have been a compulsion on the part of the Second Defendant in particular, who obviously feels that he has been gotten the best of by Mr. Nathhorst, to attempt to re-litigate such issues before me or, at minimum, to use such evidence in an attempt to explain away the allegations of improper purpose, which take on some relevance in the context of the section 43 and section 184I applications. The latter application or claim has, essentially, been abandoned by the Claimant, as will be addressed in the concluding part of this judgment when dealing with the appropriateness of the reliefs sought by the Claimant in its Claim Form and at the conclusion of the trial. Also, to some extent, these historical facts and matters have been raised by the Defendants in order to support or to bolster the steps and actions which the Moe Directors have taken in relation to Lark BVI, to pass, especially the Allotment Resolution, the STA Resolution and the Redemption Resolution, and to enter into both the STA and the Co-operation Agreement. In my view, and as I have already found as a matter of law, all of these resolutions were invalid, null and void, for the reasons already given. Furthermore, this position and conclusion in law, is not 'saved' by sections 117 and 109(6) of the BVIBC Act

[307] As far as proper purpose is concerned, and to the extent of its relevance to the validity or otherwise of these resolutions, I find as a fact that both of the Second and Third Defendants, engaged in conduct and took the actions and steps which they did in passing the various resolutions, purportedly in their capacity as directors of and on behalf of Lark BVI, when they clearly knew or ought reasonably to have known as they were advised, that they had not been properly appointed directors (a fact which they seem to have accepted as some time) and that accordingly these actions and steps were either wrong or likely to be wrong and invalid. I also find based upon the documentary and other evidence before me, including the cross-examination of the Second and Third Defendants, (the cross-examination of the Second Defendant having had to be aborted because of his sudden, and unfortunate, illness in the witness box and subsequent hospitalization), that even if the Moe Directors were directors or *de facto* directors of the Lark BVI, they clearly acted for an improper purpose in passing the Allotment Resolution, the STA Resolution and the Redemption Resolution, in causing the Company to allot 9,900 shares to the Fourth Defendant, to enter into both the STA and the Co-operation Agreement with Lark Norway, and in purporting to have the Company redeem the Claimant's bearer shares for US$1.00.

[308] This was all done in circumstances where the Claimant had acquired a valid title to the bearer shares held by virtue of certificate No. 2 and had delivered the original of Bearer Share Certificate No. 2 to Lark BVI; and, in the face of the mandatory provisions of article 23 compelling them as directors (purportedly) of Lark BVI to convert to or exchange them for registered shares, which would have enabled the Claimant to participate fully as a shareholder in the affairs of Lark BVI, including in the appointment of directors of the Company. In doing so, the Second and Third Defendants acted not in the interest of Lark BVI (except to the extent that they sort to find and appoint a new registered agent of Lark BVI and to have the Company restored to the register), but in their own personal interest, and with a strategy and purpose intended to wrestle full control of Lark BVI, and to use it as an instrument through and by which, to pursue the claims of the Second Defendant against his nemesis, Mr. Nathhorst, with respect to matters and claims which had already been rejected by the courts in Norway.

[309] In short, it could not have been in the interest of Lark BVI for the Second and Third Defendants, purportedly as 'directors', with certain fiduciary duties to the Company and its shareholders, to issue and allot a significant majority of the shares in Lark BVI to a company (the Fourth

Defendant) controlled by them, thereby diluting the shareholding of the Claimant. And to do so in circumstances where the Second Defendant relies upon the agreement in 1995 between himself and Mr. Bertel Nathhorst, whereby Mr. Nathhorst was to have 60% of Lark BVI and he, Mr. Moe, 40%, and which 60% was subsequently transferred to the Claimant and the Claimant entered by them in the Register of Members as the holder of Bearer Share Certificate No. 2 evidencing that 60% interest. Further, it could not been, and was not for a proper purpose when they sort through the various resolutions and agreements to divest Lark BVI of all of its 'potential' claims and assets, and to hand them over to a foreign company controlled by them to the exclusion of the Claimant, and for no consideration or for a stated consideration (payment of the invoice from Carey Olsen) which was not a debt owed by Lark BVI, but one incurred personally by the Second Defendant.

[310] Moreover, it was not in the interest of Lark BVI, and not for a proper purpose, for the Second and Third Defendants, ostensibly as directors of the Company, to use their position as such, to pass or purport to pass, resolutions which were designed and intended to oust the Claimant from its interest in Lark BVI by redeeming their bearer shares, and doing so for the nominal sum of $1.00, supposedly as a 'fair price'; and to use Lark BVI, in "co-operation" with Lark Norway, as an instrument through which to litigate or to re-litigate claims which the Second Defendant has, or allegedly has, based upon, as he asserts, a written agreement made 24 April 1995 between Lark BVI and himself in Oslo[130], and a Memorandum made in Stockholm, Sweden on 16 June 1998 between himself and Mr. Bertel Nathhorst. [131]

[311] These are matters which the Second Defendant has litigated before the courts in Norway, and his claims were dismissed, albeit subject to the outcome of a pending appeal. Finally, it bears repeating that the Defendants, either singularly or in concert, have not counterclaimed in this action. They have not sought any relief from this Court upon which any such claims based upon prior agreements with Mr. Nathhorst or anyone else, could be founded, even assuming this court would have jurisdiction over them, which is highly doubtful.

[312] Accordingly, I conclude that the transfer of assets from Lark BVI to Lark Norway is invalid, null and void, and declare that the STA Resolution and the STA itself are invalid and not binding upon Lark BVI. I also declare that the Moe Directors had no authority to execute and to cause

[130] Vol. IB, Tab 37 pg. 1165-1166
[131] Vol. 1A Tab 30 pg. 639

Lark BVI to enter into the Co-operation Agreement. Accordingly, that agreement is null and void.

The validity of the Resolution made 28 March 2016 allotting 9,900 ordinary shares in Lark BVI to Lark Norway ("the Allotment Resolution")

[313] The Fourth Defendant company, Lark Services (Norway) AS ("Lark Norway"), was incorporated with the Second Defendant as its sole director and his wife, Wench-Jorunn Linge Moe, as sole shareholder. The Third Defendant is the managing director[132]. By resolution made 29 March 2016, the Moe Directors purported to allot 9,900 ordinary shares in Lark BVI to Lark Norway ("the Allotment Resolution"). At that time, neither of the Second or Third Defendants were directors of Lark BVI. Accordingly, the Allotment Resolution and the purported allotment of shares to the Fourth Defendant, are invalid, null and void and of no effect. Accordingly, the said allotment of shares is hereby set aside, and the registration of the Fourth Defendant in the Register of Members as the holder of 9,900 shares cancelled.

The Validity of the Quijano Resolution -14 May 2016

[314] It is noted that Patton, Moreno & Asvat ("PMA") by letter dated 28 January 2015 (Vol. 3 pg. 81) confirmed their intention to resign as registered agent of Lark BVI, "with effect from the date of this letter". However, pursuant to section 93(2) of the BVIBC Act a registered agent must give not less than 90 days notice of its intention to resign as registered agent of a company and, pursuant to section 93(5) the effective date of such resignation, where there has been no change of registered agent effected in the interim period, is the day after the notice of resignation is registered with the Registrar of Corporate Services. Thus, the effective date of the PMA resignation would have been 28 April 2015 (or thereabouts). There was a period when Lark BVI was without a registered agent, in beach of the BVIBC Act, which led to it being struck off the register on 30 September 2015. It was not restored to the register until 19 July 2016, at the instance of the Moe Directors, after they purported to pass the Quijano Resolution.

[315] The documentary evidence discloses that the Moe Directors, acting upon the erroneous assumption that they had validly appointed themselves as directors of Lark BVI by virtue of the

[132] Vol. 3 pg. 1217-1218

series of resolutions of the board which they purported to pass in March 2016, purported, by resolution of the directors to appoint Quijano & Associates (BVI) Limited on 14 May 2016 ("the Quijano Resolutions") as the new registered agent of Lark BVI (Vol. 3 pg. 142). As the Moe Directors were not validly appointed directors of Lark BVI, either by virtue of the PMA Resolutions or the March 2016 Ratification Resolutions, the Quijano Resolution is, in my view, invalid as a decision of the board. However, I have been urged by learned counsel for the Defendant, Mr. Nader, in any event, not to formally set aside the Quijano Resolutions, since the effect of doing so would be to put Lark BVI, which had been restored to the register on 19 July 2016, in breach of section 94(5) of the BVIBC Act, giving rise to a criminal offence and liability, if prosecuted, to a fine of $10,000.

The Validity of the two Redemption Resolutions made 8 July 2016 and 18 April 2017 respectively

[316] The Moe Directors purported to redeem the Claimant's bearer shares held by virtue of Certificate No. 2 by resolution of the directors of Lark BVI dated 8 July 2016.[133]. They purported to exercise that power on behalf of Lark BVI pursuant to "section 27(1) of Schedule 2, Part IV, Division 4 of the BVIBC Act, 2004". The resolution is signed by both the Second and Third Defendants. It is notable that this resolution acknowledged that the Claimant had been "approved as a member" of Lark BVI. The resolution was subsequently approved or endorsed by the Fourth Defendant company, purportedly as a shareholder of Lark BVI, by written resolution dated 18 April 2017, and the redemption price set at the nominal sum of $1.00. This was after the Moe Directors had purported to issue 9,900 new registered shares in Lark BVI to Lark Norway on 29 March 2016, and on 25 July 2016 to transfer all rights, claims and assets of Lark BVI, said to be worth millions, to Lark Norway, and entering into the STA. I will return to this latter resolution and to the said transfer of assets later when dealing with the section 184I claim

[317] Paragraph 27(1) of Schedule 2 to the BVIBC Act does not empower a company to redeem shares, be they registered shares or bearer shares. That provision related to a company having the power to increase or reduce its capital. As is seen from the **Bank of Nova Scotia Trust Company** case, the right in a company to redeem bearer shares is to be found at paragraph 36

[133] Vol. 3 pg. 143-144

of Schedule 2. However, the incorrectness of the reference in the minutes to the section permitting a company to redeem bearer shares, may not be fatal, since the power does exist under the statute.

[318] More importantly, the Second and Third Defendants (the Moe Directors) were not and have never been directors of Lark BVI. Therefore, the Redemption Resolution is invalid and wholly in effective, and I so declare. Accordingly, the Claimant's bearer shares held by virtue of Certificate No. 2 have not been redeemed by Lark BVI. It follows that the Claimant remains as shareholder of the Company either as the holder of bearer shares or as the holder or person entitled to 60 registered shares, having delivered Bearer Share Certificate No. 2 for conversion or exchange of the bearer shares for registered shares in Lark BVI and, having by the Foundation Resolution authorized their conversion or exchanged for registered shares.

Where the actions of the Moe Directors purportedly as directors of Lark BVI nevertheless valid pursuant to Sections 117 and 109(6)

[319] I have already indicated that section 117 does not avail the Defendants. I am of a similar view in relation to section 109(6). The Defendants address these issues at paragraphs 36 to 40 of their Written Closing Skeleton.

[320] Section 117 states-

The acts of a person as a director are valid notwithstanding that

(a) The person's appointment as a director was ***defective****; or*

(b) *The person is disqualified to act as a director under section 111*.

[320] I interpret the provision in paragraph (a) as relating to a situation where the person making the appointment of the director, for example, the members in general meeting or by written resolution or the board of directors (if so authorized by the memorandum and articles of association) has the power to do so, but in executing that function there was some defect in the appointment of the person as a director. That is to be contrasted with a situation where the person making the appointment did not have the power under the constitutional documents of the company to make the appointment, as in the instant matter. Also, paragraph (b) relates to where again the person making the appointment is fully authorized and empowered to do so,

but the appointee was a person disqualified under section 111 from being appointed a director of a company, as for example, where the appointee was under 18 years of age or an undischarged bankrupt.

[321] Learned counsel for the Defendants rely on section 117. In doing so he recognized that the tenor of the English case law on the ambit of a similar section (s. 161) of the English Companies Act 2006, is unhelpful to the Defendants. In that regard he is referring to the cases cited by learned counsel for the Claimants at paragraph 82 of their Trial Skeleton Argument. There they argue that section 117 is a reflection of the rule in *Royal British Bank v* T*urquand* case designed to prevent a company from relying on its own internal deficiencies and failures to "impeach" the validity of transactions with third parties and thereby avoid liability for them. They rely on certain English authorities in support of their contention that section 117 cannot be called in aid to validate the acts of the Moe Directors. These include: ***Aidiniantz v The Sherlock Holmes International Society Ltd*** [[134]; ***Ligett (Liverpool) Ltd v Barclays Bank*** [[135]; ***Walker v Kenns*** {[136]; ***Morris v Kanssen***[137]; ***British Asbestos Company v Boyd***[138]; and *Buckley on the Companies Acts at 161.*

[322] In ***Morris v Kannen*** the House of Lord held that the invalid appointment of the appellant as a director of the company and the invalid allotment of shares to him, were not validated by section 143 of the Companies Act, 1929 not by certain provisions of the articles, since these were designed to avoid questions being raised as to the validity of transactions where there had been a slip in the appointment of a director and not to override substantive provisions relating to such appointments. This was not a case where there was a defective appointment…but one where after 1941 there was no appointment of them as directors at all, so that there acts could not be validated. At page 471 Lord Simmonds formulates the relevant principle of law in this way-

> "*There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or in other words, a defective appointment, and (b) no appointment at all. In the first case it is*

[134] [2016] EWHC 1392 (Ch)
[135] [1928] 1 KB 48
[136][1937] 1 All ER 566
[137] [1946] AC 459, HL
[138] [1903] 2 Ch 439

implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case there is not a defect, there is no act at all."

[323] By contrast, in ***British Asbestos Company v Boyd***, the respondent was one of three persons duly appointed as directors of the company and when one of the others resigned, the remaining two (the respondent and another) appointed the respondent also as secretary of the company. He later resigned as secretary. However, by a provision in the articles a director must resign his position as a director where he or she accepted another office in the company. This provision was overlooked and the respondent and other remaining director proceeded continued to act as directors of the company for several years in good faith. During the period they appointed a third person as a director. Farwell J held that the irregularities in the appointment of the respondent and the third director, were validated by article 108 and section 67 of the companies Act, 1862, and that they were the duly constituted board of directors. In that case there director in question had been duly appointed, but ought to have resigned after he had accepted the position as secretary of the company. There was no question as to the power to appoint being exercised by persons who had not such authority under the articles.

[324] Learned counsel for he Defendants accept that, in some respects, there are aspects of the cases relied on by the Claimant on this issue that are not in the Defendants' favour. He also accepts that Mr. Willins, learned counsel for the Claimant may be correct when he submitted that section 117 cannot be invoked by persons who knew they had not been validly appointed. He also accepts that this issue also turns on what the articles of a company do permit in such circumstances, conceding, as he did, that there is no such provision in the Articles of Lark BVI which would assist the Defendants.

[325] The Defendants rely on ***Dawson v African Consolidated Co***[139]; **and *Re Scottish Petroleum Co***[140]**.**. In ***Dawson v Africa Consolidated***, the person in question was acting as a *de facto* director he and the other de facto directors made a call payment which was resisted by some of the shareholders on the ground that they were not *de jure* directors. The principal irregularity asserted was that the said person under the articles had vacated his office by parting with all of his shares. After 6 days he acquired sufficient shares in the company to qualify for appointment

[139] (1880) 16 Ch D 681
[140] (1883) 23, 413 CA

as a director, however, he continued to act as a director and was not formally reappointed by his co-directors who treated him as a director and apparently did not know that for 6 days he had not been a shareholder. It was held that article 114 did not operate only as between the company and outsiders, but also as between the company and its members, and was sufficient to cover such irregularities as those alleged, and that the call was valid. At page 15 to 16 Chitty LJ opines as follows:-

> "*It is hardly necessary to add anything about the Howbeach Case. There it was quite plain that the directors who were purporting to act, and whose appointment was derived from the acts of the signatories, were not well appointed. The reasons are not given by the learned judge why they held that the 60th clause in that case did not apply so as to validate their acts; but it is quite open to say that in that particular case* ***the appointment was so radically bad that the defect did not fall within the protection****.*" (emphasis added)

[326] Having considered the case law on this issue, I am of the firm opinion that section 117(a) of the BVIBC Act, which speaks to a "defective" appointment, can have no application to the instant matter, so as to render the Moe Directors *de facto* directors of Lark BVI, and to validate there various actions and steps in passing the various directors resolutions. Put simply, there was no authority under the articles to appoint them as directors when the PMA Resolution was passed by the then directors, and there is no express provision in the articles of Lark BVI would validate such actions in the face of no appointment or a seriously defective appointment of the director. This is not a matter were there had been a "defect" in their appointment, albeit the appointer had the requisite authority to make the appointment or the directors were held out by the Company to third parties as directors of the Company.

[327] Furthermore, the Second and Third Defendants were aware from very early that there appointments either were not valid or may not be valid, a fact which they even seem to have accepted. This they clearly knew from the Westwood legal opinion. At minimum they knew from their lawyers that there was serious doubt as to the validity of their appointment, yet they continued to act as directors and to purport to pass resolutions, even after they had accepted the Claimant was a member of Lark BVI, and had resolved to remove any prior directors. I am satisfied from all the evidence and surrounding circumstances, including the cross examination

of both the Second and Third Defendants that either of them acted in good faith in passing the various Moe Directors Resolutions, with the exception of those dealing with the appointment of a new registered agent of the Lark BVI. I find as a fact that they did not. Accordingly, section 117 is of no avail to them in all the circumstances.

[328] Likewise, section 109(6) does not avail the Second and Third Defendants. It provides-

> (6)"*If at any time a company does not have a director, any person who manages, or who directs or supervises the management of, the business and affairs of the company is deemed to be a director of the company for the purposes of this Act*."

[329] It is clear from the wording of this provision, as buttressed by its subheading "management by directors", that it deals with the management of the business and affairs of a company, and not its more formally, constitutional and regulated decision-making as a board of directors or a members in general meeting, pursuant to the memorandum and articles of association and the Act. Also, it cannot apply to validate breaches of duty and it applies only where the person has acted for a proper purpose. It has no application to the actions taken and decisions made and resolutions passed by the Second and Third Defendants, purportedly as directors of Lark BVI. These decisions and resolution purported to appoint themselves as directors of the Company, the revoke the appointment of others validly appointed as directors, to redeem the claimant's bearer shares in the company offering them $1.00 as "fair" compensation; excluding the Claimant and the Foundation directors from exercising effective control of the Company; allotting shares in the Company to the Fourth defendant company owned and controlled by the Second defendant and his wife, and also controlled by Third Defendant, thereby diluting the Claimant's shareholding in Lark BVI; and taking the radical and strategic decision to dispose of the assets of the Company to the Fourth Defendant to the complete exclusion of the Claimant. It is difficult to see how the Second and Third Defendants could be said to have acted in good faith in doing these various things ostensibly as directors of Lark BVI.

The Claim for Rectification of the Register of Members – Section 43

[330] The Claimant seeks an order rectifying the Register of members of Lark BVI to enter its name as a shareholder of the company with 60 registered shares. This claim is predicated on its

entitlement to have its bearer shares converted to or exchanged for registered shares in Lark BVI, and on the mandatory requirements in article 23 of the Company's Articles, which imposes an obligation on the directors of the Company to effect such conversion or exchange upon delivery of the original of the bearer share certificate to the Company.

[331] I have already addressed these issues and made findings thereon. Suffice it to be said for this purpose, that the Claimant was entitled to have its bearer shares held by virtue of Certificate No. 2 converted to or exchanged for registered shares in the Company, it having delivered Certificate No. 2 to lark BVI and to its then registered agent, PMA, at its registered office on 18 February 2015. However, at the time there were no validly appointed directors of Lark BVI who could give effect to article 23. This notwithstanding, the Claimant is entitled to have the shares converted or exchanged as at that date or, at minimum, at 23 February 2015, the date of the Foundation First Resolution, and to have its name entered in the Register of Members of Lark BVI.

[332] An issue of standing to make the claim under section 43 of the BVIBC Act has been raised by the Defendants. As I understand this point, it rest on whether the first and second standing points were decided against them, which they have. By section 43, an application to the court for rectification of the register of members of a company can be made by either a member of the company or by "a person aggrieved by the omission, inaccuracy or delay" being complained of.

[333] It is clear from the decision in ***Bank of Nova Scotia Trust*** conjoined appeals, that the holder of bearer shares is a member of a company, including a grandfathered bearer share company. Furthermore, a shareholder is entitled to make a claim for rectification where it has challenged the validity of the redemption of its shares, as in the instant matter. ***Hunter v Senate Support Services Ltd***[141]; and ***Re Straight Developers***[142]; ***Re Alipour v UOC Corp***[143]. I am firmly of the view that the Claimant's application for rectification can be conveniently and properly resolved by this court in these proceedings, and not by separate and future hearings.

[141] [2004] EWHC 1085
[142] [2007] EWHC
[143] [2002] 2 BCLC 770

[334] Accordingly, the Claimant was at the time of delivery of Certificate No. 2, and at the time of bringing this Claim, a member of Lark BVI entitled to seek an order for rectification of the Register of Members under section 43. This is so whether the bearer shares have been converted or exchanged for registered shares, or not. Likewise, it is pelucidly clear that the Claimant is, at minimum, a person aggrieved by the failure to convert or exchange its bearer shares for registered shares in Lark BVI, and to be entered in its register as a member of the Company with 60 registered shares. It acquired ownership of Bearer Share Certificate No. 2 on or around 27 January 2004, received physical possession of the bearer shares certificate from Attendus in February 2015, and was recognized in the 24 May 2015 version of the Register of Members of Lark BVI filed with the Registry of Corporate Affairs, as the owner of these bearer shares.

[335] The Claimant is therefore an 'aggrieved person' within the meaning of that expression in section 43, whether it holds the legal or beneficial interest in the bearer shares. Furthermore, Attendus having parted with physical possession of Certificate No. 2 to the Claimant, any argument based upon legal ownership resting with the person physically holding the bearer share certificate, completely falls away as of 18 February 2015. I also hold that upon presentation of certificate No. 2 the Claimant had an immediate right to have its bearer shares converted to registered shares. This right, and the conversion to or exchange for registered shares, further crystalized when the Foundation Resolution was passed on 23 February 2015 by the Claimant as the then sole member of Lark BVI entitled to vote, and a resolution was duly passed giving effect to the conversion or exchange. Thereafter, all that was required is to effect the entry in the register of members to reflect the change and to record the Claimant as a member holding 60 registered shares.

[336] I therefore hold that the Claimant had, and has, the requisite standing to bring this claim for rectification. Accordingly, it is ordered that the Register of Members of Lark BVI be forthwith changed with respect to Bearer Share Certificate No. 2 and the Claimant recorded therein as the holder of 60 registered shares in the Company.

The Relief Sought by the Claimant

[337] The Claimant has, in their Closing Written Submissions at paragraphs. 84, 85 and 86, not pursued their claim for relief under section 184I of the BVIBC Act grounded in unfair prejudice.

By paragraph 84 the Claimant *"seek simply declarations as to the constitution of Lark BVI, specific performance of the statutory contract and declarations as to the validity of the various resolutions, together with injunctions to restrain the same conduct taking place again."* And at paragraph 85: *"That relief does not depend upon Section 184I of the BVIBC Act. If the Court is satisfied that the resolutions are invalid, it is submitted that declarations are properly to be given to that effect."* Further, they have annexed at Tab 4 to those submissions a draft of the declaratory and other reliefs which they seek.

[338] This is opposed by the Defendants. They say that this is not part of the Claimant's pleaded case, has arisen for the first time in the Claimant's skeleton argument, permission to re-amend the claim and statement of claim has not been sought, and it is not open to the Court to make orders of the type now being sought in the alternative by submissions. In this regard, they cite CPR 8.6. (1) which states, in part, that a claimant must, in the claim form, specify any remedy that the claimant seeks. However, pursuant to section 20 of the Eastern Caribbean Supreme Court (Virgin Islands) Act, a court *"shall grant all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided."* Furthermore, it is difficult to understand this ground of objection by the Defendants, since the Claim Form[144] does set out the raft of declaratory, injunctive and other order which the Claimant seeks as does the Re-Amended Statement of Claim[145]. These do not differ in any material way from the reliefs which the Claimant has set out in its draft order provided with its Written Closing Submissions.

[339] The Defendants also object on the ground that the Claimant is at most the beneficial owner of the shares held by virtue of certificate No. 2 which are and continue to be immobilized and suspended for all purposes. Accordingly, the Defendants submit, it is not open to the Claimant to seek to bring a claim as "an interested person" as all rights attaching to those interests have been suspended.[146]. In fact, section 43(1) speaks to an applicant for relief being one who is "aggrieved" by the omission, inaccuracy or delay. This provision is reasonably broad in its scope and ambit and permits a court, on the application of a person with the requisite standing,

[144] Vol. 1A Tab 1
[145] Vol. 1A, Tab 4 pgs. 45-47
[146] para. 29 Defendants' Written Closing Submissions

to order changes to a register of members to correct any error or omission, and to effect any entry which affects the interest of a shareholder or a person legitimately aggrieved thereby. Certainly, the failure to register the Claimant as a member with registered shares and the wrongful allotment of shares, are matters which affect the interest of the Claimant as a member, as it does the legitimate interest of all other members.

[340] I have already found that the Claimant is the legal owner of the bearer shares held by virtue of Certificate No. 2 and entitled pursuant to section 38(2) of the BVIBC Act and article 23, to have those shares converted to or exchanged for registered shares in Lark BVI effective as of 18 February 2015 when Certificate No. 2 was delivered to the Company for that very purpose. It is also clear that the holder of a bearer share in an immobilized company is a member of the company Accordingly, the Claimant is a member of Lark BVI which is obligated pursuant to article 23 to register the Claimant as the holder of 60 registered shares. This is not a right which is suspended by virtue of section 68(1) and (2) of the Act, but a statutory and contractual obligation of the Company to the Claimant as a member and holder of bearer shares in Lark BVI.

[341] Moreover, the mandate proscribed by section 20 of the Supreme Court Act is clear and broad in its scope. It permits a court, as a necessary function of doing justice to the parties and bringing finality to disputes between them, to make such orders and declarations as may be appropriate with respect to their legal and equitable claims having regard to the particular facts and circumstances of the matter. Of course, this cannot be used by a party to gloss over any deficiencies in its pleaded case. Here we are not concerned with a deficiency in the Claimant's actual pleaded case, but with the kinds of reliefs which it has sought in its Claim Form, based upon their pleaded case. In my view, this falls squarely within the ambit and scope of the power of the court under section 20 which is expressed in mandatory terms, subject to the discretion of the court to impose certain terms and conditions as the court thinks just.

Conclusion

[342] Having regard to the findings and conclusions on the various issues reached, the Claimant has proven its Claim on a balance of probabilities and, accordingly, judgment is entered for the Claimant in terms of the declarations, injunctions set out below. In doing so, and to the extent

set out in this decision, I reject the Defendants Amended Defence filed on 5 September 2019. The declarations and order of the Court are as follows:-

1. It is declared that:

   (1) The Claimant was entitled on 18 February 2015 to deliver its Bearer Share Certificate No. 2 to the First Defendant company for conversion to or exchange for registered shares in the First Defendant and the First Defendant was obligated to effect the share conversion or exchange as of 18 February 2015 and to enter the name of the Claimant in the Register of Members of the First defendant as the holder of 60 registered shares in the First Defendant.

   (2) The resolution dated 26 January 2015 (the PMA Resolution) passed by the directors of Lark BVI was wholly ineffective to appoint any directors of Lark BVI.

   (3) The resolution made or adopted by the Claimant dated 23 February 2015 (the First Foundation Resolution) was a valid resolution of the First Defendant and was effective to remove any then current directors holding or purporting to hold office and to appoint NATCO trading Aktiebalog and Rillie Aktiebolag (the Foundation Directors) as the new directors of Lark BVI, and to authorize the conversion to or exchange of the Claimant's bearer shares held by virtue of Certificate No. 2 to 60 registered shares in Lark BVI effective as at 15 February 2015.

   (4) In consequence, the directors of the First Defendant are and have been since 23 February 2015 NATCO Trading Atkiebolag and Rillie Aktiebolag (the Foundation Directors) and the Second and Third Defendants have not been validly appointed to the office of directors and where not *de facto* directors of the First Defendant.

   (5) Each and every resolution purportedly passed by the Second and Third Defendants as directors of the First Defendant, including but not limited to, the resolutions passed 25 September 2015 (the Removal Resolution), 30 September 2015 (the Authorization to Engage Lawyers to pursue claims in Norway against Thermtech and the Nathhorts), 21,22,23,24, and 25 March 2016 (the Re-validation Resolutions), 8 July 2016, 5 April 2017 and 18 April 2017 (the Redemption Resolutions), 25 July 2016 (the STA

Resolution), and 28 March 2017 (the Allotment Resolution), but excluding the resolution passed 12 July 2016 appointing Quijano & Associates (BVI) Limited as registered agents of the First Defendant) are invalid, void and of no effect.

(6) Each and any resolution purportedly passed by the Fourth Defendant as a shareholder of the First Defendant, including but not limited to the resolution dated 14 June 2017 (the Ratification Resolution) is invalid, void and of no effect.

2. Without prejudice to the above, the following purported acts of the First Defendant are invalid, void and of no effect, and are hereby set aside accordingly:

(1) The allotment dated 28 March 2017 of 9,900 shares to the Fourth Defendant;

(2) The redemption of the bearer shares of the Claimant held by virtue of Certificate No. 2;

(3) The redemption of the bearer shares of the Second Defendant held by virtue of Certificate No. 3;

(4) The transfer of certain assets of the First Defendant to the Fourth Defendant;

(5) The Sale & Transfer Agreement between the First Defendant and the Fourth Defendant dated 25 July 2016;

(6) The Co-Operation Agreement between the First Defendant and the Fourth Defendant dated 25 July 2016;

(7) Any resolutions, including that dated 14 June 2017, which purports to ratify some or all of the matters set out above.

3. The First Defendant and its registered agent are hereby ordered and directed to rectify the Register of Members of the First Defendant (and to file a copy of the duly amended Register of Members with the Registry of Corporate Affairs in the British Virgin Islands) to record effective 15 February 2015 that:

(1) The Claimant is the holder of 60 registered shares issued by the First Defendant; and

(2) Bearer Share certificate No. 3 represents 40 bearer shares which have not been redeemed or cancelled.

4. The First Defendant and its registered agents are hereby ordered and directed to rectify the Register of Directors of the First Defendant (and to file a duly amended Register of Directors with the Registry of Corporate Affairs in the British Virgin Islands) to record that (1) the PMA Directors resigned effective 26 January 2015; (2) NATCO Trading Atkiebolag and Rillie Aktiebolag as the only two directors of the First Defendant effective 23 February 2015; and (3) to delete and remove the Second Defendant and the Third Defendant as directors of the First Defendant.

5. The Second, Third and Fourth Defendants are restrained, whether by themselves or whether by servants, agents, lawyers or otherwise, from:

   (1) Holding themselves out as being directors of the First Defendant or as being entitled to act as directors of the First Defendant or on its behalf;
   (2) Holding the Fourth Defendant out as being a shareholder of the First Defendant;
   (3) Holding the Fourth Defendant out as being the transferee or owner of any of the assets of the First Defendant, including but not limited to the assets purportedly transferred to the Fourth Defendant by the Sale & Transfer Agreement dated 25 March 2016.

6. The Second, Third and Fourth defendant shall pay the Claimant's costs of this action, to be assessed, if not agreed within 21 days.

[343] In the circumstances, the Claimant's claim for damages is not engaged and is accordingly dismissed.

[344] The court is indebted to learned counsel for both sides in this matter, for the diligent and professional way in which they have conducted this case leading to its conclusion, especially in

light of the unfortunate illness of the Second Defendant during the course of the trial, and for the assistance rendered in their respective written and oral submissions.

The Hon. Gerard St.C Farara Q.C

Commercial Court Judge (Ag.)

By the Court

Registrar