Neutral Citation Number: [2022] EWHC 3053 (Comm)

Case No: CL-2017-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

IN THE MATTER OF GERALD MARTIN SMITH
AND IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988

Date: 30/11/2022

Before :

MR JUSTICE FOXTON

- -

Between :

(1) THE SERIOUS FRAUD OFFICE
(2) MR JOHN MILSOM AND MR DAVID STANDISH
(as joint Enforcement Receivers in respect of the realisable property of Gerald Martin Smith) — **Applicants**

- and -

(1) LITIGATION CAPITAL LIMITED
(a company incorporated in the Marshall Islands)
& 45 Others — **Respondents**

Case No: CL-2022-000330

AND IN THE MATTER OF A PART 8 CLAIM

Between :

(1) RUPERT CHARLES BRADSHAW TICEHURST
(2) ROGER JAMES TAYLOR
(3) NICHOLAS THOMAS — **Claimants / Part 20 Defendants**

- and -

(1) HARBOUR FUND II LLP
(2) Orb ARL
(3) STEWARTS LAW LLP — **Defendants / Part 20 Claimants**

- and -

(4) SMA INVESTMENT HOLDINGS LTD **Additional Party**

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Elizabeth Jones KC, Daniel Saoul KC, Richard Hoyle and **Lorraine Aboagye** (instructed by **Harcus Parker LLP**) for the **Settlement Parties**
Tony Beswetherick KC (instructed by **Stephenson Harwood)** for the **Enforcement Receivers**
Penelope Reed KC and **Tom Beasley** (instructed by **Payne Hicks Beach**) for the **Trustees**
Donald Lilly (instructed by **HFW**) for the **Joint Liquidators**
Kennedy Talbot KC and **Gary Pons** for the **Serious Fraud Office**

Hearing dates: 14 and 15 November 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 30 November 2022 at 14:00.

The Honourable Mr Justice Foxton:

A INTRODUCTION

1. In the preface to the fourth edition of *Meagher Gummow & Lehane's Equity: Doctrines & Remedies* (2002), the editors suggested of one jurisdiction that the prospect of "any principled development of equitable principles seems remote", a state of affairs they sought to attribute to the "misguided endeavours" of one judge. They observed:

> "That one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems".

2. This is now the fourth occasion in this litigation in which, as a commercial lawyer sitting in the Commercial Court, I have found myself neck-deep in the doctrines and principles of trusts law and equity, and I am concerned that my own endeavours (misguided or otherwise) may be provoking a similar reaction. However, as the Part 8 Claim which raises these issues was transferred into the Commercial Court from the Chancery Division, I have done my best to navigate unfamiliar legal pathways, and acknowledge with gratitude the assistance given by "expert guides" in the form of Ms Jones KC and Ms Reed KC, who have attempted to prevent me straying too far from equitable orthodoxy.

3. The present set of disputes arises from a trust (**the Harbour Trust**) created in connection with the provision of litigation funding by Harbour Fund II LLP (**Harbour)**, for proceedings to be brought by Mr Thomas, Mr Taylor and Orb ARL (**Orb**) against Mr Andrew Ruhan (**the Orb Litigation**). Those proceedings were settled, on terms which (at least on my findings, albeit subject in important respects to a judgment expected from the Court of Appeal following a hearing on 5 and 6 October 2022) involved the transfer of various rights and assets. Disputes have arisen as to how those assets should be administered and/or distributed pursuant to that trust, and those disputes have generated the following applications:

   i) A Part 8 Claim issued by Messrs Thomas and Taylor and Mr Rupert Ticehurst (who I shall refer to as **the Trustees** without in any way pre-determining their status) seeking to confirm their status, rights and powers as alleged trustees of the Harbour Trust (**the Part 8 Claim**).

   ii) An application by certain of the Settlement Parties (Harbour, the Viscount on behalf of Orb and four companies controlled by the Joint Liquidators or **JLs**, but who I will refer to collectively as the Settlement Parties for convenience) seeking to appoint Mr Standish and Mr Pike of Interpath Ltd (**Interpath**) as receivers over certain assets which, on my findings, are beneficially owned by the Harbour Trust and by companies under the management of the JLs.

   iii) A Part 20 Claim made by certain of the Settlement Parties – Harbour, the Viscount on behalf of Orb and Stewarts LLP (**Stewarts**) but who I will once again refer to as the Settlement Parties – in the Part 8 Claim seeking relief in the form of the transfer of shares in certain companies to new trustees to be appointed to the Harbour Trust (**the Part 20 Claim**).

iv) An application by Messrs Thomas and Taylor seeking to appoint Mr Katz, Mr Hyde and Mr Rubin of Begbies Traynor as receivers over certain assets alleged to fall within the Harbour Trust.

At the risk of a significant degree of over-simplification, I will refer to these four applications as **the Trust Applications**.

4. There were also two further applications:

i) An application to determine whether the court would have jurisdiction to impose a Piggott Condition on the Serious Fraud Office. This was resolved by a consent order.

ii) The Trustees' application for directions for the determination of the JL's application for payment out of certain monies currently held by the Court Funds Office. As I indicated at the hearing, I could not see any answer to the JL's application on the material before me. However, I gave the Trustees the opportunity to consider the position in the period prior to hand-down of this judgment, on the basis that if the JLs were required to attend to argue the application when there were no grounds for resisting it, there might well be costs consequences.

B THE BACKGROUND TO THE TRUST APPLICATIONS

5. The full background to these applications appears in the judgment at [2021] EWHC 1272 (Comm), **the Directed Trial Judgment**. However, it may be helpful to recap some of the salient facts which were either common ground or the subject of findings in that judgment.

B1 The Harbour IA

6. As I have indicated, Harbour provided litigation funding to the claimants in the Orb Litigation. The terms on which they did so were set out in a contract called the Harbour IA, to which Harbour and each of the Orb claimants were parties. Pursuant to the Harbour IA, Harbour agreed to invest up to £5,280,000 to meet "the Claimants' Legal Costs" (as defined), according to an "Agreed Budget and Timeline" (clause 2.1). That amount was to be paid directly to the legal representatives acting for the Orb claimants, defined as the Legal Representatives, who were identified in the Harbour IA, and could only be changed with Harbour's written agreement (which was not to be unreasonably withheld) (clause 4.2(e)).

7. It was the Orb claimants who had the right to conduct the Proceedings, defined as "any legal proceedings, arbitration, mediation or other steps taken in contemplation of [the same] in relation to any of the Causes of Action" (clause 6.2), with an obligation to keep Harbour informed of material matters (clause 3 and elsewhere). Harbour's control of the litigation process comprised:

i) The due diligence performed in respect of the identified causes of action before entering into the Harbour IA, which was backed up by contractual representations (clause 3.1).

ii) Setting the agreed budget and timeline, the Harbour IA providing that "the budgeted costs for each stage of the Proceedings and for each service provider shall not exceed the specific budgeted costs in the Agreement Budget and Timeline for that stage" unless the change was agreed by Harbour in writing.

iii) Harbour was able to agree the identity of the Legal Representatives in the Harbour IA, and its consent (not to be unreasonably withheld) was required for any subsequent change.

iv) Harbour could suspend the payment of costs if it was not provided with information in accordance with the Harbour IA.

v) Harbour was not liable for costs after it terminated the Harbour IA (under clauses 14.1 and 14.3 and clauses 15.1 and 15.3).

vi) Harbour benefited from certain indemnities from the Orb claimants (clause 2.5).

vii) The Orb claimants agreed to act reasonably and carefully in the litigation, and to listen carefully to the advice of the (Harbour-approved) Legal Representatives (clause 4.2(d)).

8. Clause 8 was headed "Declaration of Trust" and provided:

> "… each of the Claimants agrees on a joint and several basis that the Claimants will hold all Proceeds as Trust property on bare trust absolutely for the benefit of the Claimants and for HF2 and that such Proceeds will be kept separate from the Claimants' own funds. The Claimants further agree on a joint and several basis to give notice of the Trust to the Legal Representatives and will direct the Defendant to pay all Proceeds to the client account of the Legal Representatives. The Claimants and HF2 further agree that the Claimants as trustee of the Trust will hold the Proceeds on trust for the Trust Beneficiaries to the extent of the interests of the Trust Beneficiaries…"

Clause 1.1 defines the trust as that created "under clause 8 and other applicable provisions of the Agreement".

9. "Proceeds" was defined as:

> "any amount of money or the value of any goods, services or benefits, recovered or received by the Claimants or its Affiliates as a result of Success in the Proceedings and/or Settlement (including the present value of any goods, services or benefits to be paid in the future and the present value of any new commercial arrangements entered into with, or at the direction of, the Claimants or their Affiliates or otherwise), and shall include interest and any sums recovered in the Proceedings by way of legal costs and ex gratia payments in respect thereof. Proceeds shall be the gross amount prior to any set-off or counterclaim exercised by the Defendant or prior to any deduction for taxes payable to any government authority".

10. As Ms Jones KC noted, one of the difficulties with this definition of 'Proceeds' is that it seeks simultaneously to address two issues:

    i) First, the financial value by reference to which the amount of Harbour's entitlement is calculated, Schedule 2 providing for Harbour to receive certain defined percentages of "the Proceeds" depending on the date of receipt. The references to "the value of any goods, services or benefits", "the present value of services or benefits to be paid in the future" or of "new commercial arrangements", and the statement that "the Proceeds shall be the gross amount prior to any set-off" all seek to address this issue.

    ii) Second, to define the subject-matter of the trust (or trusts) created by clause 8.1. Self-evidently, this cannot include "the value" of goods and services (which is not an asset capable of being held on trust), future services or benefits or "new commercial arrangements" or amounts never paid to the Orb claimants because, for example, they are the subject of a set-off by Mr Ruhan.

11. Clause 9.1 provides that the Orb claimants will apply or instruct the Legal Representatives to apply any Proceeds "received as a result of Success in the Proceedings and which it holds on trust" in a particular order:

    i) First, to "deduct all stamp duties, bank charges and currency exchange costs" payable by the Orb claimants.

    ii) Next, re-paying the amount invested by Harbour.

    iii) Then, paying sums due in respect of the Orb claimants' legal costs.

    iv) After that, paying Harbour its "Schedule 2" amount.

    v) Finally, paying the Orb claimants any remaining amount "which the Claimants shall receive in their capacity as Trust Beneficiaries".

12. Clause 9.2 provides that:

    > "Until such time as all amounts payable to [Harbour] under this Agreement have been made, the Claimants shall not be entitled to deduct from the Proceeds received as a result of Success in the Proceedings any charges, fees, taxes … in connection with the proceedings unless such fees fall within the definition of Claimants' Legal Costs. Nor shall the Claimants be entitled to apply any set-off in relation to monies owed to the Defendant whether or not owed to the Defendant in relation to the Proceedings".

13. Schedule 2 provides that Harbour's "entitlement to Proceeds as a Trust Beneficiary" would be "as set out in the table below and shall be paid in cash in pounds sterling". The figures quantified Harbour's entitlement by reference to a percentage of the Proceeds capped at £40,000,000, the percentage varying dependent on the date of receipt, with a further entitlement to 10% of the Proceeds in excess of £40,000,000 up to £80,000,000,

and 5% of the Proceeds in excess of £80,000,000, whenever received. Schedule 2 continues:

> "The Claimants entitlement to Proceeds as Trust Beneficiaries shall be such proportions as equates to the amount of those Proceeds that they are entitled to receive in such capacity under the [Harbour IA]".

B2 The transfers to Dr Cochrane and SMA

14. As I explained in the Directed Trial Judgment, in March 2014 what has been referred to as the IOM Settlement was entered into, which led to legal title in various (largely non-cash) assets being transferred to Dr Gail Cochrane and SMA, a Marshall Island company, by way of what was contended to be the recovery of assets claimed in the Orb Litigation. Neither Dr Cochrane nor SMA were parties to the Harbour IA.

15. In an apparent effort to address this issue, and to deal with the fact that the assets transferred under the IOM Settlement did not take the form of cash, in October 2014 the Harbour Deed was entered into between the parties to the Harbour IA, Dr Cochrane, Stewarts and various other interested individuals, including Messrs Cooper and McNally who had procured the transfers (but not SMA). The Harbour Deed referred to the IOM Settlement, noting that neither the Orb claimants nor the defendant in the Orb Litigation were parties to it. The Deed sought to ensure that assets transferred under the IOM Settlement fell within the ambit of the Harbour Trust by agreeing that:

> "for all purposes, in particular the purposes of the Investment Agreement, the Settlement Consideration provided to Cochrane or for her direct or indirect benefit by Cooper and McNally … shall be treated as 'Proceeds received as a result of Success in the Proceedings' as referred to in Clause 9.1 of the Investment Agreement such that should be applied in accordance with Clause 9.1(a) to (f) inclusive of the Investment Agreement".

16. At the Directed Trial, it was submitted that the Harbour Deed had not been effective in overcoming the issue in [14] above, not least because SMA had not been party to it. I found that Dr Cochrane and SMA had not received the assets and rights acquired under IOM Settlement Agreement beneficially, but on bare trust for the Orb claimants.

17. At [538] of the Directed Trial Judgment, I found as follows:

> "The interests under the Harbour Trust, under which both Orb and Messrs Thomas and Taylor derive any proprietary interest they have, are held as follows:
>
> i) Dr Cochrane and SMA held the legal estate in the Transferred Assets;
>
> ii) as nominees (and hence on bare trust) for the Orb Claimants;
>
> iii) who in turn hold their respective interests on the terms of the Harbour Trust;

iv) under which each of Orb, Mr Thomas and Mr Taylor have subordinate interests after deducting legal costs and Harbour's entitlement in the proportions of 25/40ths, 7.5/40ths and 7.5/40ths respectively."

The immediate context for that finding, on which the Settlement Parties place some reliance, was to address the argument advanced by Messrs Thomas and Taylor that Orb's proprietary interest should be reduced to reflect amounts allegedly stolen by individuals for whose conduct it was said to be responsible. My conclusion was that Orb's interest under the Harbour Trust was not affected by the issues raised ([537]).

18. Against that background, issues have arisen as to the nature and management of the trust or trusts created by the Harbour IA and the transfers to Dr Cochrane and SMA. In particular:

i) Orb is *en désastre* (effectively in a form of insolvent liquidation) under Jersey law.

ii) Messrs Thomas and Taylor have sought to take various steps by way of management of the assets of the Harbour Trust and in relation to proceedings commenced in various jurisdictions concerning assets which they allege are subject to the Harbour Trust. Those actions have brought Messrs Thomas and Taylor into conflict with the position taken by the Viscount (on behalf of Orb), the Settlement Parties, the JLs and the Enforcement Receivers in relation to the same assets and proceedings.

iii) On 8 March 2022, Messrs Thomas and Taylor purportedly appointed Mr Ticehurst as a trustee of the Harbour Trust, in place of Orb, pursuant to s.36(1) of the Trustee Act 1925. The validity of that appointment is in dispute.

iv) On 18 March 2022, solicitors acting for the Trustees wrote to the Enforcement Receivers stating that all underlying assets held by the various Non-Arena Companies should be transferred to Messrs Thomas, Taylor and Ticehurst in their capacity as trustees of the Harbour Trust. Similar assertions were made by various persons who have, at various stages, been involved with those assets.

v) The actions and assertions made by Messrs Thomas and Taylor as to the Trustees' powers and rights have been challenged by a number of other parties, including the Settlement Parties and the Enforcement Receivers.

vi) On 10 May 2022, the Trustees issued the Part 8 Claim Form.

B3 The relief sought in the Part 8 Claim Form

19. The Part 8 Claim form asks the Court to determine:

> "whether, in light of events (more fully described in the witness statement attached), upon the proper construction of the Harbour IA, including by way of implied terms:

a. The function of those who are from time to time properly appointed as trustees of the Harbour Trust is to identify, take control of, secure and sell or otherwise realise the value of trust property (being that defined as Proceeds in the Harbour IA) so as to convert the same into cash (in pounds sterling) for distribution in accordance with the Harbour IA's payment waterfall provisions and to resolve claims made under the agreement's waterfall provisions and distribute cash accordingly.

b. In fulfilling their functions, the said trustees are entitled to exercise all the powers that might be reasonably necessary to fulfil the same and/or those powers usually attributable to trustees under the general law and/or as are bestowed by statute (including the Trustee Act 1925 (except s32), the Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000, including but not limited to:

    i. The power to sell trust assets;

    ii. The general power of investment including the power to vary investments;

    iii. A power to acquire land;

    iv. The power to employ agents, appoint nominees and custodians;

    v. The power to insure;

    vi. The power to compound claims and liabilities as provided for in s15 of the Trustee Act 1925;

    vii. The powers concerning reversionary interests and valuation as provided for at s22 of the Trustee Act 1925;

    viii. In relation to land, all the powers of an absolute owner.

c. That the said trustees are entitled in acting as trustees to an indemnity out of the trust fund for their liabilities, costs and expenses properly incurred and a lien over trust assets.

d. Further or alternatively:

    i. What the extent of the trustees' duties, powers and entitlement to an indemnity is;

    ii. How the Proceeds (or their traceable proceeds) are to be identified, taken control of, secured, sold or realised and distributed under the Harbour IA."

20. In addition, the Part 8 Claim Form sought a declaration that Mr Ticehurst had been properly appointed under s.36(1) of the Trustee Act 1925 in place of Orb on 8 March

2022 or alternatively asks the court to confirm that appointment under the court's inherent jurisdiction or s.41 of the Trustee Act 1925 or otherwise. Finally, and (inevitably), the Part 8 Claim Form sought:

> "Such further or other relief as the court sees fit, including but without limitation:
>
> a. Such further directions as are deemed necessary regarding the administration of the trust including as to the identification and control of trust assets including those assets that are subject to orders made within the confiscation proceedings CL-2017-000323 and the transfer of all books, papers and other records belonging to the trust.
>
> b. Such further or other declarations as may be necessary."

C THE LEGAL BACKGROUND

21. As the Part 8 Claim Form records, the court is concerned in the first instance with the interpretation of the Harbour IA, against the background of relevant provisions of the Trustee Acts 1925 and 2000. Having, on the basis of that analysis, determined what powers and duties the Trustees have, it is necessary for the court to determine which powers have been validly exercised. Finally, against that background, it is necessary for the court to determine what orders it should make in the particular circumstances of this case.

22. So far as the interpretation of the Harbour IA is concerned, I was referred to the following observation by Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2, [19]:

> "… the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words: (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document; (iv) the facts known or assumed by the parties at the time that the document was executed and (v) common sense, but (b) ignoring the evidence of any party's intentions".

23. The Trustee Acts 1925 and 2000 presumptively grant trustees various powers. Amongst those which have been referred to in the course of this application are:

i) powers of sale under ss.12 and 13 of the Trustee Act 1925;

ii) the power of two or more trustees to compound liabilities under s.15 of the Trustee Act 1925;

iii) the power to insure under s.19 of the Trustee Act 1925; and

iv) the power to value any interest in trust property not vested in the trustee under s.22 of the Trustee Act 1925.

24. Section 69(2) of the Trustee Act 1925 provides:

> "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument".

25. In *In re Delamere's Settlement Trust* [1984] 1 WLR 813, 822, Slade LJ described the issue for the court when considering the operation of s.69(2) as being whether the application of the statutory provision would be "inconsistent with the purport of" the trust. He cited with approval the observations of Lord Evershed MR in *Inland Revenue Commissioners v Bernstein* [1961] 1 Ch 399, 412-13:

> "At a first reading of the subsection it might seem that in order to exclude the power of advancement there would have to be an express exclusion or something equivalent thereto. But Mr. Bathurst for the Crown has not here contended that the section requires anything so positive in expression. He has conceded (and for reasons which will in a moment appear, I think, if I may say so, rightly conceded) that it suffices to make the statutory power of section 32 inapplicable if, on a fair reading of the instrument in question, one can say that such application would be inconsistent with the purport of the instrument. …. follows, therefore, that in *In re Turner's Will Trusts* the Court of Appeal was, as I apprehend the judgment, saying that section 69 (2) will have its exclusive effect if one finds upon a proper reading of the instrument a contrary intention and one need not seek for an express exclusion."

26. I was also referred to various authorities relating to the concept of a "bare trust". That is not a defined term, and I accept that the obligations owed by a "bare trustee" will ultimately depend on the terms and context of the particular trust, rather than that "bare" description. In support of that proposition, Ms Reed KC referred me to *Lewin on Trusts* (20th), [1-028], a reference where she submitted "all good trust arguments start". This provides:

> "A distinction has traditionally been drawn between 'bare' trusts, or 'simple' or 'naked' trusts, and 'special' trusts. According to that distinction, a bare trustee holds property in trust for a single beneficiary absolutely and indefeasibly and is a mere passive repository for the beneficial owner, having no duties other than a duty to transfer the property to the beneficial owner or as he directs. By contrast a trustee holding property on special trusts has active duties to perform, for example in executing the trusts of a will or settlement, with administrative (and perhaps also dispositive) powers accompanying his active duties. It is still possible to distinguish between an absolute trust for a single beneficiary, which might still be called a bare or simple trust, and other types of trust. *On closer examination, however, a distinction cannot satisfactorily be drawn between bare and special trusts on the basis that a person holding property on trust for another absolutely and indefeasibly is always a mere passive repository for the beneficial owner while a trustee holding property on special trusts has active duties to perform. The description of a bare trustee as a mere passive repository for the beneficial owner with no active duties to perform other than a duty of transfer requires at least some qualification in its application to cases where a beneficiary has an absolute and indefeasible interest*".

(emphasis added).

27. At [1-038] to [1-039], the editors note that "the Court of Appeal has described a bare trustee of shares in a company as a 'dummy'", but the editors doubt whether the function of a bare trustee, pending transfer, is simply to do what it is told to do by the beneficiary (albeit a bare trustee is bound by directions to transfer the property as the absolute beneficiary directs).

28. Finally, I was reminded by Ms Jones KC of the circumspection which must be adopted before applying the full panoply of trusts law to trusts which arise in a commercial context. In *Target Holdings Ltd v Redferns* [1996] 1 AC 421, 435, Lord Browne-Wilkinson noted:

> "It is in any event wrong to lift wholesale the detailed rules developed in the context of traditional trusts and then seek to apply them to trusts of quite a different kind. In the modern world the trust has become a valuable device in commercial and financial dealings. The fundamental principles of equity apply as much to such trusts as they do the traditional trusts in relation to which those principles were originally formulated. But in my judgment it is important, if the trust is not to be rendered commercially useless, to distinguish between those basic principles of trust law and those specialist rules developed in relation to traditional trusts which are applicable only to trusts of quite a different kind".

29. In *AIB Group (UK) plc v Mark Redler* [1996] AC 421, [70]-[71], Lord Toulson observed that:

> "It is a fact that a commercial trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift. The contract defines the parameters of the trust".

30. In the present context, in which the trust created is ancillary to the terms of a commercial contract, intended to secure the performance of the contractual rights of one of the parties, it is the terms of contract which are the predominant consideration.

D THE NATURE OF THE HARBOUR TRUST

31. At first sight, the trust created by the Harbour IA appears to be of the most limited kind, its purpose to provide some form of security interest for Harbour in relation to the amounts recovered through the funded litigation. In the core case which the drafters of the Harbour IA appear to have had firmly in mind – one in which a sum of money is paid by the defendant to the funded claimant in settlement of the funded proceedings or satisfaction of a judgment debt – the trust would have a very brief life and the role of the Orb claimants as trustees would have been largely ministerial in nature:

i) There is no trust over the cause of action (which the Orb claimants were free to pursue or not to pursue).

ii) The trust attached to amounts "recovered or received" (the definition of Proceeds), with the Orb claimants agreeing to hold those amounts "as Trust Property on bare trust absolutely". Whatever the scope for debate as to the precise import of those

words, they are a very strong pointer that the role of the trustees here was very much towards the minimalist end of the spectrum.

iii) The Orb claimants assumed a contractual obligation to direct the defendant to the funded proceedings to make any settlement or judgment payment into the Legal Representatives' client account (clause 8.1).

iv) The funded claimants are required to give notice to the Legal Representatives of the Harbour Trust in the terms of Schedule 7 of the Harbour IA. That requires a notice signed by all of the Orb claimants in the following terms:

> "Pursuant to clause 8.1 of the Investment Agreement … each of the Claimants hereby gives notice to [the Legal Representatives] that such Claimant holds all Proceeds as Trust Property on bare trust absolutely for the benefit of the Claimants and for HF2 and to the extent of their interests as Trust Beneficiaries under the Investment Agreement …. Each of the Claimants hereby irrevocably directs that all Proceeds received pursuant to the Proceedings should be paid to the client account of [the Legal Representatives] and disbursed accordingly".

v) The Orb claimants undertook to "apply any Proceeds received" (or instruct the Legal Representatives to apply them) in accordance with clause 9.1 "immediately upon receipt of such Proceeds".

vi) That might involve converting the amounts received into sterling (given the right to deduct "currency exchange costs" in clause 9.1(a) and the need to pay Harbour its share in sterling in Schedule 2), but otherwise no obvious managerial activity on the Orb claimants' part.

32. In particular, the Orb claimants were not under any duty to "get in" trust property, nor were they entitled to use "Proceeds" to do so:

i) As noted above, the trust were expressed to arise on receipt.

ii) The Orb claimants had the right to conduct Proceedings (or not to conduct them) and were not under "any obligation to continue with the Proceedings" (clause 6.1). That included the right to conduct (or not to conduct) enforcement (it being clear from the "Agreed Budget and Timeline" that enforcement was one stage of the Proceedings, with its own budget, and clause 15.1 expressly referring to enforcement as part of the Proceedings).

iii) The Orb claimants had the right to conduct the Proceedings "as they consider appropriate", including as to settlement, abandonment, withdrawal or discontinuance (clause 6.2).

33. It is also clear that Harbour's funding obligations are limited to the amounts in the "Agreed Budget and Timeline" for the relevant stage of the Proceedings and in total, and that the Orb claimants had no right to use any recoveries in the Proceedings for the

purpose of funding them, save to the extent of any amount which reached them at the bottom of the clause 9 waterfall:

i) Clause 2.1 makes it clear that Harbour's funding commitment is limited to the figures in the Agreed Budget and Timeline.

ii) Clause 9.1 makes no provision for amounts to be deducted from Proceeds for this purpose.

iii) Clause 9.2 makes it clear that until all amounts due to Harbour under the Harbour IA have been paid, the Orb claimants cannot deduct any "charges, fees, taxes ... unless such fees fall within the definition of Claimants' Legal Costs". That is limited to amounts "consistent with the Agreed Budget and Timeline and any accepted variation thereto".

iv) That is also the case for interim recoveries (clause 11), and amounts received from any third party "in respect of any matter relating to the Causes of Action" (clause 12).

34. There were also provisions which addressed the settlement of the Proceedings:

i) "grossing up" Harbour's interest in the Harbour Trust if the Orb claimants rejected a settlement offer which the named Legal Representatives recommended, in the event that the eventual recovery was less favourable than it would have been under the settlement agreement (clause 10.2); and

ii) committing the Orb claimants to accept a settlement offer, if the parties invoked the "Settlement Determination" process and the Settlement Assessor determined that the settlement offer should be accepted (clauses 10.4 to 10.6).

35. Finally, the designation of the Orb claimants as trustees did not come about because they were regarded as appropriate persons or entities to exercise the powers of a conventional trustee in respect of assets in which a wider group of beneficiaries were interested. The Orb claimants were essentially self-selecting as trustees, because they were the persons with the causes of action, to whom any payments in satisfaction or settlement of those causes of action would, in the ordinary and expected course, fall to be made.

36. In this case, the unanticipated form which the IOM Settlement took, and the amendment effected by the Harbour Deed in an attempt to address the position, undoubtedly complicate the position. It involved the acquisition of Settlement Consideration which took the form not simply of cash but, more significantly in terms of value, shares in various "holding companies" which held shares in a variety of companies with assets and in some cases businesses of their own. And it involved legal title being transferred to Dr Cochrane and SMA. However, I am not persuaded that the amendment effected by the Harbour Deed fundamentally changed the very limited nature of the Harbour Trust, so as to impose on the Orb claimants *qua trustees* an obligation to take steps to "get in" trust property, and the right without Harbour's consent to use Harbour Trust funds to do so. That remains fundamentally incompatible with the nature of the bargain which the Harbour IA represents:

i) It would replace the Orb claimants' absolute entitlement to pursue Proceedings "in relation to the Causes of Action" (a wide expression, made wider in its effect because the expression Causes of Action is defined as "each and every claim that the Claimant may seek to assert against the Defendant *or any other person, arising out of or related to [the 2003 Oral Agreement]"* – emphasis added) with a fiduciary power (with concomitant fiduciary obligations) to pursue claims to assets to which the Orb claimants had asserted a proprietary entitlement in the Orb proceedings.

ii) It would replace the cap on Harbour's financial exposure in the form of the "Agreed Timeline and Budget" with a further obligation to provide funding from assets to which Harbour had the first claim.

iii) It would involve the application of funds held on the terms of the Harbour Trust otherwise than in accordance with clause 9.1 of the Harbour IA, and in direct contradiction of clause 9.2.

iv) According the Orb claimants as trustees with the power to compound liabilities would be inconsistent with the complex mechanisms in the Harbour IA addressing the settlement of litigation.

v) It would give the Orb claimants a range of fiduciary powers which the parties to the Harbour IA can never have anticipated they would have, in circumstances in which they were far from obvious candidates to discharge a role of that kind.

vi) It would take the decision as to which litigation Harbour should fund out of the hands of Harbour and its investment committee and place it into the hands of the Trustees and the court.

vii) The Harbour Deed was clearly intended to preserve the existing terms and nature of the Harbour Trust, but resolve any debate as to whether the Harbour Trust extended to the Settlement Consideration payable under the IOM Settlement (see [15] above), not to change its essential nature.

37. I accept that the only provision of the Trustee Act 1925 which was expressly included by the Harbour IA was the power of advancement under s.32 (excluded by clause 1.7). However, the very limited commercial trust created by the Harbour IA is so fundamentally different an animal from the traditional trusts at which the Trustee Act 1925 is principally aimed, that I cannot accept that this limited exclusion provides a sufficient basis for otherwise importing the full panoply of Trustee Act powers, however ill-suited they might be to the particular instrument under consideration.

38. For these reasons, I am not persuaded that the Orb claimants' role as trustees extended much beyond holding "Proceeds" on the terms of the Harbour Trust, and certainly did not extend to investigating, initiating and compromising litigation, for the purpose of collecting assets in as suggested by the Trustees. Given the conclusions I have reached as to the other orders which it is appropriate to make, it is not necessary to address each of the specific powers mentioned in the Part 8 Claim Form, beyond the observation that the role, and powers, of the Orb claimants as trustees of the Harbour Trust was much more limited than the Part 8 Claim assumes.

E THE STATUS OF THE TRUSTEES

E1 The position of Mr Ticehurst

Introduction

39. Section 36(1) of the Trustee Act 1925 provides:

> "Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,— (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee; may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant as aforesaid".

40. It is common ground that Orb is no longer fit or capable of discharging the office of trustee. As I have stated, it is *en désastre* as a matter of Jersey law. The unchallenged evidence of Ms Nicole Langlois, an Advocate of the Royal Court of Jersey, is that the effect of Article 24(2) of the (Jersey) Désastre Law is that Orb cannot hold any "public or

private office" while *en désastre*, which includes holding the office of trustee (Article 24(1)). It follows, and is common ground, that Orb is "incapable of acting" as a trustee of the Harbour Trust for the purposes of s.36(1) of the Trustee Act 1925.

41. In these circumstances, in reliance on s.36(1) of the Trustee Act 1925, on 8 March 2022, Messrs Thomas and Taylor purported to appoint Mr Rupert Ticehurst as a replacement trustee. Mr Ticehurst is a solicitor who was formerly a partner and Head of the Trust Department at two major city firms, and who is currently a partner and Head of Dispute Resolution at Maurice Turner Gardner LLP. He has extensive experience of acting as a professional trustee. It is the stated intention of Messrs Thomas and Taylor to resign as trustees once Mr Ticehurst's appointment as a trustee is confirmed (on the assumption, as I explain below, that there is a single trust, of which Messrs Thomas, Taylor and Ticehurst are all trustees).

42. The Settlement Parties challenge the validity of Mr Ticehurst's appointment on a number of grounds:

i) First, on the basis that the Harbour IA did not create a single trust of which each of the Orb claimants were trustees, but three separate trusts, with each Orb claimant being trustee only in respect of its share of the Proceeds received.

ii) Second, on the basis that the nature of the Harbour Trust was such as to exclude the right of other trustees under s.36 to appoint a replacement trustee.

iii) Third, on the basis that the fiduciary power to appoint a replacement trustee was exercised by Messrs Thomas and Taylor for an improper purpose and is therefore void.

iv) Finally, if the appointment was otherwise valid, the Settlement Parties submit that the court should exercise its inherent jurisdiction to remove Mr Ticehurst, given the facts which are now known as to the circumstances of his appointment and the funding arrangements put in place to cover his fees and the costs of the application to validate his appointment.

How many Harbour Trusts are there?

43. It is right to record that, until the service of their skeleton argument, the Settlement Parties had throughout these proceedings referred to the Harbour Trust as a single trust, and my judgments and orders have proceeded on the same basis. While the Settlement Parties' skeleton for this hearing stated that "the court order of 8 July 2022 which appointed Mr Ticehurst as interim trustee … proceeds on the basis of the misapprehension that there is a single 'Harbour Trust'", the terms of the order were prepared by the representatives of the Settlement Parties, and were consistent with the way in which the Harbour Trust had been referred to at that hearing, and indeed all previous hearings.

44. While the terms of the Harbour IA contain the usual provision that "except where the context otherwise requires, words denoting the singular include the plural and vice versa", the convention of referring to the Harbour Trust as a single entity is also adopted in the Harbour IA, in the definitions of "Trust" ("the trust created under clause 8 and any other

applicable provision of this Agreement") and of "Trust Beneficiaries" ("the beneficiaries of the Trust"), in clause 8 ("the Claimants as trustee of the Trust") and in clause 12 ("part of the Trust created under clause 8").

45. There are other indicia in the Harbour IA that it contemplates a single trust in which the recoveries of each of the Orb Claimants fall to be administered as a single fund:

i) The definition of "Proceeds" includes "any sums recovered by way of legal costs", which, *ex face*, is likely to involve orders payable to the Orb claimants jointly, and there is no provision for splitting this amount (or any other joint recoveries) between separate trusts.

ii) Clause 8.1, which establishes the Harbour Trust, refers to the Orb claimants' obligation to hold Proceeds as Trust Property as arising "on a joint and several basis". While the purpose of the reference to "several" is not entirely clear, and may be no more than a drafting tick, or perhaps a recognition that the Orb claimants each make a promise *inter se* as well as a joint promise to Harbour, the "joint" nature of the obligation is a strong pointer to the creation of a single trust of the pooled recoveries. Clause 8.1 also provides that the obligation to give notice of the trust to the Legal Representatives is "joint and several".

iii) Clause 9 and Schedule 2 provide for a single waterfall for the application of the assets held on trust, and clause 9 provides (once again) that the Orb claimants obligations under that clause are "joint and several". There are no provisions which would allow for any adjustment or pro-ration across three distinct trusts so far as the application of the Proceeds held in those trusts are concerned.

iv) Clause 12 provides that "in the event that any of the Claimants receive any sum from any third party in respect of any matter relating to the Causes of Action", that amount was to be treated as "part of the sums recovered … and it shall be part of the Trust created under clause 8". There is no provision allocating this amount to the Harbour Trust of the particular Orb claimant concerned, still less to allow for any subsequent Orb claimant-specific adjustment to reflect that receipt.

46. The only potential contra-indication is to be found in Schedule 7, the required form of notice and irrevocable direction to the Legal Representatives, whereby "each of the Claimants hereby gives notice … that such Claimant holds all Proceeds as Trust Property". However, that can also be read as a notification by each Claimant of its position as one of the trustees of a joint fund, and the fact that there was a joint and several obligation to serve a single notice on behalf of all three Orb claimants lends support to that interpretation.

47. Having regard solely to the terms of the Harbour IA, therefore, I am satisfied that the case convention of referring to a singular Harbour Trust is consistent with the better interpretation of the Harbour IA. Ms Jones KC's riposte to that conclusion was that it was not legally tenable, because each trustee could only declare a trust over their own property. However, the effect of the Harbour IA was not simply to create a series of bilateral obligations between each Orb claimant and Harbour, but also obligations

between the Orb claimants *inter se*. I am satisfied that clause 8.1 takes effect as a binding agreement by the Orb claimants to jointly settle their respective recoveries on the single trust created by the Harbour IA, with each Orb claimant a trustee of that single trust. I would have taken some persuading that if, as I have concluded, that was the intention of the parties to the Harbour IA as ascertained from their agreement, there was some inherent structural limitation in the law of trusts which prevented its fulfilment.

48. There was some suggestion on the part of the Settlement Parties that I had already reached the contrary conclusion by reason of the underlined words in the Directed Trial Judgment, [538]:

> "The interests under the Harbour Trust, under which both Orb and Messrs Thomas and Taylor derive any proprietary interest they have, are held as follows:
>
> i) Dr Cochrane and SMA held the legal estate in the Transferred Assets;
>
> ii) as nominees (and hence on bare trust) for the Orb Claimants;
>
> iii) who in turn hold <u>their respective interests</u> on the terms of the Harbour Trust;
>
> iv) under which each of Orb, Mr Thomas and Mr Taylor have subordinate interests after deducting legal costs and Harbour's entitlement in the proportions of 25/40ths, 7.5/40ths and 7.5/40ths respectively."

49. However, as I have stated, the Directed Trial was conducted throughout on the basis that there was a single Harbour Trust, but without any argument (or decision) on the point. If, as I have concluded, the effect of the Harbour Trust was that assets were pooled so as to be held on a single trust at a point of receipt, there is nothing in [538] which is inconsistent with that state of affairs. The effect of the Harbour Deed was that the proceeds of the IOM Settlement were held on the basis of the trust created by the Harbour IA, the effect of which I have set out above.

50. It follows that I reject the Settlement Parties' first ground of challenge to the appointment of Mr Ticehurst.

Was the s.36 power impliedly excluded?

51. As I have noted, the Orb claimants were trustees of the Harbour Trust because they were the parties bringing the Cause of Action with the benefit of the funding provided by Harbour, with the power of settlement, to whom, in the ordinary course, any settlement payment or discharge of the judgment would fall to be made. The Orb claimants would stand to benefit from any Proceeds once the prior claims under clause 9.1 had been discharged, but were to receive no remuneration for the discharge of their role as trustees. Harbour had various contractual rights against the Orb claimants, with whom it chose to enter into contractual privity, and had obtained certain security rights in relation to them (referred to in the Harbour IA as "the Security" and defined as "the fixed and floating charges created over the assets of the Claimants by instruments of deed dated the date hereof").

52. Further, the relationship between the Orb claimants *inter se* was not such that it might have been anticipated that, in some eventualities, the other two Orb claimants would get to decide who should hold the position of trustee originally held by the third (or indeed one of them in relation to the position of the other two).

53. The replacement of one of the Orb claimants as trustee by someone who did not have any of those attributes and was not in contractual privity with Harbour with the associated rights under the Harbour IA and the Security, to be chosen exclusively by the other two trustees, would involve a very significant departure from the position outlined at [51] and [52]. It would, almost inevitably, involve the appointment by the other two trustees of someone who would have to be remunerated for performing the role because they would have no interest in any Proceeds, and someone who would want to have an indemnity against trust assets, in circumstances in which the Harbour IA makes no provision for any such remuneration to be paid, did not provide the Orb claimants with any indemnity in respect of their role as trustees, and where the existence of any such remuneration or indemnity would be inconsistent with the clause 9 waterfall.

54. I am satisfied that the terms and nature of the Harbour IA, and the relationship of the Orb claimants, are wholly inconsistent with the existence of some "intra-trust" power of replacement of this kind to be exercised by one or both of the other trustees. The Trustees' argument that two of the Orb claimants have the right to devolve the rights and obligations of trustee (such as I have found them to be) on a stranger to the Harbour IA, and to do so without the need for Harbour's consent, would also sit uneasily with clause 22.1, which emphasises the personal nature of the obligations and rights under the Harbour IA by providing that "the Claimants are not entitled to assign and/or transfer any of their rights and/or obligations under any of the Transaction Documents".

55. It follows that I accept the Settlement Parties' contention that the power of replacement in s.36 of the Trustee Act 1925 was excluded in this case, with the result that the purported appointment by Messrs Thomas and Taylor of Mr Ticehurst as trustee was invalid and of no effect. If a replacement trustee was required, it was necessary to apply to the court under its inherent jurisdiction or under s.41 of the Trustee Act 1925.

Was any power to appoint a replacement trustee exercised for an improper purpose?

The factual background

56. In order to address these issues, it is necessary to deal with certain events which are the subject of outstanding applications which are not before me today. These include a committal application issued by the Enforcement Receivers and an application to challenge the jurisdiction of the court in respect of the Settlement Parties' Part 20 Claim, issued by persons who claim to have authority to act on behalf of SMA, but whose entitlement to do so is very much in dispute. For that reason, I have dealt with these allegations with some caution.

57. On 3 March 2021, Messrs Cooper and McNally commenced proceedings in the Marshall Islands against SMA (**the RMI Proceedings**), the basis of those proceedings being that the assets which I have found that SMA held on bare trust, and which were ultimately

held on the terms of the Harbour Trust, should be available to meet their claim. Messrs Cooper and McNally have been found to have acted dishonestly:

i) in my judgment in the Directed Trial ([208]-[211]); and

ii) in an arbitration award of Mr Stuart Isaacs QC in an LCIA arbitration commenced by Mr Sodzawiczny.

58. On 21 June 2021, the Enforcement Receivers asked LCL (a company I found to be ultimately beneficially owned by Dr Smith, his brother, Mr Anthony Smith, holding shares as nominee on his behalf: [498] and [610] of the Directed Trial Judgment) to transfer the shares in SMA to them. LCL relied upon the proceedings commenced by Messrs Cooper and McNally as a reason for not doing so.

59. On 9 August 2021, LCL purported to appoint a company called BKV Limited (**BKV**) as director of SMA. An individual called Mr Atik Miah has held himself out as the principal of BKV. Mr Miah is a known associate of Messrs Cooper and McNally, strongly suggesting that Dr Smith (through LCL) and Messrs Cooper and McNally (through BKV) are co-operating in attempts to prevent the Enforcement Receivers from gaining control of SMA, including to protect the Arena Companies on behalf of the Harbour Trust. On 5 August 2021, LCL had purported to assign rights under a document called the LCL Funding Agreement (whose authenticity was strongly challenged in the Directed Trial, although in the event it was not necessary to determine that question) to BKV.

60. In the course of August 2021, Mr Thomas began taking steps by reference to his capacity as a trustee of the Harbour Trust. On 30 August 2021, Mr Thomas informed the Settlement Parties that he and Mr Taylor had resolved to take steps to "collect in the Orb Claimants' assets in the Joint Trustees' names" and to undertake discussions with Mr McNally and BKV, and on 17 September 2021, Mr Thomas and Mr Taylor resolved to seek a stay of the RMI Proceedings with Mr Cooper and Mr McNally "to enable settlement negotiations to occur".

61. On 3 and 6 September 2021, Mr Thomas wrote to LCL asking for the shares in SMA to be transferred to Orb, Mr Thomas and Mr Taylor, and it is clear that LCL provided them with purported share certificates (Mr Thomas informing the solicitors for the Settlement Parties on 9 September 2021 that the share certificates were now in the Orb claimants' names). As I have stated, LCL had previously refused to comply with a request by the Enforcement Receivers for the transfer of the shares in SMA to them (see [58] above).

62. On 27 September 2021, Mr Thomas informed the Viscount that he intended to seek appointment to the board of SMA and to seek stays of litigation in the Marshall Islands and the Isle of Man involving Messrs Cooper and McNally. On 30 September 2021, there was a purported appointment of Mr Thomas to SMA's board by BKV. On 6 October 2021, Mr Thomas wrote to the lawyers who the Enforcement Receivers had instructed in the Marshall Islands Proceedings, purporting to instruct them to stay the proceedings to allow negotiations with Messrs Cooper and McNally to be conducted.

63. On 1 December 2021, Messrs Thomas and Taylor applied for a stay of execution in respect of the costs order I had made against them on 21 October 2021 in the Directed Trial requiring them to pay £335,000 within 42 days.

64. On 15 December 2021, persons claiming to be entitled to act on behalf of SMA filed an application in the Eastern Caribbean Supreme Court in SMA's name. Mr Thomas provided an affidavit in support of that application which (i) supported BKV's contention that it was a director; and (ii) contended that SMA was entitled to an indemnity on assets held on trust (i.e. the position adopted by Messrs Cooper and McNally in the Marshall Islands Proceedings, which was, at first sight at least, detrimental to the interests of those who claimed to be interested in those same assets under the Harbour Trust).

65. On 26 January 2022, BKV and Mr Thomas filed a notice seeking to intervene in the Marshall Islands Proceedings, challenging the Enforcement Receivers' right to act on SMA's behalf, and Mr Thomas applied to stay the proceedings to allow for settlement discussions with Messrs Cooper and McNally.

66. By this point, therefore:

i) There was clearly an entrenched conflict between the Enforcement Receivers, and Harbour and Orb as beneficiaries under the Harbour Trust, on the one hand, and, in various respects, Messrs Thomas and Taylor, Messrs Cooper and McNally and BKV on the other, in relation to (i) the status of the assets held by SMA; (ii) who had the right to act on SMA's behalf and (iii) how to deal with the claims advanced by Messrs Cooper and McNally against SMA brought with a view to enforcing against assets held by SMA.

ii) Messrs Thomas and Taylor were adopting a distinctly more favourable stance towards the claims or rights asserted by Messrs Cooper and McNally and BKV than either the Enforcement Receivers or the Settlement Parties were adopting:

a) As well as upholding BKV's claim to be a director of SMA, Mr Thomas owed his own purported appointment to BKV.

b) Mr Thomas was supporting Messrs Cooper and McNally's claims (in economic terms) to the Arena Surplus, something which appeared to conflict with the interests of the Harbour Trust, going so far as to state on affidavit that:

> "SMA is entitled to an indemnity from trust assets in respect of claims against it relating to those trust assets; there are very substantial claims against SMA and it is possible that the entirety of the economic interest in any surplus vests in SMA".

iii) BKV was an entity which had had close dealings with LCL, a company beneficially owned by Dr Smith through his brother Anthony Smith, and was also linked with a known associate of Messrs Cooper and McNally.

iv) Messrs Cooper and McNally had been the subject of various serious findings of dishonesty.

67. It was against that background that Messrs Thomas and Taylor had purported to appoint Mr Ticehurst as trustee of the Harbour Trust, following which Payne Hicks Beach LLP (**PHB**), acting for the Trustees, demanded that all proceeds from the IOM Settlement be handed to the Trustees. There was no attempt to consult with Harbour and Orb about the proposed appointment.

68. On 10 May 2022, the Trustees, acting through PHB, issued the Part 8 Claim Form. On 15 July 2022, Mr Ticehurst issued an application seeking to stay applications which might have the effect of dismissing a claim to a "Pigott Order" which Messrs Thomas and Taylor wished to seek.

69. It will be apparent from the above summary that Mr Thomas, in particular, had been engaged or involved in a significant amount of legal activity. It was Mr Thomas' own evidence, filed in support of his application for a stay of execution of the costs order, that he has no funds of his own, and that these costs have been met by a funder who he was not willing to name. The funder was also meeting the costs of PHB and Mr Ticehurst, and also the solicitors and counsel separately instructed by Messrs Thomas and Taylor to advance the stay of execution application.

70. Requests by the Settlement Parties' solicitors for the disclosure of the funder's identity were made on 27 July 2022 (to Mr Thomas and Mr Taylor's solicitors), 18 August 2022 (to PHB and again to Mr Thomas and Mr Taylor's solicitors and also to Mr Ticehurst) and 21 September 2022 (to PHB and Mr Ticehurst).

71. These requests finally received a response on 14 October 2022, when PHB stated that Messrs Thomas and Taylor had borrowed the funds from two lenders whose identity had been provided to PHB on a confidential basis, and that "all appropriate KYC/AML checks have been completed".

72. On 17 October 2022, Minardi (an entity which I have previously found to be under the control of Mr Ruhan, who has also been found to have committed serious and sustained acts of dishonesty in my judgment in HPII & Anr v Ruhan & Stevens [2022] EWHC 383 (Comm)) wrote to the JLs intimating various claims, and seeking to constitute a creditors committee of various of the Arena Companies. Minardi proposed that Mr Ticehurst should be a member of the creditors committee. On the basis of my findings, Mr Ruhan is the ultimate beneficial owner of both Phoenix and Minardi, who advanced competing claims against those of the parties interested in the Harbour Trust at the Directed Trial. A letter sent by Minardi on 11 October 2022 was signed electronically by Mr Ruhan and copied to Mr Ruhan's email address. In a letter to the Enforcement Receivers of 21 October 2022, Minardi asserted that Mr Thomas and BKV were SMA's only lawful directors (to that extent, at least, making common cause with Mr Thomas and with Messrs Cooper and McNally).

73. On 24 October 2022, Mr Thomas contacted the Settlement Parties' solicitors suggesting that they have a discussion. That discussion took place on an open basis the following

day. On 27 October 2022, Mr Thomas wrote to Mr Zoubir of the Settlement Parties' solicitors effectively offering to broker a deal which would resolve all of the competing claims in return for "an agreed consideration":

> "For an agreed consideration I would transfer all rights as both trustees and orb claimants.
>
> In addition, I believe I would be able to arrange cessation of MI proceedings; a settlement with Minardi; a pre-judgment settlement with Phoenix (if appropriate); withdrawal of the Part 8 application and withdrawal of the Pigott application if so agreed".

74. In the Trustees' skeleton argument for the hearing, prepared on Mr Ticehurst's instructions, it was suggested that the question of who was funding Mr Ticehurst was "not obviously relevant to the issues in [the Part 8 Claim], save indirectly as regards enforcement of costs orders".

75. At the hearing, I indicated my unhappiness that the identity of the party funding the Trustees, and Messrs Thomas and Taylor in respect of their own activities, had not been disclosed to the court. As a result, on the evening of the first day, Mr Ticehurst filed a witness statement to assist the court disclosing the following:

i) PHB had made a payment of £18,000 to his firm's client account in respect of incurred and future fees on 8 March 2022. A further payment of £10,000 was paid on 24 May 2022. No further sums have been paid, with fees to Mr Ticehurst's firm of £51,956.40 currently outstanding.

ii) Mr Ticehurst and his firm had been provided with details of those lending funds to Messrs Thomas and Taylor "on a confidential basis". Mr Ticehurst stated that "while I was uncomfortable with this position, as I saw considerable merit in transparency on this issue, I was unable, absent a release of my confidentiality obligation, to provide this information when requested".

iii) The first funder was a company called Shoreline Commercial Limited (formerly Sulby Collaborations Limited), "an English company owned and controlled by Mr Anthony McNally (brother of Simon McNally) which has lent £585,000 to Mr Thomas".

iv) Shoreline had received the funds from Devonhirst Investments Limited, a company registered in the Isle of Man, one of whose directors was Anthony McNally. It was understood that the source of the funds was "the profits of Devonhirst's commercial activities which include property development".

v) The other lender was Wynndel Property Management Limited, whose "sole director and majority controller (75%) is Mr Anthony Paul Smith (brother of Dr Gerald Martin Smith)", the source of the loan being "Wynndel's commercial activities which include property development".

76. I have already referred to previous findings concerning Mr McNally and Mr Anthony Smith. I should also add that:

i) Funds which I found to have been unlawfully removed from companies under the control of the JLs found their way to Devonhirst, not all of which have been accounted for, raising the concern that those funds may be the source or one of the sources of the funding provided to Mr Thomas.

ii) Evidence given by Mr Cooper in the arbitration proceedings commenced by Mr Sodzawiczny in a statement dated 13 March 2022 was to the effect that the directors of Devonhirst at that point were Simon and Anthony McNally, Mr Cooper himself, Anthony Barber and Sarah McKee.

iii) Wynndel appears to have received rent in respect of at least some of the Hamilton House properties. A prospectus issued by the Hintville Alpha Fund identified numerous Hamilton House properties as forming part of its alleged portfolio, and stated that "the letting, maintenance, refurbishment and development of the properties are managed on a day-to-day basis by Wynndel Property Management Limited".

iv) In the Directed Trial Judgment, I found at [610]:

> "Conduit's position as it appears from the documents is that it held the shares for Dr Smith's brother, Mr Anthony Smith. I am satisfied that the true beneficial owner was Dr Smith, for whom Mr Anthony Smith was a nominee. Mr Anthony Smith accepted he was not 'engaged meaningfully in the day to day events' involving LCL before 2016, and the available documents relating to its formation and its early administration involve Dr Smith or his close business associate, Ms Stickler, not Mr Anthony Smith. LCL's position in this litigation appears to have been largely determined by Dr Smith, with remarkable similarities (even to the extent of common errors) in correspondence sent on Dr Smith and LCL's behalf. The metadata for certain documents emanating from LCL - a statement of case and two letters from Mr Anthony Smith – identify the author as 'Gerald', and this is also true of Mr Anthony Smith's witness statement served for this trial. Finally, I am satisfied that the LCL Transfers were co-ordinated by Dr Smith, and done for the purposes of seeking to make enforcement against the Non-Arena Companies more difficult, while still leaving them within his control."

v) As I have explained, the assets subject to the Harbour Trust include various interests in properties in the Hamilton House development. Two individual properties are owned outright, the remainder by way of fractional equitable interests. The LCL Parties Settlement Agreement, between the Settlement Parties and the various LCL Parties (who include Mr Anthony Smith, Dr Smith, Dr Cochrane, Dr Imogen Smith, Ms Iona Smith and other individuals closely linked with Dr Smith) provided that vacant possession of the Hamilton House properties which they were occupying would be provided within 12 months of a certain date. The parties in occupation of the properties have all adopted the line taken by Messrs Thomas and Taylor in

correspondence that the Orb claimants succeeded at the Directed Trial, on which basis they have contended that the obligation to deliver up vacant possession of the properties has not been triggered. The correspondence suggested that those in occupation would be liaising with the Trustees in relation to these properties (including individuals in occupation of properties in which the Harbour Trust has no interest). One of these letters, sent in the name of Ms Iona Smith, has Dr Smith's metadata as the author. The use by Dr Smith and those associated with him of the Part 8 Claim and the interest of the Orb claimants as a reason for not providing vacant possession demonstrates at least one way in which the appointment of Mr Ticehurst and the pursuit of the Part 8 Claim might have served Dr Smith's agenda.

vi) The interests of Mr Anthony Smith and Dr Smith, so far as the Hamilton House properties are concerned, would once again, at first sight, appear to be directly opposed to the beneficiaries of the Harbour Trust.

Was the appointment of Mr Ticehurst undertaken by Mr Thomas and Mr Taylor for an improper purpose?

77. The circumstances set out above raise a strong prima facie case that Mr Thomas with Mr Taylor's support has been co-operating with parties whose interests would at least appear to be directly opposed to those of the beneficiaries under the Harbour Trust, with Mr Thomas' actions being funded by those parties. The funding entities are closely connected to individuals against whom prior findings of dishonesty have been made (and in the case of Dr Smith, someone who has twice been convicted and imprisoned for fraud). Given:

i) the extent of the financial commitment apparently undertaken by the funding parties;

ii) the extent to which Mr Thomas has adopted positions which are apparently contrary to his interests as a beneficiary of the Harbour Trust but which might serve the interests of Messrs Cooper and McNally and Dr Smith;

iii) the extent to which the position now adopted by Mr Thomas conflicts with the position he took at the Directed Trial (which involved wholesale attacks on the honesty of Dr Smith and of those associated with LCL);

iv) the extent to which the position now adopted by Mr Thomas conflicts with the position taken by his solicitor as recently as 3 June 2021 when Mr Crossley referred to "Dr Smith and his acolytes hav[ing] the clear and deliberate intention of seeing to frustrate the order of Mr Justice Foxton" and suggested that "the action by Messrs Cooper and McNally, again, … appears to be a pre-planned construct orchestrated by Dr Smith in a further attempt to frustrate the due process of law";

there is also a strong prima facie case that the various actions undertaken by Mr Thomas with the benefit of that funding, including the appointment of Mr Ticehurst, were undertaken at the direction of or at least to serve the interests of those funders. The failure to follow good practice and consult Harbour and Orb before exercising the power of appointment also supports that inference (*Lewin*, [15-055]).

78. It would have been open to Messrs Thomas and Taylor to seek to answer that strong prima facie case by comprehensive and candid evidence addressing their dealings with the funders and the funders' role in their activities. However, no such evidence has been provided (and indeed there are no statements from Messrs Thomas and Taylor at all).

79. In these circumstances, and on the basis of the evidence before me, I have concluded that any power of appointment was not exercised for a proper purpose, and would have been void for that reason as well (on the basis set out in *Lewin*, [30-066]).

Should the court set the appointment aside?

80. This issue does not arise for determination. In any event, Mr Ticehurst informed the court that if his continued involvement was likely to be a source of difficulty, he would resign from the office of trustee. The circumstances of Mr Ticehurst's appointment, the source of his funding, and the manner in which that funding came to light would, in my view, have made his continuing involvement unhelpful, and a likely source of ongoing dispute and distrust. There is also the fact that, as the principal source of instructions in the Part 8 Claim, he has positively argued for an interpretation of the scope of the Harbour Trust and the powers of the trustees of that trust which conflicted with that for which Harbour and Orb contended, and which I have rejected. Had matters reached this stage of the analysis, therefore, I would have been grateful for Mr Ticehurst's pragmatic offer to step down in order to reduce the potential for dispute going forward.

81. For essentially the same reasons, I have concluded that it would not be appropriate to exercise the court's power under s.41 of the Trustee Act 1925 to validate Mr Ticehurst's appointment as trustee now. Any such appointment is strongly opposed by Harbour and Orb, for reasons which cannot be described as capricious or insubstantial.

E The position of Messrs Thomas and Taylor

82. As I have indicated, Messrs Thomas and Taylor have indicated their willingness to resign. However, it is not clear to me whether that willingness will continue in circumstances in which I have held that their appointment of Mr Ticehurst was not valid.

83. I am satisfied that I should exercise the court's inherent jurisdiction to remove Messrs Thomas and Taylor from the offices of trustees if they do not resign:

i) In the Directed Trial Judgment, I found that Messrs Thomas and Taylor in their witness statements, and Mr Thomas in his oral evidence, had not given a frank account of their dealings with the proceeds of the IOM Settlement ([34]-[35], [38]-[39]). I also made other findings critical of Mr Thomas' evidence ([227]-[240], [546]).

ii) Most significantly, I found that they had both known of and acquiesced in the transfer of the IOM Settlement to Dr Cochrane and SMA (rather than to trustees under the Harbour Trust) and that they knew or suspected that some of the assets so transferred were being applied by Dr Smith and Dr Cochrane for their own benefit, being content for that to happen so long as Dr Smith made payments to them from

those assets as well ([542] and [547]). It is obvious that individuals who have behaved in this way should not continue to hold office as trustees.

iii) As I have explained above, Mr Thomas (in particular) has been conducting himself as trustee in a manner which, at first sight, appears calculated to advance the interests of third parties who have opposing interests to those of the beneficiaries under the Harbour Trust, rather than the beneficiaries. Mr Thomas appears to have been able to persuade Mr Taylor to go along with much of this course of action.

iv) I have found that Mr Thomas and Mr Taylor sought to exercise a power which they understood to be a trust power for an improper purpose: see [79].

84. The court's inherent power to remove trustees who have been guilty of misconduct is clear (*Letterstedt v Broers* (1884) 9 App Cas 371). In *Fay v Moramba Services Pty Ltd* [2009] NSWSC 1428, [24], Brereton J suggested that the question for the court is whether the due and proper administration of the trust is opposed to the trustees remaining in office, with regard to the interests of all the potential beneficiaries. I am satisfied that it is.

F THE WAY AHEAD

Introduction

85. In these circumstances, it is necessary for the court to determine what course should now be taken. Broadly, there were three options on offer:

i) The Trustees ask the court to appoint Mr Edwin Kirker, Managing Director at the London office of Kroll, as a trustee.

ii) Messrs Thomas and Taylor had, in the alternative, asked the court to appoint receivers over all of the trust assets, the suggested appointees being three partners in the well-known firm of insolvency practitioners, Begbies Traynor Group (Mr Stephen Katz, Mr Adrian Hyde and Mr David Rubin).

iii) The Settlement Parties invite the court to appoint trustees with limited powers to hold the shares in certain companies: Ballaugh, Unicorn, Glen Moar and Sulby (the Arena Holdcos) and also Legion NA Investments Limited and Land Consultants Ltd (**the Relevant Companies**). In due course, the Settlement Parties have made it clear that they intend to invite the court to order SMA to transfer the shares in the Relevant Companies to those trustees. The trustees who the Settlement Parties ask the court to appoint are Emma Jordan and Toby Graham.

iv) The Settlement Parties invite the court to appoint two insolvency practitioners from Interpath, where the current Enforcement Receivers work. They are Mr David Standish (currently one of the Enforcement Receivers) and Mr David Pike (who has been assisting the current Enforcement Receivers). I shall refer to Mr Standish and Mr Pike as the Enforcement Receivers in this context. The Settlement Parties seek their appointment as receivers over the 50% interest in Bodega (which owns a property in Jersey) and over the legal and equitable interests in various London properties in which the Harbour Trust or other Settlement Parties have been found to hold complete or fractional interests (**the Property Assets**), rather than simply over the Harbour Trust's interest in the Property Assets.

86. There are three key issues dividing the parties:

i) whether the role of trustees appointed over the Harbour Trust's interest in the shares in the Relevant Companies should be limited to receiving and holding the assets;

ii) whether the Property Assets which fall within the Harbour Trust should be dealt with differently from the Harbour Trust's interest in the shares in the Relevant Companies; and

iii) whether it would be appropriate to appoint the Enforcement Receivers as receivers over property which is subject to the Harbour Trust.

The role of the trustees of the Harbour Trust

87. I accept that new trustees are required to perform the role of receiving and holding assets, given the conclusions I have formed and the concerns I have expressed as to the position of Messrs Thomas and Taylor.

88. The shares in the Relevant Companies all fall within the Harbour Trust and the companies themselves are currently within the control of the JLs. The JLs believe that it is those companies which may in due course give rise to the Arena Surplus. Legal title to the shares in the companies is held by SMA, and, as I have indicated, steps are being taken across a broad front by third parties to lay claim to the Arena Surplus, in which the ownership, control and liabilities of SMA are a significant feature. In these circumstances, I am satisfied that it is necessary for the Harbour Trust's interest in shares in the Relevant Companies to be transferred to neutral trustees, who are under the control of the court, to safeguard the Arena Surplus and ensure that it remains available to whoever is ultimately found to be beneficially entitled to it. This aspect of the relief sought by the Settlement Parties was not challenged by the Trustees, Ms Reed KC stating that "it is common ground between the parties that it is not a good idea for the [Arena Shares] to remain vested in SMA, bearing in mind what has been going on". The issue of whether the court should go further and order the transfer of the legal title to those shares from SMA is not an issue to be determined at this hearing.

89. However, I have found that the role of the trustees under the Harbour Trust is very limited, and does not extend to taking active steps to gather in assets, and to commence, conduct and settle litigation to that end. I am not persuaded that there is any need to provide the trustees who the court is asked to appoint to the Harbour Trust with greater powers than the Orb claimants had. That would be inconsistent with the terms of the Harbour IA, and have the effect of fundamentally re-writing the allocation of risks and responsibilities in that instrument. Further, the underlying companies are under the control of court-appointed officers, the JLs (the courts in question being those of the British Virgin Islands and the Isle of Man, common law jurisdictions whose judges have considerable experience of dealing with disputes concerned with the liquidation and winding-up of companies). I see no need for the JLs' work to be "second guessed" by individuals appointed at the level of the (very limited) Harbour Trust, and doing so would involve a significant potential drain on trust a assets (particularly if those wishing to interfere in the winding-up of the Arena Companies tried to exploit the existence of such a supervisory role for their own purposes).

90. Ms Reed KC for the Trustees argued that if the court-appointed trustees of the Harbour Trust on terms which limited their role to receiving and holding assets, that will have the effect that there is no one looking after the interests of Messrs Thomas and Taylor as beneficiaries of the Harbour Trust, and in particular looking to maximise the recovery of any trust funds paid away in breach of trust, when it will be Orb, Messrs Thomas and Taylor who would stand to benefit from any recoveries over and above Harbour's share, and where the Viscount (on behalf of Orb) has entered into a Settlement Agreement with the other Settlement Parties.

91. I am not persuaded that there is anything in this objection.

92. First, I am satisfied that it is open to Messrs Thomas and Taylor as beneficiaries to pursue any party alleged to be wrongfully holding trust property. Ms Reed KC challenged the assertion that it is open to beneficiaries to take steps to recover assets in which they have a proprietary interest without the involvement of a trustee, or at least said that she did not "entirely accept … that this is something that happens all the time". In particular, she submitted that Messrs Thomas and Taylor might have difficulty in establishing their beneficial interest because they would need to show that the prior claims of Harbour did not exhaust the trust estate.

93. However:

i) It is clear that a beneficiary is able to pursue property applied in breach of trust and its proceeds against recipients who are not bona fide purchasers for value: *Lewin*, [44-001].

ii) I do not accept the contingent nature of Messrs Thomas and Taylor's interest changes that position. As noted in *Lewin*, [1-006]:

> "A trust is not a mere obligation. It may confer on a beneficiary the equitable ownership of a trust asset, or a partial equitable interest in the asset. *Even if he has neither, a beneficiary can enforce the trust against anyone to whom a trust asset may come, except a bona fide purchaser for value without notice.*"

iii) I addressed this issue in the Directed Trial Judgment when considering the rights of a member of a class who were potential objects of a fiduciary power of advancement in relation to the wrongful transfer of trust assets. After referring to *Lewin*, [1-061] and [47-073], I concluded at [205]:

> "I am satisfied that, at the time of the IOM Settlement, Mr Ruhan as the sole member of the class of eligible beneficiaries at that point in time, had the right to require the trustee of the Arena Settlement to administer the assets in accordance with the terms of the Settlement, and to seek relief in the event that the trustee dealt with any assets in breach of trust, including against any third party recipients of that property (save to the extent that those third party recipients were able to set up a defence to an action requiring them to return any trust property they had received)."

I see no reason why Messrs Thomas and Taylor would be in any different position.

94. Second, there is real doubt as to what other viable claims there might be:

i) In correspondence, many of the potential claims raised by PHB on behalf of the Trustees are potential claims by companies under the control of the JLs rather than assets of the Harbour Trust. The failure to recognise this important distinction repeats the issue which arose in relation to HPII's claims at the Directed Trial, referred to at [656] of the Directed Trial Judgment.

ii) Other potential claims suggested by PHB involve alternative tracing claims to assets whose ownership was the subject of findings at the Directed Trial, at which I upheld the tracing claims of the companies under the control of the JLs, and rejected tracing claims advanced on behalf of the Harbour Trust (Directed Trial Judgment, [652]-[653]).

iii) When considering potential claims outside of these categories, it is necessary to keep in mind quite how long ago the IOM Settlement took place and the Qatar Settlement Payment was made, and the steps taken by numerous well-resourced parties at great expense to attempt to identify the traceable proceeds of assets which survive and are not defeated by a bona fide purchaser for value defence. This includes the efforts of the Settlement Parties in the Directed Trial and of HPII, and its administrators, in its tracing claim. The fruits of that research were the claims to the IUAs considered and determined at the Directed Trial.

iv) It is clear that significant sums of money were expanded on the lavish lifestyle lived by Dr Smith (see [544] and [606(ii)] of the Directed Trial Judgment), and can no longer be recovered.

v) The suggestion that there is a realistic prospect of further assets of significant value being recovered now is wholly speculative, and the cost of testing that speculation with trust funds very significant. At this hearing, and despite Mr Thomas' lengthy involvement in underlying events, nothing could be offered by way of potential claims beyond bare possibilities in relation to the proceeds of certain cash payments.

95. However, if Messrs Thomas and Taylor are able to identify assets to which they believe the Orb claimants or the beneficiaries under the Harbour Trust have a claim, they could seek the approval of the beneficiaries under the Harbour Trust to use trust funds to pursue those claims, and if that was not forthcoming, seek an assignment of the relevant cause of action and pursue them themselves (as Ms Reed KC recognised).

96. I am satisfied, therefore, that the appointment should be on the basis of the limited powers set out in the draft order submitted by the Settlement Parties, and turn to the issue of who should be appointed. Given my conclusions as to the limited role of the trustees, I am not persuaded that it would be appropriate to appoint Mr Kirker, whose expertise lies in commercial investigations and asset tracing. As to the individuals put forward by the Settlement Parties, Ms Jordan is a partner at Taylor Wessing, heading up that firm's contentious trusts team and Mr Graham is a partner at Farrer & Co and head of that firm's contentious trusts and estates group. Having reviewed their curriculum vitae, both have obvious relevant expertise. Both have consented to act, and explained their charge out rates, the steps taken to clear conflicts and the arrangements for professional indemnity cover. I am satisfied that they are appropriate individuals to perform the limited role which I have identified, and I will appoint them. I will refer to them hereafter as **the New Trustees**.

97. I am also persuaded that it is appropriate to authorise reasonable remuneration for the New Trustees, and that they should be entitled to an indemnity against trust assets (on the basis of the court's jurisdiction as referred to at Lewin, [19-043] and [20-049]. However, given the importance of securing the Harbour Trust's interest in shares in the Relevant Companies in the current tumult, it is appropriate for Harbour and Orb to meet their remuneration and costs in the first instance, to be recovered from the Arena Surplus once received.

98. That leaves open the question of whether the New Trustees' appointment should be limited to the Harbour Trust's interest in the shares in the Relevant Companies, and, if not, what the consequence would be of there being no trustee of the Harbour Trust's interest in those assets. I deal with this issue when considering what order I should make in respect of the Property Assets.

99. That leaves open the question of whether the New Trustees' appointment should be limited to the Harbour Trust's interest in the shares in the Relevant Companies, and, if not, what the consequence would be of there being no trustee of the Harbour Trust's interest in those assets. I deal with this issue when considering what order I should make in respect of the Property Assets.

Should the Property Assets which are subject to the Harbour Trust be dealt with differently from the Harbour Trust's interest in the shares in the Relevant Companies?

100. The issues raised by the Property Assets are rather different. The interests of the Harbour Trust are, in most instances, fractional equitable interests:

i) in the case of Bodega, with the Viscount under Dr Cochrane's désastre;

ii) in the case of the Hamilton House properties (with the exception of flats 2 and 24) and Montagu Square with companies administered by the JLs and with the legal estate in many cases being held by the Non-Arena Companies which form part of Dr Smith's "realisable property" and therefore fall within the existing receivership of the Enforcement Receivers.

That split ownership and control has the potential to cause delay and lead to additional expense in realising the Property Assets on the most advantageous terms. The assets in question all have legal owners (who hold on bare trust for the relevant beneficiaries), such that there is no question of these being equitable interests held without a trustee. The order sought by the Settlement Parties would appoint receivers over these assets, who would be able to work with other interested parties with a view to selling the assets with vacant possession as speedily as possible, and holding the proceeds to further order of the court. Those receivers would benefit from the additional powers which receivers have, given the sanctions which can attach to non-compliance with the receivers' orders.

101. The court has a flexible power to appoint receivers under s.37 of the Senior Courts Act 1981. It is a power which is often used in the trust sphere (*Lewin*, [40-033] to [40-044]). While the court will be reluctant to take the management of a traditional trust out of the hands of the trustees and place it in the hands of the receiver (*Lewin,* [40-033]-[40-037]), that concern has limited application here, given the very limited and largely ministerial role which the trustees of the Harbour Trust have.

102. Having regard to the following distinct features of the Property Assets, viz:

i) the fact that the steps to be taken to realise them (obtaining vacant possession and selling them) are much simpler than the winding up of the Relevant Companies so as to establish the Arena Surplus and (unlike the Relevant Companies), there is no officeholder currently in control of the process of realisation;

ii) it is not possible, due to the various fractional interests, to transfer the underlying assets to the trustees of the Harbour Trust, so that any order limited to trust property would not place the officer-holder in a position to realise the Property Assets to the collective best advantage;

iii) the need to co-operate with other officeholders with fractional interests in the same properties or block of properties;

iv) the fact that the holders of the various legal estates or interests (as bare trustees) are not realistically in a position to take the necessary steps; and

v) the need for the party administering these assets to have strong and readily enforceable powers, in the face of what events to date suggest will be significant resistance to any attempt to obtain vacant possession;

I am satisfied that I should appoint receivers with powers of sale and to take the steps necessary to achieve a sale in relation to the Property Assets, on the terms set out in the draft order submitted by the Settlement Parties.

103. Those receivers will, in the usual way, be entitled to remuneration and an indemnity in respect of their expenses from the receivership property, its income and proceeds.

104. That leaves the issue of whether I should stop at this point, when doing so would mean that in respect of the Harbour Trust's interests in these assets, there would currently be no trustee in place (given Orb is unable to act as a trustee and Messrs Thomas and Taylor are no longer to be trustees), albeit there would remain trustees of the relevant underlying assets in the form of the legal owners of the assets in question (either the shares in Bodega or the holders of the legal estate of the relevant London properties). *Lewin* notes at [14-074]:

> "Where the removal of a trustee is required without the appointment of a new trustee in his place, or where for any other reason the statutory power under section 41 is not applicable (or is unsuitable), recourse must be had to the inherent jurisdiction of the court. The court has an inherent jurisdiction in executing the trusts to remove a trustee without appointing a new trustee in his place, and even

> though his consent or co-operation is not forthcoming. But the court will not make an order removing a trustee without an appointment in his place unless either an adequate number of trustees will remain after the removal, or the need for removal is urgent, in which case the court would normally appoint a receiver pending an appointment of new trustees by the court later on, or other appropriate arrangements are in place for the ongoing administration of the trust, for example where the trust is being administered by the court."

105. The authority cited in support of the last proposition is the decision of the Ontario Supreme Court in *Gonder v Gonder Estate* [2010] ONCA 172. In that case, the trustees had applied for their own removal from office as trustees of a deceased's estate due to personal difficulties, and alternatively sought directions for the sale of the house (which was the last remaining asset in the deceased's estate by the date of the application) and the payment of the proceeds into court. The first instance judge made an order removing the trustees from office. The Ontario Court of Appeal upheld the judge's decision to remove the trustees, but held that he should have made alternative provision for the proper administration of the estate. It rejected the argument that it was impossible to remove the only trustee without appointing a replacement ([32]), while agreeing that a replacement trustee would ordinarily be required. At [34], the court stated:

> "In the very rare cases where equity demands that a sole trustee be removed, but no replacement is forthcoming, courts possess an inherent jurisdiction to order the trustee's removal and provide for the orderly administration of the estate".

In that case, the court suggested that "the difficulties caused by the removal of the respondents as estate trustees might have been addressed by an order for sale" ([56]), by judicial order if necessary ([61]), with the proceeds paid into court ([62]).

106. The court in *Gonder* referred to two English authorities said to support its decision – *Gardiner v Downes* (1856) 22 Bevan 395 and *Barker v Peile* (1865) 2 Drewry and Smale 340. Both relate to applications for costs by retiring trustees, and it is difficult to find any statement in either of the very short judgments which bears on the issue considered in *Gonder*. I was also referred by the Settlement Parties to *In re Smirthwaite's Trusts* (1870-71) LR 11 Eq 215, but that case is addressed to the rather different issue of whether the court could appoint a new trustee under the Trustee Act 1850 where there were no existing trustees.

107. The decision in *Gonder* is doubted in *Underhill and Hayton: Law of Trusts and Trustees* (20th), [74.14]:

> "The court has jurisdiction in an administration action or on a claim inter partes asking for administration or execution of the trusts (but not on a claim under the Trustee Act 1925) to discharge one of two or more trustees without appointing another person to succeed him. It will not do so unless there remain at least two trustees or a trust corporation to succeed him. A Canadian case suggests that the court may remove a sole trustee (or all the trustees) so that no trustee remains in office, as long as provision is made for the ongoing orderly administration of the trust estate. This misinterprets the earlier cases relied on, which distinguish (1)

removal of the trustees from office from (2) discharge of the trustee from duties in future (e.g. because of payment into court). In the second case the trustee continues and there is no need for a new appointment".

108. I accept that removal of the only trustees without replacing them will be a rare, perhaps exceptional, course, but I am not persuaded that it cannot be done. If, for example, there is a pressing need to remove the existing trustees because they are unable to act, or are unsuitable to remain in office, or some combination of the two, I am not persuaded that the court would be precluded from acting simply because it had not, at the stage of the removal application, been possible to identify a suitable person willing to assume the office of trustee. The court will exercise its power to remove trustees if this promotes the welfare of the beneficiaries and the competent administration of the trust (*Letterstedt v Broers* (1884) 9 App Case, 371, 386), and if the due and proper administration of the trust is opposed to the trustees remaining in office, with regard to the interests of all the potential beneficiaries (see [84] above). If these considerations require the immediate removal of the existing trustees, but do not require the immediate appointment of a replacement, then I am satisfied that the court can proceed on that basis, at least as an interim measure, while keeping the position under review.

109. In this case:

i) the existing trustees (Messrs Thomas and Taylor) cannot remain in office;

ii) the nature of the Harbour Trust and the role of the trustees of the Harbour Trust is very limited;

iii) so far as the Property Assets are concerned, the court is able to appoint receivers answerable to the court who can realise the Property Assets and pay the proceeds into court; and

iv) with those proceeds realised and secured, the court can consider at some point in the future whether it is necessary to appoint a further trustee or trustees for the straightforward act of distribution of trust assets falling with the Harbour Trust in accordance with the waterfall in the Harbour IA.

110. Accordingly, I do not propose to make any order appointing a replacement trustee of the Harbour Trust in respect of the Harbour Trust's interest in the Property Assets at this stage. Should the court conclude that it is necessary or appropriate at some future stage to do so, consideration can be given to extending the role of the New Trustees to encompass the Property Assets to the extent that they fall within the Harbour Trust.

Would it be appropriate to appoint the Enforcement Receivers as receivers of the Property Assets?

111. Finally, the Trustees object to the appointment of the Enforcement Receivers as receivers of the Property Assets. Before considering their objections, it is important to note the factors which point strongly in favour of the desirability of the Enforcement Receivers being appointed:

i) These assets have been under the control of the Enforcement Receivers (and in particular Mr Standish) for some time, as a result of the 2008 Receivership Order, the 7 December 2017 Receivership Order and the order which I made following the Directed Trial. When making that order I noted that:

> "The Enforcement Receivers are known to the court, they are familiar with the assets and I am satisfied that they provide the best course available to hold the status quo for the interests of all the parties who either are or at least contingently may be entitled to some form of interest in those assets".

ii) In particular, the Enforcement Receivers are already charged with the preservation and management of Hamilton House in their capacity as Enforcement Receivers for the Realisable Property of Dr Smith, and any receiver appointed over the Property Assets would have to liaise closely with them. They are already well-advanced in their thinking on how best to realise these assets.

iii) Professional fees of a wide variety of kinds have already taken a significant toll on the principal amounts in dispute in this case. It would take a compelling case to justify introducing another set of professionals, to work alongside those already involved, and who would need to familiarise themselves with the complex background to this matter from scratch. It would also create a wholly unnecessary risk of inter-officer disagreement.

112. However, the Trustees oppose the appointment of the Enforcement Receivers on two grounds.

113. First, it is said that Mr Standish and the other receiver under the 2008 and 7 December 2017 Receivership Orders, Mr Milsom, have found themselves in sharp disagreement with Messrs Thomas and Taylor in relation to a number of matters concerning assets which are (or, in some respects which Messrs Thomas and Taylor have wrongly asserted are) subject to the Harbour Trust, and have issued committal proceedings against Mr Thomas. However:

i) Those conflicts essentially arose from actions by Messrs Thomas and Taylor as trustees of the Harbour Trust, a position that they no longer hold. It is fanciful to suppose that the Enforcement Receivers have any animus against Messrs Thomas and Taylor in their capacity as the residuary beneficiaries under the Harbour Trust once prior entitlements are satisfied, still less that this would influence their approach to selling the various properties.

ii) It is, in any event, difficult to identify any scope for the Enforcement Receivers, in seeking to realise the best value of the Property Assets and holding the proceeds to further order of the court, to take steps which would be adverse to the legitimate interests of Messrs Thomas and Taylor as beneficiaries of the Harbour Trust.

iii) Messrs Standish and Pike will be subject to the control of and ultimately answerable to the court. The Enforcement Receivers are professionals, essentially engaged in the commercial activity of realising the value of real property rather than any

inherently judgmental process, and with every incentive to realise the best possible value.

114. Second, it is said that there may be a conflict of interest between the Enforcement Receivers, or others with fractional interests in the relevant properties, and Messrs Thomas and Taylor. This challenge breaks down into a number of allegations best considered individually.

i) First, it is said that there may be a conflict given the role which Mr Standish has in relation to other property under the existing receivership order. But the distribution of the proceeds of sale will be a matter for the court, not the Enforcement Receivers.

ii) Second, reference was made as to a possible conflict of interest between those interested under the Harbour Trust (which owns the beneficial interest in 100% of two of the Hamilton House properties) and the fractional interests of the companies administered by the JLs as to whether the wholly-owned Hamilton House properties should be sold individually or as part of a larger offering. However (i) the only evidence before the court strongly suggests that the latter approach will be in the best interests of all interested parties; (ii) there was nothing to suggest the financial impact of this particular dispute was capable of impacting Messrs Thomas and Taylor given (a) the Harbour Trust also has significant fractional interests which, on this hypothesis, would be the beneficiaries of any bulk sale strategy; (b) the residuary nature of their interest under the Harbour Trust, which is subject to Harbour's interest, subject to Stewarts' lien and when Messrs Thomas and Taylor (unlike Orb) must give credit for amounts already received in breach of trust, and (c) in any event, directions can be sought from the court if this remains a live point of dispute.

iii) Third, it is suggested that a conflict arises from the contractual obligations assumed by Mr Standish in his capacity as an Enforcement Receiver and the JLs under the Settlement Agreement, clause 14.1 of which provides that the Settlement Parties "overriding goal" is "maximising recoveries for the Distribution Settlement Parties collectively". However:

a) Clause 4.4 of the Settlement Agreement provides that "nothing in this Agreement imposes any obligation upon the Enforcement Receivers … to act in a way which they reasonably consider will amount to a breach of their duties".

b) The Settlement Agreement only settled claims between the Settlement Parties *inter se* (given the definition of "The Claims") and only the assets and entitlement of the Settlement Parties went into the various settlement pots (clauses 4.3 and 5).

c) The Trustees are correct to assert that, on one view, Appendix 3, dealing with "Property to be realised by the Enforcement Receivers", and clauses 26 and 38 dealing with the same assets, may extend to assets falling within the Harbour Trust. However, the Enforcement Receivers have no personal interest

in those assets, and clause 4.4 makes the Enforcement Receivers' primary duties clear.

d) Further, no explanation was offered as to how clause 14.1 might impact on the very limited role which the Enforcement Receivers would be performing under the receivership order the court is asked to make, which is essentially concerned with realising the best value of a share in a property-owning company (Bodega) and various interests in London property, and holding the realised value to further order of the court.

115. In short, I am satisfied that the objections to the appointment of the Enforcement Receivers are essentially manufactured complaints, rather than the result of genuine concerns on the part of Messrs Thomas and Taylor relating to their legitimate interests as beneficiaries under the Harbour Trust. They do not begin to outweigh the clear and objectively demonstrable benefits of appointing the Enforcement Receivers.

116. No cross-undertaking in damages is required. The court is not being asked to appoint a receiver by way of equitable execution, but to realise the value of assets which are the subject of complex and fractional beneficial ownership, as determined in the Directed Trial, and hold the proceeds to further order of the court for distribution to those beneficially entitled. Further, the Enforcement Receivers are insolvency practitioners and have offered to provide security by extending their bond (which provides £5m of cover) to the court-appointed receivership. In addition, Interpath has professional indemnity insurance.

G CONCLUSION

117. The parties are asked to draw up an order giving effect to the determinations in this judgment.

118. The issue of whether it is appropriate for the court to exercise jurisdiction over the claims advanced by the Settlement Parties against SMA in the Part 20 Claim and, if so, what relief, if any, should be granted, will need to be considered at a subsequent hearing, when the jurisdictional challenge which BKV and Mr Thomas have sought to issue on SMA's behalf falls to be considered.