In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: 361

IN THE MATTER OF A TRUST

JUDGMENT

(in Chambers)

Date of hearing: November 22-23, 26-28

Date of Judgment: December 12, 2012

Mr Frank Hinks QC of counsel and Mr. Keith Robinson, Appleby (Bermuda) Ltd, for the 2nd Defendant ("D2")

Mr Nikki Singla of counsel and Mr. Justin Williams, Williams, for the 9th Defendant ("D9")

Mr Robert Miles QC of counsel and Ms Nicole Tovey, Trott & Duncan, for the 8th, 10th,

12th, 30th and 31st Defendants ("D8", "D10", "D12", "D30" and "D31")

Mr Simon Taube QC of counsel and Mr Adam Collieson, Appleby (Bermuda) Ltd, for the Guardian ad Litem of the 32nd and 34th -37th Defendants ("D 32", "D34-37")

Mr. Nicholas Le Poidevin QC of counsel and Mr Alex Potts, Sedgwick Chudleigh, for the 45th Defendant ("D45")

Introductory

1. On November 14, 2011, Ground CJ approved the settlement of a dispute between D9 and, *inter alia*, his father D2 in relation to the terms of, *inter alia*, an offshore trust ("the Trust") established for the benefit of D2's children and their issue ("the November 14, 2011 Order"). This formed part of a wider distribution of the testamentary trust established by D2's father ("the Testamentary Trust"), the authorisation for which was sought by the Trustees of the Testamentary Trust in the present action which was commenced on November 2, 2009. A Confidentiality Order was made herein on December 8, 2009, which continued in force under the terms of the November 14, 2011 Order. The substance of the settlement was contained in "Proposal No.4". However, important supplementary provisions were contained in the "Settlement Terms".

2. That Order gave liberty to apply to enforce the terms of the settlement. D 2 applies by Summons dated June 5, 2012 to enforce the settlement embodied in the November 14, 2011 Order. He primarily seeks injunctive and declaratory relief against D9 in respect of his threat to bring proceedings in the Onshore Court ("the Onshore Application") to compel the Trustee (D45) to disclose information about the underlying operating company which is the principal Trust asset (the "Onshore Operating Company"). However, he also seeks a variation of Proposal No 4 to set aside 80% of a preferential payment[1] made to D9 and a direction that the Trustee should remove D9 as a director of two 'Family Holdcos", as a penalty for D9's alleged breach of the Settlement Terms.

3. At the end of the hearing there was no serious dispute that D2 was entitled to an injunction restraining D9 from pursuing a claim against the Trustee before the Onshore Court because the pursuit of such threatened claim would entail a breach of clause 18 of the Trust Deed, which selected Bermuda as the administrative forum for the Trust.

4. However, D2 (supported by the Trustee, the majority of D9's siblings and the Guardian) also sought a wider injunction in respect of any similar claims seeking to challenge Proposal No 4 (including claims against onshore companies and directors linked to the Trust). This wider injunction was sought on the basis of, *inter alia*, the cross-examination over two days of D9 and the assertion that he was, in effect, committed to tearing apart the structure which he had reluctantly agreed to, having been unable to secure recognition for his most exorbitant distribution demands. Both the precise scope of the factual findings to be made and the scope of any such further injunctive relief to be granted required careful consideration, notwithstanding the compelling policy arguments

[1] Originally, D2 sought to forfeit the entire preferential payment. In closing arguments, the reduced sum of 80% of that payment was asserted.

in favour of upholding the integrity of the settlement embodied in the November 14, 2011 Order.

5. The Trust assets are worth some $1 billion. They represent roughly one-third of the global estate distributed by the Trustees of the Testamentary Trust. That wider distribution was said to have been arranged at a global legal cost in the region of $100 million. Establishing the Trust to which the present application relates, for the benefit of D2's branch of the family, was not inexpensive. Nor was it uncontroversial. The central controversy centred on D9's expectation that his unique contribution to the value of the Onshore Operating Company which he worked for at a senior level for several years should be recognised in the distribution plan of the Trust. When he discovered that his father intended to treat D9 and his siblings equally, his relationship with his father broke down, he suffered a mental breakdown and his relationship with both the Company and his family was severed[2].

6. With all parties ably represented, the present dispute presents superficially as a commercial trust dispute about purely commercial matters. However, it was obvious that the motivations of the main protagonists, a strong patriarch and an equally strong-willed son for whom family and business connections are closely intertwined, were heavily infused with deep-seated emotions of an intensity rarely seen outside of familial relationships. Any sensible analysis of the evidence in this case, as in any other family trust dispute, must take this underlying familial background into account.

The November 14, 2011 Order

7. The November 14, 2011 Order was made, according to its recitals upon the consent of counsel for D2, his children (including D9) and his adult grandchildren, who were defined as the "*Specified Parties*". Paragraph 8 ("*Settlement Terms*") provides in material respects as follows:

> "*8.1 It is declared in relation to the Specified Parties that their consent and agreement extends to the whole of ...Proposal No.4 and ...Schedules and in recognition thereof that the Settlement Terms shall by virtue of this Order be enforceable as between them in accordance with the provisions of such Settlement Terms.*
>
> *8.2 Without prejudice to the generality of the liberty to apply conferred below, the Specified Parties shall have liberty to apply to enforce the Settlement Terms...*"

[2] The precise order in which these background events occurred was not clear to me but is unimportant for present purposes.

8. Paragraph 9 authorised the Trustee of the Testamentary Trust to establish, subject to reasonable amendments and adjustments, the distribution structure contemplated by Proposal No.4. But paragraph 8 of the November 14, 2011 Order both :

    (a) embodied the Specified Parties' consent to Proposal No. 4 as a whole; and

    (b) provided that one element of Proposal No 4, the Settlement Terms (Schedule T), was to be enforceable by way of an application under the Order itself.

9. Paragraph 22 of the Order varied the Confidentiality Order to permit the release of confidential information in certain specified contexts. Apart from arbitrations dealing with outstanding issues, the only litigation exception provided for deploying information covered by the Confidentiality Order was:

    "*(3) to enable any party to or represented in these proceedings to take all reasonable and proper steps before this Court to enforce the rights and obligations arising under this Order and all transactions effected or to be effected pursuant to the same, provided that the parties will take all appropriate and reasonable steps to seek to maintain the confidentiality of the confidential documents within any enforcement proceedings.*"

10. The practical effect of paragraph 22 of the November 14, 2011 Order, in the context of a case where this Court saw fit to take the unusual step of granting an Anonymity Order on November 5, 2009, was apparently as follows. No material protected by the Confidentiality Order could be deployed in litigation otherwise than for enforcement purposes in this Court without first applying to this Court to vary the said Confidentiality Order. It seemed ultimately to be common ground that the Confidentiality Order was sufficiently broad to encompass any information about Proposal No. 4 and the structure implemented pursuant to it with the imprimatur of the November 14, 2011 Order.

Proposal No. 4

11. Section G of Proposal No. 4 sets out the substance of the settlement reached. Proposals 2 and 3 were supported by the Guardian and all of D2's children except D9 and his sister D11. The principle of an equal allocation between all siblings was opposed by them (paragraph 31). The settlement was conditional upon execution of the releases contemplated by the Settlement Terms, and involved D9 receiving a preferential payment (paragraph 32). Other elements of the settlement set out in paragraph 33 included:

(a) "*dispositive decision making would remain at the level of*" the Trustee (33.3);

(b) D2 would be excluded from "*dispositive decision making*" in relation to the Children's Family Accounts (33.4);

(c) "*investment decision making would be delegated to the Children's Family Account Holdcos*" (33.5);

(d) each child of D2 would be a director of his or her Family Account Holdco and the other directors would be directors of the Trustee with the exception of D2 (33.6);

(e) the Children's Family Account Holdcos would be able to make recommendations to the Trustee on dispositive decisions and the Letter of Wishes would request the Trustee to act upon such recommendations (33.7-33.8).

12. Proposal No. 4 also made detailed provisions in relation to the Trust structure including the identity of the initial directors of the Trustee, minimum distributions to the Family Account Holdcos and contingencies relating to the increase or decrease in the value of the Onshore Operating Holding Company. As regards the latter, paragraph 84 provided that a major accountancy firm ('the Accountancy Firm') would provisionally value the Company shortly before Closing and finally no more than six months after Closing.

13. Paragraph 1.2 of the Settlement Terms provides that :

(a) save as otherwise provided, the Settlement Terms are governed by Bermuda law;

(b) "*Without prejudice to the availability of any other means of enforcement, the Settlement Terms shall be enforceable by application under the Liberty to Apply provision of the Court Order*";

(c) the Court is empowered to reduce the provision made for any party found in breach.

14. Under Part 2 of the Settlement Terms, D9 withdraws all claims which he raised or could have raised in opposition to Proposal No.4.

15. On December 16, 2011 the Trust was formally constituted. Closing took place just before and after midnight on New Year's Eve/New Year's Day. In early January D9 received his preferential payment and the structure contemplated by Proposal No. 4 was created.

The evolution of the present dispute

16. On February 2, 2012, one of his co-directors, JK (a partner in the Accountancy Firm but writing on the Trustee's letterhead) gave D9 notice of the first board meetings of D9's two Family Holdcos. D9 replied through LM, who held himself out as a specialist in estates and trust law and civil litigation, by letter dated February 16, 2012, seeking to retain JK for D9's personal business purposes.

17. Although JK rebuffed the invitation to meet with D9 in relation to D9's personal business affairs unequivocally, LM did not accept this rebuff in responding in the first of two letters sent on February 23, 2012 which had a muted adversarial undertone. The second letter of February 23, 2012, requesting an agenda and advance materials for the two initial board meetings on March 8, 2012 was unobjectionable.

18. However D9's onshore lawyer began to stir the controversy pot on February 24, 2012. Responding to an even-dated letter from JK firmly declining to meet with D9 for the latter's personal business purposes in his capacity as D9's former financial adviser, LM wrote as follows:

> "*As a Director of the corporation controlling the Trust, your refusal to meet is troubling, to say the least and in my view, it is not the kind of behaviour expected in your fiduciary capacity*…."

19. More vigorous stirring occurred on March 2, 2012 when LM wrote JK raising concerns about a conflict of interest between his role as a director of the Trustee and as partner of the Accountancy Firm who was carrying out the valuation required by Proposal No.4. Was D9 raising an objection to Proposal No.4 which had he agreed to abandon or simply trying to ensure that the Proposal was implemented in a proper way? The concerns were raised in the peculiar context of D9 seemingly seeking to aggravate any conflict problems by imposing on JK another conflicting role.

20. On March 2, 2012, LM again requested pre-meeting materials. The next response came from RS, a lawyer with a firm acting as counsel to the Trustee. In a letter dated March 7, 2012, RS explained why JK could not meet to discuss providing advice to D9. As regards briefing materials for the two initial Board meetings, he advised that the directors were

"*hoping to have business-like meetings…that are not encumbered by undue legal formality*". It was also explained that the purpose of the meetings was "*to establish some basic administration for those companies in advance of distributions that are to be received at the end of March*". Despite this reasoned basis for not supplying an information package prior to the Board meetings, LM renewed his demand for such information on March 8, 2012 generating a somewhat sharp response from RS.

21. If D2 and D9 were to be regarded as neighbouring countries separated by a hotly disputed border, the opening salvoes of correspondence would be the equivalent of warning artillery shots being fired by each side across the frontier in the immediate aftermath of a significant peace treaty, with D9 firing the first shot. On March 14, 2012, LM sent a letter which was (against this background) unlikely to generate a cordial or constructive response. By accident or design, the letter comprised two contrasting elements to it:

    (a) firstly, the letter raised concerns about confidentiality due to conflicts and suggested the need for an independent sub-committee of the Board. This could only be viewed as provocative, because these 'conflicts' were an explicit feature of Proposal No. 4;

    (b) secondly, the letter requested financial information on the performance of the operating group. This request, objectively viewed, was at least arguably a reasonable one as the information sought was of a type typically furnished by trustees to beneficiaries. However, against a background of hostility, a structure designed to exclude D9 from any direct involvement with the operating companies and in the context of hostile correspondence between lawyers which hinted at challenges to the structure itself, this request for information was unlikely to be well received.

22. Two days later, RS replied, vigorously rejecting the suggestion of a sub-committee of the Board as contrary to the hard-won settlement. He also rebuffed the suggestion of any confidentiality problems. He then pointedly noted: "*The issues you have raised, to the extent that they have any merit, are matters to be discussed by the directors at their meetings.*" The information request, which came at the end of LM's letter, was dealt with most tersely at the end of RS's response as follows:

    "*Without in any way commenting on or being seen as accepting the legitimacy of these requests for information, I note that the parties for whom I act are not*

in a position to disclose, or authorize the disclosure of, information about the Onshore Operating Holding Company or any of its subsidiaries."

23. On March 30, 2012, D9's onshore lawyer sent a highly contentious letter, running to six pages, complaining about both the need to make the Board composition more independent and the inadequacy of information being supplied, concluding with the suggestion that D9 might need to protect his children's interests by referring his concerns to the public authority responsible for children ("the Children's Office"). This prompted an equally (if not more) contentious five page response from BR which did not even deal with the information request. It concluded as follows:

> "*I have taken note of your various threats of litigation and, at this point, will respond only by saying that I believe that any [Onshore] Court to which you might resort would respect the integrity of the negotiations in which [D9] participated, of the agreement he entered into (and under which he has already received millions of dollars), and of the Order of the Bermuda Court to which he consented.*"

24. On May 11, 2012, IH fired off three electronic missiles on behalf of his client, D9. The first letter[3] confirmed that his client intended to proceed with "*these matters*" onshore and that co-counsel had been retained. The second letter elaborated upon the first, explaining that D9 wished to ensure a proper tax assessment in relation to the Onshore Operating Company, complaining about the inadequate supply of information and indicating that D9 proposed to contact the tax authorities directly through his own tax counsel in this regard. The third letter acknowledged receipt of just under $750,000, without prejudice to the determination of the allocation of these funds to be determined in the Onshore Court. On May 17, 2012, in a remarkably restrained response, BR stated, *inter alia*:

> "*...It is, with respect, extremely difficult to understand from your correspondence what it is your client complains of...I would in any event point out that, as embodied in the Court Order (recital three), your client agreed not merely to Proposal No 4 but also to...the draft...Trust clause 18.1...which provides that the trust shall be governed by the laws of Bermuda and the forum for the administration of the trust shall be the Courts of Bermuda. I can see no justification for proceedings being commenced in any jurisdiction, but if your client has concerns about the due administration of the trust the appropriate forum in which to raise them is Bermuda.*"

[3] The chronology used is taken purely from the order in which the letters appear in the Core Bundle.

25. In a May 25, 2012 letter, LM wrote to RS querying whether he would accept service of a proposed application and foreshadowing contacting the court to arrange a hearing "under seal". On the same date a letter was sent to a judge of the Onshore Court requesting a hearing under seal, but not (it is common ground) actually filing the application. Clearly D9, despite threatening to file the Onshore Application, was not keen to actually do so. On May 28, 2012, RS warned that breach of the Confidentiality Order would constitute contempt of court. On the same date RS wrote the Onshore Court making the same point.

26. Under cover of a May 29, 2012 letter, LM forwarded an unfiled copy of the proposed Onshore Application and sought confirmation that service would be accepted by RS. RS replied the same day inviting D9 to refrain from filing the application and clarifying that, despite the references in LM's correspondence to the Estate of D9's grandfather, the probate of which generated the funds which were settled on trust, RS's firm acted for the Trustee of that Trust. The references to the Estate of D9's grandfather, the distributions from which formed the basis of Proposal No. 4, clearly implied (somewhat slyly) that D9 was seeking to challenge Proposal No. 4 itself.

27. However, LM fiddled artfully, rather than filing the threatened application. On May 31, 2012, he confirmed that D9 would be attending the June 7 Board meetings. The next day he advised the Onshore judge that both counsel had agreed to a pre-filing Chambers hearing. On June 4, 2012, LM clarified with the Court that a telephone conference was all that was contemplated. And later that day he advised the Onshore judge that D9 had agreed not to file his application "*pending a further assessment of the jurisdictional issues relating to the Bermuda courts.*" Meanwhile on May 31, 2012, RS had supplied LM with an unissued copy of the Summons now before this Court which was issued on June 5, 2012. Having regard to this, LM advised RS on June 4, 2012 that D9 would undertake not to file the Onshore Application without further notice.

28. To complete the confused picture as to precisely what D9 was threatening to litigate over, a request was also made in this same June 4, 2012 correspondence for the Directors to ask the Accountancy firm to postpone their valuation of the Onshore Operating Company (a) due to the failure to provide the information sought, and (b) "*until a Court has adjudicated upon the issue*". On June 5, 2012, this extraordinary invitation was understandably declined by RS. That same day D2's Summons, seeking to restrain D9 from prosecuting the threatened Onshore Application together with related relief, was issued by this Court.

29. In summary, the correspondence clearly demonstrates that, from the outset, D9 approached his roles as a Trust beneficiary and Family Holdco director in a warlike

manner, never overtly challenging Proposal No. 4 but repeatedly submerging any occasional legitimate queries under a sea of insinuations about the integrity of the new Trust structure. The integrated structure anticipated business like collegial relations between all concerned flowing from the fact that the distribution principles and the administrative framework (including the identity of D9's co-directors) had already been agreed. The adult beneficiaries' role was essentially to receive distributions, a specified portion of which was required to be reserved and invested for minors and unborn beneficiaries. In addition, the adult beneficiaries were given a perhaps unusually substantive role in deciding how the distributions received should be invested.

The (draft unfiled) Onshore Application

30. The Onshore Application, like the correspondence before it, blended averments suggesting D9 was seeking to enforce Proposal No. 4 with strong hints that the Trust structure had not been validly set up and that the Onshore Court might be required to remedy this.

31. For starters, the action heading read "*IN THE MATTER OF THE TESTAMENTARY TRUST*…" To anyone familiar with the establishment of the Trust, referring back to an instrument which was at this juncture only of historical significance implied a challenge to the long, convoluted and expensive process which culminated in distributions being made from the Testamentary Trust into the elaborately designed new Trust structure by way of implementation of Proposal No. 4 as approved by this Court through the November 14, 2011 Order.

32. On the other hand, the body of the Application itself is expressed to be made by D9 as a beneficiary of the Trust seeking relief, mostly information, and predominantly in D9's capacity as such. Reliance is also placed on D9's status as Family Adviser and director. It is asserted that the Trust does not contain an <u>exclusive</u> jurisdiction clause and that the Trustee as an Onshore company can be sued in that forum. There is no suggestion whatsoever of any challenge to Proposal No. 4.

33. In D9's supporting affidavit, however (sworn on May 28, 2012 but also unfiled), what might fairly be viewed as sinister insinuations about the validity of Proposal No. 4 re-emerge. In paragraph 6, he deposes that he urgently requires the information in connection with a valuation to be carried out by the end of June. This suggestion is wholly or substantially inconsistent with his legitimate role under the Trust as the valuation was for the Accountancy Firm to perform. In paragraphs 9-14, moreover, D9 rehearses the circumstances of his departure from the Onshore Operating Company in 2010 and subsequent isolation from its employees at the instance of his father, together

with the consequent deterioration of family relations. He asserts that his unique experience of the underlying operating company would be beneficial for the entire family; this implies his desire to expand his prescribed role in the agreed Trust structure. In paragraphs 15 and 41, D9 makes the following incendiary averments:

> "*I have grave concerns about the validity and enforceability of certain aspects of the variations to the Testamentary Trust, not the least of which is the fact that the variations to the Trust set out herein were made without notice to any minor beneficiaries…While I certainly consented to Proposal No. 4, I have grave concerns that it could be argued by a third party that this was not in fact a distribution of the Testamentary Trust*…"

34. Based on assertions that the Trustee "*has breached its fiduciary duties on various levels*" (paragraph 101), the affidavit concludes by foreshadowing a request that the Onshore Court appoint independent directors. However, D9 explicitly states that his goal is that the Trust representatives should be "*required to speak openly to me and to discuss in good faith the opportunities and concerns that will contribute to fulfilment of intentions of Proposal No. 4*" (paragraph 103). Again, this combines an affirmation of Proposal No. 4 with implicit criticisms of the viability of the agreed structure, albeit criticisms expressed to be based on the way in which the relevant actors have behaved rather than arising from inherent conflicts.

Findings: has D9 acted and/or threatened to act in a way which challenges or otherwise subverts Proposal No. 4?

<u>The oral examination of D9: overview</u>

35. D9 was examined orally for almost two full days, most of which consisted of careful and forceful cross-examination by Mr Hinks on behalf of D2. Because of technical problems, the witness gave his evidence seated only a few feet immediately in front of the Bench and answered questions maintaining full eye contact with me throughout. In assessing his evidence I place perhaps greater weight on my general impression of him as a witness than I would ordinarily do.

36. Despite his counsel's attempt to characterise him simply as an honest, gentle and sensitive man, I found him to be as complex as the picture portrayed in the correspondence and court documents prepared on his behalf. I drew the following general conclusions from his testimony looked at against the background of the wider picture painted by the documentary evidence adduced in the present case:

(1) he attempted to give his evidence in an exceptionally honest and straightforward manner, accepting responsibility for even the tone of his lawyers' letters and voluntarily revealing his legal strategy;

(2) his ability to challenge most of his own family, including a strong father and most of his siblings, (in the aftermath of a mental breakdown) prior to the 2011 settlement and in the context of the present dispute suggests he is far more tough, strong-willed and adversarial than his apparently sensitive demeanour might superficially suggest;

(3) he was overcome emotionally on more than one occasion when discussing the loss of his working connection with the Onshore Operating Company and the lack of recognition for his financial contribution to it, the ruination of his once close relationship with his father and the consequences of this for his children's relationship with the wider family. These events appeared to me to have a greater influence on his present motivations than he was willing or able to acknowledge;

(4) his evidence was least convincing when he sought to explain that he was not nurturing lingering discontent about the Proposal No. 4 dispensation and was now happily preoccupied with his own new business ventures.

Does D9 wish to actually challenge the validity of Proposal No.4?

37. D9 reiterated throughout his evidence that he accepts Proposal No. 4 and that the reason for his aggressive litigious approach is that his father will cause those in his thrall to simply stonewall him unless sufficient pressure is applied to compel a response. As with most of the contentious issues in this case, evaluating this assertion requires a nuanced approach. I find that:

(1) D9 on balance does with his rational mind accept Proposal No. 4. However, the purity of this acceptance is diluted by lingering emotional discontent about the deal and the sense of rejection that it represents;

(2) D9's deployment of a lawyer to deal with his co-directors in a contentious way before the Family Holdcos' first Board meetings had no objective justification for it. This had the effect of reducing rather than increasing the prospects of an effective working relationship for D9 within the new trust structure;

(3) because of the history of the contentious negotiation of Proposal No. 4, both D2 and D9 understandably developed a high degree of mutual mistrust and suspicion. D2's assertion that his son wishes to "subvert and destroy" the Trust (4th Affidavit, paragraph 14) seems to me to be an exaggeration of D9's true intent;

(4) stonewalling on the part of the Trustee did to some extent occur in relation to D9's information request, belatedly acceded to on the eve of the hearing of the present application, albeit after the Onshore Operating Holding Company's Unanimous Shareholder Agreement was amended to permit this. That a positive reaction to the information request was not initially forthcoming is unsurprising having regard to the context in which the request was made;

(5) on balance I would find that D9 has no desire to "wreck" the Trust structure. I accept his evidence to the effect that his litigation strategy was designed to generate a response and open lines of communication rather than motivated by a desire for actual litigation. His handling of the threatened Onshore Application, which could easily have been filed before interim injunctive relief was sought, supports this.

Has D9 subverted Proposal No.4 and/or threatened to subvert it?

38. Mr Hinks for D2 aptly characterised D9 as spoiling for a fight in the immediate aftermath of Closing and his receipt of his preferential payment. It is impossible to sensibly construe the record of correspondence between D9's lawyer and his co-directors in any other way. However, the central complaint is that D9 undermined and still continues to threaten to undermine Proposal No. 4 by demanding a role for himself and operating principles which would involve modifying the agreed structure.

39. The evidential picture, as already noted above, is at first sight far from clear. D9 clearly instructed his lawyer to avoid any explicit challenges to the settlement agreement. Commingled with inappropriate demands made of the Trustee were permissible ones. The question of whether the threatened Onshore Application against the Trustee warrants narrow injunctive relief based on a breach of the Trust jurisdiction clause is dealt with separately below.

40. In his oral evidence, D9 confirmed that he still wished to pursue either the threatened foreign action against the Trustee or, alternatively, a reformulated similar claim against

his co-directors on the grounds that the scope of the fiduciary obligations of the directors is governed by Onshore law. Looking at the situation broadly, I am bound to find that D9 has subverted and threatens to subvert Proposal No.4 for the following reasons:

(1) D9 from the outset has approached the agreed Trust structure in an adversarial way based principally on his apparent conviction that his co-directors are puppets of his father and incapable of discharging their functions in an independent manner. He has been unable or unwilling to distinguish interactions with his co-directors from interactions with his father. D9 explained his desire to continue Onshore litigation despite being supplied most (if not all) of the information he demanded in the following terms:

> "*I wished I didn't have to intimate that that is a possible step, to force people to come to the table, but it, unfortunately, is a longstanding pattern of negotiating with my father, that unless I—unless he knows that I have the resolve to go the whole way, that I'll be stonewalled and unable to carry out, you know, my obligations*"[4];

(2) D9 has sought to equate his role as a director of the Family Holdcos, which are simply investment holding companies in what was supposed to be a non-hostile family structure, with the role of a director on the Board of a large trading company. Not only was his attempt to involve himself in the valuation of the Onshore Operating Holding Company inconsistent with the agreed assignment of this task to the Accountancy Firm. He also demonstrated a strong desire to insert himself in the management of the wider Trust structure (against the wishes of virtually every other stakeholder) when he was contractually bound to play a far more limited role in his own corner of the structure. Ironically, this may in part be a reflection of his desire to repair his relations with his siblings:

> "*And I am confident right now what's going on is not correct. It's wrong and won't stand the test of time. And everyone trying to play a role in continuing to isolate me from information, for me to carry out my duty, is leaving a terrible track record, and I—I want to be recognised at some point by my siblings that I did good...*"[5];

[4] Transcript 23.11.2012, pages 40-41.
[5] Transcript 26.11.2012, pages 322.

(3) D9 generally appeared unable to contemplate working within the Trust structure with his co-directors in a collegial manner and to be convinced that the structure has inherent weaknesses, notably conflicts of interest, which he is compelled to address through litigation if his concerns are not accepted by the other parties concerned.

Has D9 actually breached the Settlement Terms?

41. Clause 2.5 reads in material part as follows:

> "[D9] *hereby irrevocably discontinues and withdraws the response to Proposal No.3...in its entirety, including any and all direct or indirect issues, actions, potential or actual causes of action, suits, proceedings, claims, demands and grievances raised...and any and all future direct or indirect issues, actions, causes of action, suits, proceedings, claims, demands and grievances that* [D9] *could raise in opposition to Proposal No.4.*" [emphasis added]

42. Paragraph 2.8 of the Settlement Terms contains a covenant by D9 not to sue in respect of any of the matters waived under, *inter alia*, paragraph 2.5. D9 has most clearly raised either directly or indirectly in correspondence, in the draft Onshore Application (including his affidavit in support) and in his written and/or oral evidence filed in response to the present action, *inter alia*, the following specific issues which could have been raised in opposition to Proposal No.4:

(1) The Accountancy Firm's alleged inability to properly discharge, *inter alia*, their valuation functions due to conflicts of interest;

(2) his co-director's alleged inability to discharge their duties as directors of D9's Family Holdcos independently while also serving, *inter alia*, on the Board of the Trustee on which D2 sits.

43. The Accountancy Firm's role in relation to the valuation was spelt out in paragraph 84 of Proposal No. 4. Paragraph 126 of Proposal No. 4 expressly contemplated directors of the Onshore Operating Company qualifying as independent directors of the Family Holdcos to be established by the Trustee. The conflicts of which D9 complained could have been raised prior to his approval of Proposal No. 4. In raising these issues subsequently, he has breached the Settlement Terms and, in particular, his obligations under paragraph 2.5.

44. D9's pursuit of these issues in the Onshore Application or in reformulated proceedings against any other defendants would constitute a breach of the same contractual terms and ought properly to be restrained.

45. Whether the distribution to D9 should be altered by virtue of these breaches will be considered below. But attention ought first to be given to whether the threatened Onshore Application ought to be restrained on the narrower basis that its prosecution would involve a breach of an exclusive jurisdiction clause.

Findings: is the threatened Onshore Application in breach of the Trust jurisdiction clause?

Is Clause 18.1 a jurisdiction clause?

46. It is clear from the recitals to the Trust Deed, that the Trust was established to receive assets from the trustees of the Bermuda-based Testamentary Trust and to allocate such assets by way of implementation of Proposal No. 4 reinforced by the November 14, 2011 Order.

47. Clause 18 of the Trust Deed provides as follows:

> "**Governing Law and Forum**
> *18.1 Except as otherwise provided, the interpretation and validity of the provisions of this Trust and all questions relating to the management, administration, investment, distribution and the perpetuity period applicable to this Trust shall be governed by the laws of Bermuda and the forum for the administration of this Trust shall be the courts of Bermuda.*" [emphasis added]

48. Mr Le Poidevin for the Trustee submitted that, having regard to the terms of clause 18.1 and the wider context of the Trust as a whole, this constituted an exclusive jurisdiction clause as regards all claims relating to the administration of the Trust. His submissions were supported by all others parties appearing in support of D2's application. However, even Mr Singla did not ultimately directly challenge this interpretation of clause 18.1 in his oral submissions although I have considered the contrary arguments set out at paragraphs 181-191 of his Skeleton Argument.

49. The Trustee's counsel submitted: "*The expression 'forum for administration' has become a conventional expression in jurisdiction clauses*" (Submissions, paragraph 34). This proposition was amply supported by illustrative persuasive authorities, including: *Green-*

v-Jernigan (2003-04) 6 I.T.E.L.R. 330; *Koonmen-v-Bender* (2003-04) 6 I.T.E.L.R. 568; *Nabb Brothers Ltd-v- Lloyds Bank International (Guernsey) Ltd* [2005] I.L. Pr. 37; *Helmsman Ltd-v- Bank of New York trust Company (Cayman) Ltd* (2010-11) 13 I.T.E.L.R. 177; *Re the Representation of AA* (2010-11) 13 I.T.E.L.R. 690.

50. Clause 18.1 is unquestionably a jurisdiction clause.

Is clause 18.1 an exclusive jurisdiction clause?

51. Mr Le Poidevin submitted that clause 18.1 was clearly an exclusive jurisdiction clause if the Court took into account, as it should, the circumstances surrounding the creation of the Trust and the need to avoid construing the clause as redundant in light of the statutory jurisdiction over trusts which exists under Bermudian law. When regard is had solely to case law and academic authority considering the exclusive jurisdiction clause issue in a trust context, however, the position is not crystal clear.

52. In *Green-v-Jernigan* (2003-04) 6 I.T.E.L.R. 330, Groberman J of the British Columbia Supreme Court found (at paragraph 41) that "*the reference to Nevis being the 'forum for the administration of the trust' was intended to make the courts the exclusive venue for legal disputes under the deed*". But the crucial words appeared in a clause that also made reference to "*the exclusive jurisdiction of*" Nevis. I do not find this decision of any assistance with construing a bare 'forum of administration clause'. On the other hand, the clause considered by the Jersey Court of Appeal in *Koonmen-v-Bender* (2003-04) 6 I.T.E.L.R. 568 was more comparable to the clause under consideration in the present case. It read:

> "*This Settlement is established under the laws of Anguilla and subject and without prejudice to any transfer of the administration of the trusts hereof to any change in the Proper Law and to any change in the law of interpretation of this Settlement duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of Anguilla which said Island shall be the forum for the administration thereof.*"

53. There was also a clause in the relevant trust deed which somewhat curiously defined "*Proper Law*" as meaning "*the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this Settlement shall from time to time be subject and by which such rights construction and effect shall be construed and regulated*". This was not regarded as pivotal in the Court of Appeal's construction of the forum for administration clause as an exclusive jurisdiction clause. Rokison JA crucially held as follows:

> "*48. The Royal Court observed that the expert evidence adduced from Mr Courtney Abel did not assert that the clauses of the AEBT cited above conferred exclusive jurisdiction, but only that they made the court of Anguilla the forum of choice. In my view, there is no meaningful distinction between these two expressions. If a clause provides that disputes shall be referred to a particular forum, or that that forum shall be the forum for the resolution of such disputes, that constitutes an agreed choice of forum, whether or not the word exclusively is added. Just as, if a contract provides for disputes to be referred to arbitration, that is an arbitration clause to which the courts will give effect. As is stated in the latest edition of Dicey and Morris The Conflict of Laws in paragraph 12-078:*
>
> > *'…the true question is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction irrespective of whether the word exclusive is used'*."

54. That case concerned a breach of trust claim against the trustee. The decision has been criticised for incorrectly equating a trust jurisdiction clause with a contractual jurisdiction clause and for failing to take into account the historical meaning of 'administration' in the law of trusts: Paul Matthews, '*What is a Trust Jurisdiction Clause*', The Jersey Law Review, October 2003.

55. Both this article and the British Columbian and Jersey cases mentioned above were considered by Henderson J of the Caymanian Grand Court in another breach of trust case, *Helmsman Ltd-v- Bank of New York Trust Company (Cayman) Ltd* (2010-11) 13 I.T.E.L.R. 177. It was argued that because the trusts were governed by English law, the selection of England as the forum for administration should be construed as implicitly prescribing exclusivity otherwise the forum designation was effectively redundant. Because the trusts had been relocated to Cayman, Henderson J did not find it necessary to decide the point of construction on the jurisdiction clause.

56. The fourth case to which I was referred which directly considered the question of whether a trust administration forum clause was exclusive was another Jersey decision, *Re the Representation of AA* (2010-11) 13 I.T.E.L.R. 690. The Royal Court in this case (Commissioner Clyde-Smith) considered the three aforementioned cases together with the Matthews article. The trust deed had a Jersey forum administration clause, but was administered in Guernsey by a Guernsey trustee. The newly appointed trustee commenced hostile litigation against the former trustees in Jersey in reliance on the forum clause which provided:

> "*…this Trust is established under and shall be governed in all respects by the laws of the Island of Jersey which shall be the proper law of the Trust and the courts thereof shall be the forum for the administration of the Trust*."

57. The Royal Court found that in the absence of any reference in the clause to "exclusive jurisdiction", as in *Koonmen*, "*it was not the intention of the draftsman of the trust that the courts of Jersey should have exclusive jurisdiction over all disputes in relation to the trust*" (paragraph 31). The force of this decision as a persuasive authority for present purposes is, to my mind, weakened by the distinguishable facts.

58. There were related proceedings pending in Guernsey involving creditors of the trust which the claim brought by the new trustees against the former trustees overlapped with. And the Royal Court's alternative finding (and, it appears, its dominant practical concern) was that if the clause was exclusive "*the circumstances were exceptional and justified the court in overriding cl 3.1 so as to enable the Guernsey court to continue to exercise its jurisdiction without interference by this court*" (paragraph 35). This perhaps explains why the Court did not fully consider the Caymanian Grand Court decision in *Helmsman* and (at paragraph 28) incorrectly described that case as declining to follow *Koonmen*.

59. Finally it is noteworthy that the claim was not an 'inwards' claim by a beneficiary against the trustee; it was an application by a new trustee for directions as to whether it should submit to the jurisdiction of the Guernsey Court (which was already seized of an application by the former trustees in relation to the trust) with a view to compelling the former trustees to, *inter alia*, hand over control of the trust assets.

60. No sensible reading of any judicial authority can ignore the context in which the relevant decision is made. Mr Le Poidevin aptly relied on the following *dictum* of Commissioner Clyde-Smith in *Re The Representation of AA* (at paragraph 30) which I gratefully adopt:

> "*…it is at the end of the day a question of the court construing the particular deed before it in order to derive from it the presumed intention of the parties. That exercise has to be conducted against the background of the surrounding circumstances or matrix of facts existing at the time when the document was executed…*"

61. In the present case, two circumstances were relied upon as supportive of a finding that the administrative forum clause was intended to be an exclusive jurisdiction clause as far as trust administration matters are concerned. The first and more abstract point is that as section 9 of the Trusts (Special Provisions) Act 1989 is sufficiently broad to confer non-exclusive jurisdiction upon this Court, the addition of the forum clause is redundant unless it is intended to add the missing exclusivity ingredient. Section 9 provides as follows:

> "*9. The Supreme Court has jurisdiction-*
>
> *(a) where a trustee is resident in Bermuda;*
>
> *(b) where any trust property is situated in Bermuda but only in respect of property so situated;*

(c) where the administration of any trust is carried on in Bermuda, or

(d) *where the Court thinks it appropriate.*"

62. The existence of this statutory provision is neutral in the context of the present case as the choice of Bermuda governing law is not specified as a basis for founding jurisdiction and none of sub-paragraphs (a) to (c) appeared (or appeared obviously) to apply. The argument that selecting Bermuda as an administrative forum for a trust suggested a desire to add exclusivity because the clause otherwise added nothing to the general legal position would have greater force in a case where the trustee was resident in Bermuda, the trust property was resident in Bermuda and/or the administration was carried out in Bermuda. Nevertheless, in my judgment the mandatory language of the clause 18.1 itself, and the combined selection of a Bermudian governing law and Bermudian forum for administration does naturally suggest exclusivity:

> "*this Trust <u>shall be</u> governed by the laws of Bermuda and the forum for the administration of this Trust <u>shall be</u> the courts of Bermuda.*"

63. As Lawrence Collins LJ (as he then was) noted in a case where the only connection between the trust and England was an English governing law clause, *Gomez-v-Gomez-Monche Vives* [2009] Ch at 287:

> "*63. It is true that, apart from the governing law, there is no connection between the trust and England. The place of residence of the trustees is not England, the trust is not administered in England, the trust assets and documents are not in England and nor are any of the beneficiaries domiciled in England. But I am satisfied that the trust is not domiciled in Liechtenstein, because all of the administration of the Trust is carried out, either directly or indirectly, by the third defendant in Liechtenstein. To suggest that the domicile might be the Cayman Islands (because the principal trust assets, the shares in Gonzalez Byass, were shares in a company incorporated in the Cayman Islands) is merely fanciful.*
>
> *64. The connection between a trust and its proper law is in every sense real and close. A trust is not like a commercial contract where it is only necessary to consider the content of the applicable law in exceptional circumstances. Trustees in particular have to be intimately aware of their responsibilities under the general law applicable to the trust. They may have to know whether they can lawfully accumulate income. Resort to the law governing the trust is central to their responsibilities. Consequently the judge was right to find that the trust is domiciled in England.*"

64. The express choice of a governing law for a trust must accordingly always be an exclusive one as it signifies the domicile of the relevant trust. A trust can only have one domicile. It follows that the combination of a Bermuda governing law clause and a Bermuda forum for administrative clause points towards the draftsman's intent that the courts of Bermuda should exclusively determine matters relating to the administration of the trust. This is probably why Rokison JA in *Koonmen-v-Bender* (2003-04) 6 I.T.E.L.R. 568, also analysing a clause selecting a single governing law and administrative forum for a trust, rightly considered that the absence of the word "exclusive" (or indeed the inclusion of the phrase "exclusive jurisdiction" in the definition of "Governing Law") did not matter. The choice of Bermuda law as the governing law of the trust combined with the designation of Bermuda as the forum for administration of a trust will ordinarily signify both (a) the exclusive selection of Bermuda as the domicile of the trust, and (b) the exclusive selection of Bermuda as the forum the courts of which will supervise the administration of the trust.

65. This view is only fortified by the highly unusual fact that the Trust in the instant case was established pursuant to the compromise of a very significant dispute which was approved by way of an Order of this Court. That compromise was declared to be enforceable under the liberty to apply provisions of the November 14, 2011 Order. Moreover, the practical effect of the Confidentiality Order is that it is difficult to see what claims can be pursued by Trust beneficiaries in relation to the Trust structure without seeking prior leave from this Court by way of the approval of a variation of the Confidentiality Order. If the draftsman of clause 18.1 wished to facilitate judicial oversight of the Trust by some other court, it seems to me that such an unlikely intention would have been articulated in express terms.

66. For the above reasons, I find that clause 18.1 constitutes an exclusive jurisdiction clause in respect of applications involving the "*administration of the trust*".

67. This conclusion necessarily leaves open the possibility that a variety of claims might not be caught by such a clause. Obvious examples of potential claims not caught by the clause include claims brought by trustees against strangers to the trust or beneficiaries to recover trust property, claims relating to the administration of the trust asserted abroad in ancillary proceedings and/or any other claims which clearly have no connection with the administration of the trust.

Would the prosecution of the Onshore Application or any substantially similar proceedings seeking to enforce rights arising out of the Trust structure entail a breach of clause 18.1?

68. It remains to consider what types of proceedings are caught by the Trust administration forum clause. In D9s' Skeleton it was argued that this could not embrace a breach of trust claim. I reject this submission. The threatened proceedings are primarily directed at compelling the Trustee to supply information to a beneficiary. Whatever the 19th century scope of administration proceedings may have been, Order 85 rules 2, 4 of the rules of the Supreme Court now provides as follows:

"***85/2 Determination of questions, etc. without administration***

2 (1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions—

(a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;

(b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;

(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

(3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs—

(a) an order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts;

(b) an order requiring the payment into court of money held by a person in his capacity of executor, administrator or trustee;

(c) an order directing a person to do or abstain from doing a particular act in his capacity of executor, administrator or trustee;

(d) an order approving any sale, purchase, compromise or other transaction by a person in his capacity of executor, administrator or trustee;

(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court…

*…**85/4 Grant of relief in action begun by originating summons***

4 In an administration action or such an action as is referred to in rule 2, the Court may make any certificate or order and grant any relief to which the plaintiff may be entitled by reason of any breach of trust, wilful

> *default or other misconduct of the defendant notwithstanding that the action was begun by originating summons, but the foregoing provision is without prejudice to the power of the Court to make an order under Order 28, rule 8, in relation to the action.*"

69. The better view is that a modern draftsman using the terms "administration" in a trust forum clause does not have in mind now rare administration actions but, rather, is merely seeking to signify the administration of a trust in a general sense by the domiciliary courts of the trust. By way of illustration, Lord Walker, delivering the judgment of the Privy Council in *Schmidt-v-Rosewood Trust Ltd.* [2003] 2 AC 709 (at paragraph 66) described the beneficiary's right to seek disclosure of trust documents as "*one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts*".

70. Accordingly, it is clear that the threatened Onshore Application, which is admittedly primarily directed at compelling the Trustee to disclose financial information about a company it controls would, if not restrained, involve a breach of the exclusive (trust administration) jurisdiction clause in the Trust Deed.

71. It is, ultimately, also clear that a substantially similar action brought by D9 solely in his capacity as a director against companies or their directors which are in practical terms administered by the Trustee as part of the Trust structure would also infringe clause 18.1. I say this due to the fact that Proposal No. 4 explicitly contemplated that the various corporate entities (in particular the Family Holdcos) would merely be tax efficient vehicles for distributing the profits generated by the Onshore Operating Company to the Trust's beneficiaries, under the overall supervision of the Trustee. Any questions relating to how the Family Holdcos should operate in relation to the other corporate entities in the Trust structure will almost inevitably engage questions of Trust administration.

72. The proof of the pudding is in the eating. The Onshore Application was formulated primarily as a trust matter. For lines to be blurred between corporate and trust capacities in this kind of commercial context is probably not unusual. As Lord Walker also observed in *Schmidt-v-Rosewood Trust Ltd.* [2003] 2 AC 709 (at paragraph 65(2)):

> "*Neither side made any submissions seeking to distinguish between trust documents and documents relating to the affairs of a company controlled by the trustees (see for instance Butt v Kelson [1952] Ch 197). This may have represented a realistic decision made by the trustees in the light of how the two settlements were in fact administered.*"

73. For these reasons I find that D9 ought properly to be restrained from issuing the Onshore Application against the Trustee or substantially similar proceedings (in terms of the claims asserted and/or the relief sought) against his Family Holdcos or their directors because such proceedings would be in breach of clause 18.1 of the Trust Deed.

Findings: ought D9 to be deprived of any benefit received under Proposal No. 4 by reason of having breached his obligations under the Settlement Terms?

74. D2 submitted that D9 should be stripped of his preferential payment (or at least 80% of it) and removed as a director pursuant to the following clause in the Settlement terms:

> "*1.2 …Without prejudice to the availability of any other means of enforcement, the Settlement Terms shall be enforceable by application under the Liberty to Apply conferred by the Court Order. If on any application the Court finds that any person is in breach of his or her obligations under the Settlement Terms the Court shall (in addition to any other remedies open to it) have power to vary the terms of Proposal No. 4 so as to reduce the provision made for the person in breach to such extent as to the Court may appear reasonable.*" [emphasis added]

75. The Trustee and Guardian took a neutral stance on this aspect of D2's application. The power to reduce the provision made for D9 is potentially engaged by my finding that he breached his obligations under paragraph 2.5 of the Settlement Terms. Having regard to the Court's ability to penalize D9 in costs and having regard to the likely scale of any such award, in my judgment the gravity of the breaches would make it unreasonable to impose any further penalty in this regard.

76. The breaches complained of by D2, if fully made out, would perhaps have justified some financial penalty in addition to legal costs. I have rejected the contention, based on the evidence adduced on the present application, that D9 is committed to wrecking the bargain reflected in Proposal No. 4. Nor have I accepted that he was motivated by greed in pursuing what he himself characterised as attempts to get his father's attention. On balance I find that the reason why D9's litigation strategy appeared so incoherent was that it lacked a coherent commercial goal. It was largely emotionally motivated, partly by disappointment at the bargain he was forced to accept but to a significant extent based on legitimate feelings of hurt based on the extent to which he and his family have become estranged from the wider family group.

77. It was noteworthy that his oral evidence about this estrangement was not challenged by D2's counsel. On the contrary, Mr Hinks poured scorn on certain aspects of the open settlement letter sent on D9's behalf which to my mind constitutes the best available evidence as to what his contractual breaches were designed to achieve. In considering this letter, I express no concluded views on its implications (if any) in relation to costs.

78. Williams, D9's Bermudian attorneys, on July 18, 2012 wrote Appleby (Bermuda) Ltd., D2's attorneys, proposing to give various undertakings to dispose of the present

application. Very broadly, undertakings were offered which would have made it unnecessary for D2 to seek permanent injunctive relief. The open offer was stated to be conditional upon four matters "*which are extremely important to our client as part of the process to mend relations between the family*", namely:

(1) holding a family meeting involving all of D2's children who were involved in the present proceedings assisted by a professional facilitator;

(2) acknowledging D9's contribution to the Onshore Operating Company by holding a retirement dinner;

(3) not discouraging the Company's employees from dealing with D9;

(4) D2 attending a family activity with D9.

79. Conditions (1) and (4) were admirable family-healing goals of relevance not just to D9 and D2 but to the wider family, including minors and (potentially at least) unborn children as well. Conditions (2) and (3) were understandable requests but probably unrealistic so soon after a major dispute concerning the value of D9's contribution to the Company. It is difficult to avoid the strong suspicion that D2's anger at his son's perceived "disobedience" and legitimate preoccupation with preserving the Trust structure for the benefit of all may well have blinded him to:

(a) the possibility that the scars in his relationship with D9 are capable of being healed;

(b) the emotional harm that the current estrangement may be inflicting by way of collateral damage on other family members including his own grandchildren.

80. It is true that D9's open settlement letter ended with preposterous financial demands if the overall proposals were rejected; but to my mind it ought to have been obvious that there was no conceivable legal basis for the demands and that D9's real goal at this juncture was restorative justice rather than financial justice. He was, it seems to me, seeking to recover a lost extended family and lost working relationships nurtured in a cherished family business which had been brought to an abrupt end. It is, however, not altogether surprising that these overtures fell on stony ground. Against a long background of hostile correspondence and stormy relations, burying such delicate sentiments in a lawyer's letter dealing primarily with settling contentious litigation (moreover a letter

which itself ended with extraordinary financial demands) was not the ideal channel on which to broadcast the rapprochement theme.

81. In summary, while I have found that D9 has breached the Settlement Terms, I also find that the motivations underlying these breaches were only partially attributable to a desire to actually subvert Proposal No.4 flowing from his inability to emotionally accept the bargain struck. D9 was also motivated by the desire, albeit manifested in a most inelegant and contractually impermissible way, to heal the family wounds inflicted by the events which culminated in the November 2011 settlement. Family harmony is consistent with the interests of the Trust (which the Settlement Terms were also designed to facilitate), and not designed to ensure (as regards minors and unborn children in particular) material wellbeing alone. In considering what relief is "reasonable" for a breach of the Settlement Terms, this Court must in my judgment be entitled to take into account whether such relief will be for the benefit of the Trust's beneficiaries as a whole.

82. As Pennycuick J observed in *In re Remnant's Settlement Trusts* [1970] 1 Ch 560 at 566G[6] in the distinguishable but not wholly inapposite context of approving a settlement and deleting forfeiture clauses affecting children:

> "*I have not found this an easy point, but I think I am entitled to take a broad view of what is meant by 'benefit'…On that last point I was referred to In re Weston's Settlements [1969] 1 Ch 223, where Lord Denning M.R. said, at p.45:*
>
> > *'But I think it is necessary to add this third proposition: (iii) the court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit.'*
>
> *I do not think Lord Denning intended to use the words 'educational' and 'social' in any restrictive sense. I think the court is entitled and bound to consider not merely financial benefit but benefit of any other kind.*"

83. Taking these broader considerations into account, together with the fact that I will be granting permanent injunctive relief (and likely making an adverse costs order of some sort against D9), I do not think it would be reasonable to deprive D9 of all or some of his preferential payment. Nor indeed would it be reasonable to direct that the Trustee is at liberty to remove him as a director of his Family Holdcos, a role which I accept he genuinely cherishes. However, it is only appropriate to note that if D9 were to continue to conduct his role as a director as he has to date, it is difficult to see what choice the Trustee would ultimately have but to seek his removal.

[6] This case was not referred to in argument but is only cited for illustrative purposes.

Summary

84. I find that D2 is entitled to a permanent injunction restraining D9 from filing the Onshore Application and/or any other proceedings raising substantially similar issues or seeking substantially similar relief. This remedy is granted on the grounds that D9 has breached the Settlement Terms, subverted and/or threatened to subvert Proposal No. 4 and/or because such proceedings are prohibited by clause 18.1 of the Trust Deed, which I find to constitute an exclusive jurisdiction clause for the purposes of the relevant claims.

85. I will hear counsel as to costs and as to the precise terms of the injunction order.

Dated this 12th day of December, 2012, _____

IAN RC KAWALEY CJ