In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 085 & 086

IN THE MATTER OF A TRUST ESTABLISHED BY A DECLARATION OF TRUST DATED 14 JANUARY 2000 AS THE FA TRUST

IN THE MATTER OF A TRUST ESTABLISHED BY A DECLARATION OF TRUST DATED 14 JANUARY 2000 AND KNOWN AS THE FB TRUST

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr. Keith Robinson and Mr. Kyle Masters of Carey Olsen Bermuda Limited for the Plaintiffs**

Ms. Hannah Tildesley of Appleby (Bermuda) Limited, for the Defendants

Date of Hearing: 19 October 2020 **Date of Ruling: 6 January 2021**

JUDGMENT

Application to remove the Protector of a trust; relevant test to be applied; whether in all the circumstances it is the appropriate to remove the protector of the trust

HARGUN CJ

Introduction

1. These are consolidated proceedings in relation to the FA Trust and the FB Trust ("**the Trusts**"). Both trusts are materially identical in terms of the trust provisions and the relevant facts for the purposes of the applications before the Court. The present applications made by the trustee of the Trusts ("**the Trustee**"), seek to remove the current Protector of the Trusts ("the First Defendant" or "**the Protector**") and the apparent successor Protector ("the Second Defendant" or "**the Successor Protector**"). Both applications are supported by the beneficiaries of the respective trusts even though the beneficiaries have not been joined formally as parties to these proceedings.

Background

2. The background to these proceedings is set out in my Ruling dated 7 November 2019, dealing with the application by the Protector to require the Trustee to indemnify the Protector in respect of his costs and expenses of the proceedings and to do so on a contemporaneous basis. By that Ruling I refused to make an order sought at that stage of the proceedings. For ease of reference I set out again the salient facts and trust provisions.

3. The Trusts were established by Declarations of Trust dated 14 January 2000, made by Bermuda Trust Company Limited ("BTCL") and the First Defendant as the "Original Trustee". The First Defendant was also named as the Protector of Trusts. The Trusts were established upon the division into two halves of an earlier trust of which BTCL was a trustee and known as the F Trust. The First Defendant retired as trustee leaving only BTCL as the trustee of the Trusts. By deed dated 8 April 2016, the Plaintiff was appointed as the Trustee of the Trusts.

4. The Trusts are irrevocable and governed by Bermuda law. The Trusts are in a discretionary trust form with clause 3 providing an overriding power of appointment for any member of the "Specified Class". Clause 4 provides that in default of and subject to any appointment under clause 3, the Trustee has broad discretion to benefit any member of the Specified Class.

5. The Trustee's powers in clause 3 and 4 are each subject to the consent of the Protector. There are a number of other powers and functions of the Trustee which can only be exercised either in consultation with or the prior approval of the Protector. The Trustee is required to consult with the Protector prior to making investments under the Trustee's broad investment powers under clause 6(a). The Protector has the power to veto Trustee's exercise of its powers to exclude or add persons as members of the Specified Class. The Protector has the power to veto the Trustee's entry into contracts, mortgages, charges or undertakings in connection with the Trustee's exercise of its power to borrow on the security of the Trust fund. The Protector has the power to direct the Trustee, vary, and or exclude powers of an administrative or management nature. The Protector has the power to appoint and remove trustees. The Protector has the power to declare (i) a change of the proper law of the Trust; (ii) that the courts of such proper law shall thereafter be the forum for the administration of the Trust; and (iii) in conjunction with the above declaration, that the Perpetuity Period shall thereafter endure for such lesser period as the Protector may determine.

6. Clause 18 of the Trust deals with Protectorship and provides:

> *"(1) The Protector shall have the power to appoint a successor protector by written instrument delivered to the Trustees and to the successor named therein And such appointment shall take effect on the date of receipt by the Trustees of confirmation in writing from the successor of his acceptance of such appointment or such later date as may be specified therein*

(2) If at any time there shall be no Protector of the trusts hereof or no effective appointment has been made as aforesaid then the power of appointing a Protector shall vest solely in the Trustees and after such an appointment should have been made the provisions of sub-Clause (1) of this Clause shall again have effect but so that should there be no Protector appointed by the Trustee all powers exercisable by the Protector shall be treated as if these were vested solely in the Trustee for all purposes

(3) The Protector shall be wholly indemnified and held harmless out of the Trust Fund from any losses damages, judgment debt or expenses, including attorney's fees, which shall be paid on a contemporaneous basis."

7. As noted in my earlier Ruling, there is in fact an issue in these proceedings whether the First Defendant continues to be the Protector of the Trusts. This is so because by a letter dated 24 July 2009 and addressed to BTCL, he exercised the power pursuant to Clause 18(1) to appoint the Second Defendant as his Successor Protector. The Second Defendant is the First Defendant's wife, and both Defendants are in practice together as attorneys.

8. In accordance with Clause 18(1), the appointment as Successor Protector was to take effect on the date of the receipt by BTCL of written confirmation from the Second Defendant that she accepted her appointment as the Successor Protector. The Second Defendant duly provided such confirmation of the letter dated 24 July 2009.

9. However, by further deed dated 8 April 2016, the present Trustee was appointed as trustee of Trust in place of BTCL. The following month, the First Defendant purported to revoke his prior appointment of the Second Defendant as Successor Protector and instead to make her appointment effective only *"at such time as [the First Defendant] shall die in office or resign as Protector".* The Trustee contends that there is doubt whether or not the First Defendant remains the Protector or whether the Second Defendant is in fact the Protector.

10. It is clear to the Court that all the relevant parties (the Protector, the Successor Protector, the Trustee and the beneficiaries) have assumed and carried on, on the basis that, despite the terms of the letters dated 24 July 2009 and 15 May 2016, that the First Defendant continued to be the Protector of the Trusts and that the Second Defendant had merely been designated as the Successor Protector on the death, incapacity or removal of the First Defendant as the Protector. In the circumstances I find that the letters do not reflect the intention of the parties and should be rectified to accord with the position as set out in the letter dated 15 May 2016. Accordingly, the position is that the First Defendant continues to be the Protector of the Trusts and the Second Defendant has been designated as Successor Protector in the event of the death, incapacity or removal of the Protector of the Trusts. To the extent necessary I also make validation orders as may be required to ensure that the Trusts have been properly administered with the First Defendant as the Protector of the Trusts, in accordance with the decision of the Court *In the Matter of C Trusts* [2019] SC (Bda) 44 (22 July 2019) at [26]-[29].

The background to the removal application

11. The factual background to the underlying dispute is that historically, trustee-beneficiary communication has only been conducted indirectly, using the First Defendant as a conduit. The present Trustee took the view, on legal advice, that it would be sensible to have a direct line of communication with the named beneficiaries who remain alive. During the course of providing this advice, the Trustee's legal advisers became aware that on 15 January 2019, the Protector had been "Publicly Censured" (a term of art) by the Attorney Grievance Committee for the First Judicial Department of New York State because he had counselled a client to engage in conduct he knew or should have known was illegal or fraudulent and suggested that lawyers in the United States can act with impunity.

12. During these proceedings the Protector accepted that that he had met with a potential client who represented himself as appearing on behalf of a West African minister. The meeting was in fact a journalistic "sting" operation. The individual stated that the minister desired to

purchase real property in the form of a brownstone, an airplane, and a yacht in the United States. The Protector was under the impression that the money involved was in the tens of millions. The potential client's explanation of the source of the money suggested that the money was questionable. The individual relayed that *"companies are eager to get hold of rare earth or other minerals…and so they pay some special money for it. I wouldn't name it bribe; I would say facilitation money."* The Protector informed the individual that they would need to hide the true source of the money by setting up different corporations to own the properties the minister sought to purchase. The Protector counseled the individual on techniques including "scrubbing" the money before transfer out of West Africa or at an intermediary location in the context of what he called an asset privacy and protection program. The Protector also provided assurances regarding protection of the attorney-client privilege and stated that *"they don't send the lawyers [in the United States] to jail because we run the country."*

13. On 16 March 2018, the Protector completed a "*Personal Declaration and Certification*" form ("**the Personal Declaration**") at the Trustee's request for regulatory compliance purposes. In that form, the Protector confirmed that he "*had never been the subject of a judicial or other official inquiry*". Further, the Protector thereafter undertook to advise the Trustee *"promptly of any change in circumstances which causes the information contained [in the form] to become incorrect and to provide [the Trustee] with a suitable updated Declaration within 30 days of such circumstances."*

14. On 26 February 2019, the Chief Operating Officer of the Trustee, called the Protector to inform him that the Trustee intended to write to write to him formally to ask him to resign. During that call, according to the Chief Operating Officer, the Protector cut off the conversation and informed her that he was going to remove the Trustee. This call was followed by an email dated the 27 February 2019 stating*: "As I told you on the telephone call yesterday, I shall exercise my right as Protector to transfer the trusts to a new trustee. I will do so with all deliberate speed."*

15. On 8 March 2019 the Protector sent an email to the Trustee confirming that: *"I am making appropriate arrangements. I expect to have done so by the end of next week*", which the Trustee understood as a reference to the transfer of the Trusts to a new trustee. By order of this Court dated 12 March 2019, the powers of the Protector to appoint and remove trustees pursuant to clause 17 were, pending the determination of the Originating Summons, suspended.

The legal test for the removal of a protector of a trust

16. In paragraph 28-046 of *Lewin on Trusts* 20th Ed., it is stated that the fiduciary character of the protector has the consequence that the court has jurisdiction to remove a protector for good cause, at any rate where that step is necessary to prevent the trusts from failing or where a protector's continuance in office would prevent the proper execution of the trusts. The editors further state that the test for removing a fiduciary protector has been equated with that for the removal of a trustee.

17. The statements of principle in relation to the removal of the trustee is to be found in Privy Council decision in *Letterstedt v Broers and Another* (1884) 9 App Cas 371. Lord Blackburn, giving the advice of the Board, stated the relevant test at pp 385-387, as follows:

"Story says, s. 1289, "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees; which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its

principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety." (emphasis added)

18. *In re the A Trusts* [2013] WTLR 1117, Jersey Royal Court (HWB Page QC, Commissioner) confirmed that the jurisdiction to remove the protector flows from the fiduciary nature of the position and the guiding principles for removal are akin to those to remove a trustee. The Court held at [8] that Lord Blackburn's words express the test in the simplest and most appropriate terms: namely, whether the continuance of the trustee [or protector] "*would be detrimental to the execution of the trusts*". The Court applied this test to the facts before it:

"[10] … In the present case, mutual hostility and distrust between the representor beneficiaries and the protector had led to a breakdown of relations that was quite plainly having a seriously detrimental effect on the execution of the trusts and was likely to continue to do so. This alone would have been a sufficient basis for the exercise of the court's jurisdiction had not been the only way in which the situation could have been redressed. But add to this the fact, as we found, that S bore much of the responsibility for this state of affairs and we are left in no doubt whatever that this was a case in which it was right for a protector who was reluctant to retire to be removed from office."

19. *In the matter of the K Trust*, [2016] WTLR 1225, the Royal Court of Guernsey (Deputy Bailiff McMahon), the Court confirmed that the above passages in the judgment of Lord Blackburn in *Letterstedt v Broers*, show that it is the welfare of the beneficiaries and the competent administration of the trust that found that the jurisdiction for the removal of a trustee and so, by analogy, a protector. The Court refused to follow the approach of the Isle of Man Court in *Re Papadimitriou* [2004] WTLR 1141, that the jurisdiction to remove a protector should only be exercised *"in exceptional circumstances."* The Court acknowledged that this is *"not a jurisdiction to be exercised lightly."*

20. In my judgment the approach of the Royal Court of Guernsey in *Re K Trusts*, relating to the circumstances where it is appropriate to exercise the jurisdiction to remove a

protector of the trust, represents the position as a matter of Bermuda law. The overriding consideration is the welfare of the beneficiaries and the competent administration of the trust. It is unnecessary for the Court to make a finding of wrongdoing on the part of the protector as a ground for removal. It is sufficient that there is evidence that the continuance of the office holder would be detrimental to the execution of the trust.

Rival submissions and discussions

21. The Trustee submits that here the Court needs to determine whether the Protector's continuance in office will have a detrimental impact on the proper execution of the Trusts and/or the welfare of the beneficiaries. The Trustee submits that the Protector's continuance in office, objectively and in all the circumstances, would be detrimental to the execution of the Trusts and to the welfare of the beneficiaries given:

    (1). The very nature of the conduct giving rise to the First Defendant's censure;

    (2). The manner in which the Protector disclosed (or, rather, failed to disclose) the censure; and

    (3). The Protector's reaction to the request that he resign as Protector.

22. In relation to the nature of the conduct giving rise to the censure, Mr. Robinson points out that during the course of his conversation with the potential client, the Protector (displaying a concerning familiarity with money-laundering techniques) was recorded discussing the methods by which the "facilitation money" could be used to buy various sorts of property in the United States. The Protector counseled this person on intricate techniques including "scrubbing" the money before transfer out of West Africa or at an intermediary location in the context of what the Protector called an asset privacy and protection program.

23. The First Affidavit of Faith Caton, Trust Manager of the Trustee, confirms that during the course of his conversation with the prospective client, the Protector also mentioned his role as a protector of a Bermuda trust. At paragraph 23 of his First Affidavit, the Protector confirms that he does not serve as a protector for any other trust. Accordingly, submits Mr. Robinson, he was referring to his role as Protector of the Trusts when discussing the various money-laundering techniques that could be deployed to the benefit of the West African minister.

24. Mr. Robinson submits that the Protector's misconduct complained of is extremely serious in the context of offshore international trusts. He points to the fact that the Trustee is a regulated entity by the Bermuda Monetary Authority ("**BMA**"), and is obliged to report any misconduct such as money-laundering to the BMA. Having regard to the regulated nature of the industry, it is not possible for the Trustee to continue to engage with the First Defendant as the Protector of the Trusts.

25. Mr. Robinson says that the Protector appears to acknowledge the illegality of the matters under discussion in stating that "*they don't send the lawyers [in the United States] to jail because we run the country."* Plainly, argues Mr. Robinson, the conduct which led to the Protector's censure gives rise to serious questions about his integrity and his fitness to discharge his fiduciary functions as Protector.

26. Ms Tildesley, on behalf of the Protector, argues that the censure has nothing to do with the First Defendant's conduct as Protector. She argues that the Protector has served the Trusts without any issue for 20 years. Rather, the censure is simply a single example of a mistake in an otherwise spotless career (as an attorney and as a protector).

27. Counsel also relies on what she says are a number of mitigating features to the censure. She points out that the Protector co-operated with the New York Court; he admitted the conduct; he accepted full responsibility for his actions; the conduct was aberrational; and

the misconduct occurred in the context of a single open ended conversation during a meeting with a potential client and after it had concluded he took no further steps in relation to the meeting or the matters discussed.

28. Ms Tildesley further submits the Protector remains more than able to perform his functions competently. Indeed, she argues, he has done so throughout the duration of these removal proceedings and, in the nearly 5 years since the 60 Minutes sting operation that gave rise to the censure.

29. In relation to the allegation relating to failure to disclose the disciplinary proceedings, Mr. Robinson submits that the Trustee is concerned about the manner in which the Protector initially failed to notify the Trustee or the beneficiaries of the disciplinary proceedings against him, and then later sought to downplay the significance of those proceedings. He points to the following timeline:

    1. The underlying sting operation conducted by the anti-corruption advocacy group Global Witness had first been publicized by CBS News in January 2016 as well as in the New York Times around the same time.

    2. On 6 to March 2018, the Protector completed the Personal Declaration at the Trustee's request for regulatory compliance purposes. In that form, the Protector confirmed that he *"[had never] been the subject of a judicial or other official inquiry."* He also agreed to advise the Trustee *"promptly of any change in circumstances which caused the information contained [in the form] to become incorrect and to provide [the Trustee] with a suitably updated Declaration within 30 days of such change in circumstances."*

    3. Mr. Robinson submits that it is clear that the disciplinary proceedings against the Protector had been ongoing from (at the latest) 22 of October 2018, when he submitted an affidavit "*in which he conditionally [admitted] …to certain*

misconduct in violation of the [New York Rules of Professional Conduct]…[and consented] to the agreed upon discipline of public censure" (see p.2 of the Order of the Appellate Division of the Supreme Court of the State of New York (First Judicial Department).

4. Further, the proceedings themselves were commenced on 5 of November 2018 (see p.1 of the Order of the Appellate Division of the Supreme Court of the State of New York (First Judicial Department).

30. The Protector had, as noted above, agreed to advise the Trustee promptly of circumstances that would cause the information in the Personal Declaration to become incorrect. Mr. Robinson submits that the Protector knew that he was the *"subject of an investigation proceeding or other inquiry by a self regulatory organisation of which [he was] a member"* and/or, *"the subject of a judicial or other inquiry"* from as early as *"summer to autumn of 2018*" (see p.4 of Appleby letter dated 18 April 2019 and definitely by 22 of October 2018 (see paragraph 29.3 above)). Mr. Robinson argues that the Protector's decision to wait until after the completion of the censure proceedings in January 2019 was clearly in breach of his agreement in the Personal Declaration.

31. Mr. Robinson argues that even after the New York Court had delivered its verdict, the Protector did not engage with the matter promptly or appear to grasp its seriousness. He only provided a copy of the decision to the Trustee on 14 February 2019, after he had been confronted about the issue by the Trustee, and then with the comment that he was *"in good company"* because *"12 other lawyers, including a former President of the American Bar Association, were involved."*

32. In response, Ms Tildesley argues that as the Protector admitted the conduct which was the subject matter of the censure, he was not therefore the subject of *"judicial or other*

inquiry." She argues that the only decision to be made by the New York Court was as to what sanction he should face.

33. Ms Tildesley submits that the matters leading up to the censure were not "*civil proceedings"*, they were disciplinary proceedings. In any event, she argues, fraud or dishonesty were not proven against the Protector by way of the censure. Counsel maintained that the Protector therefore answered the questions in the Declaration Form correctly. At the very least, Counsel argued, the applicability of those questions to the censure is ambiguous and therefore any incorrect answer that may have been given can be excused on that basis.

34. In relation to the allegation relating to Protector's reaction to the request for resignation, Mr. Robinson submits that this allegation is by far the most serious matter that is relevant to the Court's determination of these applications. In his First Affidavit the Protector states that his *"…first reaction to the telephone call from [the Trustee] was to find a trustee that would not have any problem working with me as a Protector. In other words, I was not "punishing" the Plaintiff; rather, my thought was to solve their problems by finding another trust company that could work with me."*

35. Mr. Robinson submits that both the contemporaneous correspondence generated by the Protector and his Affidavit evidence conspicuously fails to deal with the most important issue, namely, the best interests of the beneficiaries. Even on his own account of his immediate threat to replace the Trustee with *"…all deliberate speed*", he fails, submits Mr. Robinson, to make any reference to whether or not a replacement of trustee, with all that this entails, was in the best interests of the beneficiaries. Mr. Robinson argues that the Protector's proposed removal of the Trustee was plainly retaliatory and ignored the beneficiaries' interests and which would have needlessly interfered with the proper execution of the Trusts and it would clearly have been a breach of fiduciary duty.

36. In response, Ms Tildesley submits that the Protector's initial reaction following the Trustee raising the censure was born of surprise at the Trustee's response, particularly against the background of his long history of service to the Trusts and the beneficiaries. Crucially, Counsel argues, the Protector took absolutely no steps to remove the Trustee, nor does he intend to do so.

37. It appears to the Court that it is unrealistic to contend that the First Defendant's advice to a prospective client had nothing to do with his role as the Protector in relation to these two Trusts administered in Bermuda and governed by the Bermuda law. The Protector's statements to the prospective client potentially amounted to advising a client on money-laundering techniques. He specifically referred to "*scrubbing"* the money before the transfer out of West Africa and before it was received in the US financial system. In the censure Order dated 15 January 2019 it is specifically recorded that the Protector informed the individual that they would need to hide the true source of the money by setting up different corporations to own the properties the minister sought to purchase. The censure Order notes that the "*disciplinary proceeding*" against the Protector alleged that the Protector was *"guilty of certain misconduct, in violation of rules 1.2 (d) and 8.4 (h) of the New York Rules of Professional Conduct (RPC), arising out of his counseling a client on how to engage in conduct that the respondent knew or should have known was illegal or fraudulent."*

38. The censure Order records that the parties agreed on stipulated facts *"including the admission to the acts of professional misconduct and the violation of rules 1.2 (d) and 8.4 (h) of the Rules of Professional Conduct."*

39. Rule 1.2 (d) of the New York Rules of professional conduct provides that: *"A lawyer should not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent…"*

40. The Rule 8.4 (h) provides that*; "A lawyer or law firm shall not engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."*

41. Having regard to the admitted facts and the admitted violations of Rules 1.2 (d) and 8.4 (h), it is not surprising that the Trustee took the view that it could no longer have any professional dealings with the Protector. Furthermore, the admitted facts and violations of Rules 1.2 (d) and 8.4 (h) must raise serious issues as to the Protector's suitability as a person occupying the position of a protector of a trust, governed by Bermuda law, which necessarily involves the discharge of fiduciary responsibilities.

42. Further, in order to comply with the Trustee's obligations under the Foreign Account Tax Compliance Act (FATCA) and the Common Reporting Standards (CRS), the Protector undertook to advise the Trustee *"promptly of any changes in circumstances which causes the information contained herein to become incorrect and to provide [the Trustee] with a suitably updated Declaration within 30 days of such change in circumstances."* The Personal Declaration made by the Protector is dated 16 March 2018. It is not clear precisely when the disciplinary proceedings against the Protector were commenced by the Attorney Grievance Committee. The letter from Appleby, the Protector's Bermuda attorneys, dated 18 April 2019 states that the disciplinary steps were not taken by the Attorney Grievance Committee until the summer to autumn of 2018. The censure Order dated 16 January 2019 records that the Protector submitted an affidavit in those proceedings on 22 October 2018.

43. In the Personal Declaration the Protector was asked the question: *"Has fraud or dishonesty been proven against you in any civil proceedings?"* The protector answered that question in the negative. However, at some stage prior to January 2019, the Protector admitted violation of Rule 1.2 (d) which necessarily involved an admission that the protector had counseled a client to engage in conduct he knew was illegal or fraudulent. It does not appear that the Protector volunteered this information to the Trustee until after these matters were drawn to the attention of the Protector by the Trustee itself in February 2019.

44. In the Personal Declaration the Protector was also asked the question: *"Have you ever been the subject of a judicial or other official inquiry?"* The Protector again answered that question in the negative. The disciplinary proceedings which resulted in a hearing before 5 Justices of the Supreme Court, Appellate Division, First Judicial Department, were commenced, according to the letter from Appleby dated 18 April 2019, in summer to autumn of 2018. Yet, it does not appear that the Protector volunteered this information to the Trustee until after these matters were drawn to the attention of the Protector by the Trustee itself in February 2019.

45. In the Personal Declaration the Protector was also asked the question: *"Have you ever been the subject of investigation, proceeding or other inquiry by a self regulatory organisation [of] which you are or were a member?"* As noted above, the disciplinary proceedings against the Protector were commenced, according to his own Bermuda attorneys, in summer to autumn 2018. Yet, the Protector did not volunteer this information to the Trustee until after these matters were drawn to the attention of the Protector by the trustee itself in February 2019.

46. I accept Mr. Robinson's submission that even once the New York Supreme Court had delivered its verdict, the Protector did not engage with the matter promptly or appear to

grasp its seriousness. He only advised and provided a copy of the decision on 14 February 2019, after he had been confronted about the issue by the Trustee, and then with the inappropriate comment that he was "*in good company*" because *"12 of the lawyers, including a former president of the American Bar Association, were involved."*

47. As noted above, in response to the Trustee's suggestion that the Protector should consider resigning from his position, the Protector advised the Trustee that he *"shall exercise [his] right as Protector to transfer the trusts to a new trustee, I will do so with all deliberate speed."* The power given to a protector to remove a trustee and appoint successor trustee is a fiduciary power which has to be exercised for a proper purpose and in the interests of the beneficiaries. It is clear to the Court that the fiduciary obligations which the Protector owed to the beneficiaries were not uppermost in his mind when he threatened to remove the Trustee *"with deliberate speed."* The Protector repeated the threat to remove the Trustee in his email of 8 March 2019 stating that *"I am making appropriate arrangements. I expect to have done so by the end of next week."* There can be little doubt that the only reason the Trustee has not been removed by the Protector is as a result of the Order of this court dated 12 March 2019 suspending his power to do so.

48. In the circumstances the Court is satisfied that the actions of the Protector, as outlined above, have seriously damaged his relationship with the Trustee, such that the Trustee has justifiably taken the position that it can no longer have any professional relationship with the Protector. The continuation of the state of affairs is detrimental to the execution of the Trusts and does not advance the welfare of the beneficiaries.

49. Furthermore, the beneficiaries support the present applications that the Protector be removed by the Court and replaced by individuals who are competent to undertake the office and have the support of the Trustee and the beneficiaries. The beneficiaries of the FA Trust have submitted letters to the Court confirming that they support the Trustee's

position in these proceedings to remove the First Defendant as the Protector and to remove the Second Defendant as the Successor Protector. They do not feel that either of the Defendants are suitable individuals for these roles.

50. The beneficiaries of the FB Trust have also submitted a letter to the Court offering their *"strong and unwavering support of [the Trustee's] application to the Bermuda Supreme Court for the removal of [the First Defendant] as Protector and [the Second Defendant] as Successor Protector of the [FB Trust]. We strongly feel that neither [the First Defendant] nor [the Second Defendant] have acted, are acting, nor will ever act in our best interests. We will only feel protected if they and all their associates are fully removed from current and future potential roles as Protectors of any of our assets. [The First Defendant's] New York State censure is not an isolated lack of judgment; it is rather indicative of years of demeaning treatment and poor communication directed towards us by [the First Defendant and the Second Defendant]."*

51. In the circumstances, the Court has come to the view that it is appropriate to remove First Defendant as the Protector of the Trusts. Ms Tildesley urges that in the event the First Defendant is removed by the Court, the Court should confirm the Second Defendant as the Successor Protector. Counsel rightly points to the fact that the Second Defendant is a long-standing attorney and no allegations of misconduct have been made against her. In the end I have come to the view that the appointment of the Second Defendant will not promote the welfare of the beneficiaries of the Trusts.

52. In this regard, the Court does not approach the matter in an overly technical way. The Court must have regard to existing business and personal relationships between the First Defendant and the Second Defendant. The Court must take into account that the Second Defendant's appointment as Successor Protector (and in the alternative, the son of the Defendants) was made by the First Defendant. The Court notes that the Second

Defendant is the First Defendant's spouse and law partner in the firm. Both the First Defendant and the son of the Defendants in the alternative to her are the First Defendant's appointees. As the Court has found that the confidence in the First Defendant's ability to continue as Protector has been affected by his behavior, the Court accepts the submission that in light of the unusually strong links between the First Defendant and the Second Defendant and given the clear desire of the beneficiaries to have a clean break from both the First Defendant and the Second Defendant, the Court should exercise its powers to appoint another protector, who has not been appointed by, and who is not connected to, the First Defendant.

53. Accordingly, in the exercise of the Court's inherent power, the Court appoints Mr B, a lawyer and consultant based in Rome, Italy and who has been the legal advisers to the family of the beneficiaries for some time, to be the Protector of the FA Trust. The Court also appoints Mr. D, a Bermuda lawyer to be the Protector of the FB Trust.

54. The Court will hear the parties in relation to the issue of costs relating to (i) the Protector's earlier application for an indemnity in respect of his legal costs of these proceedings; and (ii) the Trustee's present applications for removal of the Protector and the Successor Protector.

Dated this 6th day of January 2021.

NARINDER K HARGUN
CHIEF JUSTICE