In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2018 No: 376

IN THE MATTER OF THE B TRUST
IN THE MATTER OF RSC O.85 AND PART IV OF THE TRUSTEE ACT 1975

BETWEEN

~~**ST JOHN'S TRUST COMPANY (PVT) LIMITED**~~
(Former Trustee *de son tort*)

MEDLANDS (PTC) LIMITED
(In its capacity as Trustee)

And **Plaintiff**

(1) THE ATTORNEY GENERAL
(In her capacity as representative of the charitable beneficiaries)

(2) DOROTHY KAY BROCKMAN
(In her personal capacity and as representative of the human beneficiaries, including minors and unborn, of the B Trust)

~~**(3) BERMUDA TRUST COMPANY LIMITED**~~
(Former Trustee)

~~**(4) HSBC PRIVATE BANK (C.I.) LIMITED**~~
(Formerly Bank of Bermuda (Guernsey Limited) (Former Trustee)

(5) MARTIN LANG
(In his capacity as the Trust Protector)

~~**(6) GROSVENOR TRUST COMPANY LIMITED**~~
(Former Trustee *de son tort*)

Defendants

(The "376 proceedings")

And

COMMERCIAL JURISDICTION
2020 No: 476

IN THE MATTER OF THE TRUST SETTLED BY A EUGENE BROCKMAN ON 26 MAY 1981 FOR THE BENEFIT OF HIS CHILDREN AND CHARITIES

IN THE MATTER OF RSC O. 85 AND PART IV OF THE TRUSTEE ACT 1975

BETWEEN

DOROTHY KAY BROCKMAN
(In her personal capacity and in her capacity as intended representative of the other human discretionary and contingent Beneficiaries pursuant to RSC Order 15/13)

Plaintiff

And

(1) MEDLANDS (PTC) LIMITED
(In its capacity as the outgoing Trustee)

(2) THE ATTORNEY GENERAL
(In her capacity as representative of the charitable beneficiaries)

(3) MARTIN LANG
(In his capacity as the Trust Protector)

(4) BCT LIMITED
(In its capacity as the intended new Trustee)

Defendants

(The "476 proceedings")

RULING

Hearing Date: Friday 26 March 2021
Decision: Wednesday 12 May 2021

<u>Appearances (476 Proceedings)</u>

Plaintiff: Mr. Francis Tregear QC of Counsel and Ms. Sarah-Jane Hurrion (Hurrion & Associates Ltd)
1st Defendant: Mr. Robert Ham QC of Counsel and Mr. Matthew Mason (Wakefield Quin Limited)
2nd Defendant: Ms. Shakira Dill-Francois (Deputy Solicitor-General) and Ms. Lauren Sadler-Best (Crown Counsel) on behalf of the Attorney General
3rd Defendant: Mr. John Machell QC of Counsel and Mr. Lewis Preston (Kennedys Chudleigh Ltd)
4th Defendant: Mr. Keith Robinson (Carey Olsen Bermuda Limited)

Application for Directions pursuant to RSC Order 15 Rule 13 for the Appointment of the Plaintiff to appear and partake in Court proceedings on behalf of other beneficiaries / Removal of a Trustee and Appointment of new Trustee under section 31 of Trustee Act 1975 / Application by an outgoing Trustee to retain Trust Assets to meet actual and contingent liabilities – Effect of Contractual Indemnities and whether section 47 of the Trustee Act 1975 applies - the Court's Supervisory and Equitable Jurisdiction to sanction indemnities in favour of an outgoing trustee

INDEX

TOPIC	Page No.
Introduction	**5**
The Plaintiff's Application for Appointment to Represent the Human Beneficiaries	**9**
Medlands' Request for Indemnities	**12**
Medlands' Request for Indemnities (The Indemnity Agreements entered by Medlands)	**13**
Medlands' Request for Indemnities (Various Court Proceedings involving the Trust)	**14**
Medlands' Request for Indemnities (Proposed Scope of Indemnities to be granted)	**16**

Medlands' Request for Indemnities (The Beneficiaries' Objections)	**17**
Medlands' Request for a Retention of Trust Assets	**18**
Medlands' Request for a Retention (Medlands' Financial Position)	**23**
Medlands' Request for a Retention (The Trust Structure, Assets and Liquidity)	**23**
Medlands' Request for a Retention (BCT Limited's Domicile)	**24**
The Relevant Law	**26**
The Legal Position on a Trustee's Right of Indemnity	**26**
Whether a Trustee's Right of Indemnity includes a Right of Retention of Trust Funds	**28**
The Law on the Court's Supervisory Role and *Public Trustee v Cooper* Applications	**35**
The Court's Statutory Powers under Section 47 of the Trustee Act 1975	**37**
Analysis and Findings	**39**
Analysis and Findings on BCT Limited's Powers to grant Indemnities to Medlands	**39**
Analysis and Findings (Is BCT Limited surrendering its discretionary power to the Court?)	**41**
Analysis and Findings (Is it suitable for BCT Limited to surrender its discretion?)	**42**
Analysis and Findings on the Exercisable Jurisdiction of this Court	**44**
Analysis and Findings on the Indemnities for Actual and Contingent Liabilities	**45**
Court's Approval of Indemnity for Medlands' liability to other Former Trustees	**46**
Court's Opinion of Indemnity for Medlands' liability to Mr. Gilbert and Conyers	**46**
Court's Approval of Indemnity for Medlands' liability to Zobec	**54**
Scope of Court's Approval of Indemnity for Medlands' Costs to remain 'Alive'	**54**
Analysis and Findings on the Question of a Retention	**55**
Conclusion	**57**

RULING of Shade Subair Williams J

Introduction

1. The present applications sample a cluster of Court proceedings which swarm over a charitable trust holding assets worth billions of dollars. The history and factual background to these proceedings is well known to the Courts and to the parties. (See *St John's Trust Company (PVT) Ltd v Watlington and Ors* [2020] Bda LR 25, per Hargun CJ; *Medlands (PTC) Ltd and Ors v Commissioner of the Bermuda Police Service* [2020] Bda LR 26, per Harjun CJ; *Re the B Trust, Medlands (PTC) Ltd v Attorney General et al* [2020] Bda LR 42, per Subair Williams J).

2. Suffice to say, if the tale of the Brockman Trust proceedings was theatrically narrated in English monarchical terms, the 376 proceedings could be featured in the era of the 9th century King "Alfred the Great" of both Wessex and Mercia while the 476 proceedings might sooner be cast in the later scenes spotlighting the 1066 reign of the Duke of Normandy, William the Conqueror. To put it in more colloquial terms, the 376 proceedings have aged out while the 476 proceedings shows the promise of a new era.

3. The 376 proceedings originated in the Trust Administration and *Beddoe* jurisdiction of the Court in respect of a trust established in 1981 as an irrevocable discretionary settlement under Bermuda law ("the B Trust"/ "the Brockman Trust" / "the Trust"). (The anonymity and confidentiality orders previously made by this Court in the 376 proceedings are no longer capable of effectively shielding the identity of the Trust as the Brockman Trust nor the names of the settlor or the human beneficiaries.)

4. The present applications are made in the 476 proceedings which invoke the Court's supervisory and equitable jurisdiction. These applications arise out of an appeal from the 376 proceedings (Civil Appeal No. 8 of 2020) wherein St John's Trust Company (PVT) Limited ("SJTC") sought to impugn my Orders of 1 November 2019 and 19 December 2019 in an attempt to reverse, *inter alia*, my appointment of Medlands as the then new trustee of the Brockman Trust.

That appeal was dismissed and my order removing SJTC as a trustee *de son tort* was left undisturbed.

5. It was also determined by the Court of Appeal that a new trustee, namely BCT Limited, would be appointed to replace Medlands (PTC) Limited ("Medlands"). In a communication made on behalf the Court of Appeal, dated 2 February 2021, the parties were informed:

> "…
>
> *The appeal in relation to Civil Appeal No. 8 of 2020 is dismissed with reasons to follow.*
>
> *The Court is, however, satisfied that a new independent institutional trustee should be appointed and that this Court has power to, and should, make that appointment by this Order.*
>
> *Accordingly, Medlands (PTC) Ltd shall be discharged as trustee of the B Trust and replaced as trustee by BCT Ltd., a subsidiary of Maples FS, with effect from a date and on such terms as to BCT Ltd's appointment as may be directed by Subair Williams J, upon hearing from such of the 1st, 2nd, 3rd, 6th and 9th Respondents[1] and BCT Ltd as wish to appear on such application (but with no other party to this appeal having standing to appear or present evidence or submissions in relation to the matter) at a hearing to be fixed at a time as soon as practicable which is convenient to Subair Williams J.*"

6. Directions to this effect were subsequently formalized by the Court of Appeal in its Order dated 2 February 2021.

7. In a letter dated 25 March 2021, Ms. Katie Tornari of Marshall Diel & Myers on behalf of SJTC wrote to the Court inviting this Court to adjourn the hearing of the application giving effect to the transfer of trusteeship. It is suggested by that letter that this hearing ought not to proceed before the Court of Appeal's production of a formal Order and its determination of an intended application for a stay of its order. Notwithstanding, I saw fit to proceed as any Order

"[1] *R1=Medlands, R2=the AG as protector of charity, R3=Robert Brockman, R6=Martin Lang, the Protector of the Trust by the order of 19/12/19 and R9=Mrs. Dorothy Brockman, the appointed representative of the "human" beneficiaries of the Trust.*"

of a stay from the Court of Appeal would likely extend to these ancillary directions in any event. For that reason I proceeded to hear the applications made on the Plaintiff's Originating Summons filed for orders granting relief in the following terms:

"*1. The Plaintiff be appointed pursuant to Order 15, rule 13 of the Rules of the Supreme Court 1985 to represent the interest in these proceedings of:*

(a) Thomas David Brockman;
(b) Victoria Brockman;
(c) Robert Theron Brockman;
(d) Robert Theron Brockman II and his minor son;

2. *The First Defendant, Medlands (PTC) Limited (Medlands) be discharged as the trustee of the trust settled by A Eugene Brockman Trust on 26 May 1981 for the benefit of his children and charities (the Trust);*

3. *BCT Limited a controlled subsidiary of Maples FS Limited, which is a licensed trust company in the Cayman Islands subject to the regulation of the Cayman Islands Monetary Authority (CIMA) and authorized by CIMA to act as a trustee to be appointed pursuant to section 31 of the Trustee Act 1975 and pursuant to the inherent jurisdiction of the Court as trustee of the Trust in substitution for and in replacement of Medlands;*

4. *All the property and assets of the Trust be vested in BCT Limited pursuant to Part IV of the Trustee Act 1975 and pursuant to the Court's inherent jurisdiction;*

5. *The Plaintiff be indemnified out of the assets out of the Trust in respect of these proceedings and in respect of any liability to pay any other person's costs of these proceedings;*

6. *The costs of and occasioned by these proceedings be paid on an indemnity basis out of the assets of the Trust, to be taxed if not agreed;*

7. *Such other or further directions be given in respect of the subject matter of these proceedings as the Court considers appropriate*."

8. Broadly speaking, the appointment of BCT Limited is unopposed by Medlands. However, paragraph 2 of the Originating Summons raises issues as to the appropriate indemnities to be granted to Medlands as the outgoing Trustee. The scope of Medlands' entitlement to indemnities together with its request for a retention of trust funds to meet its actual and contingent liabilities is the gravamen of the disputed issues before me.

9. The appointment of BCT Limited was supported by the Protector of the Trust, Mr. Lang. He adopted a neutral position in relation to the balance of issues raised by the Originating Summons and asked this Court to take note of his professional relationship and friendship with Mr. Stainrod, one of Medlands' two directors. (The particulars of Mr. Lang's relationship with Mr. Stainrod as co-directors and shareholders of Marbury Fund Services (Cayman) Limited and of how Mr. Stainrod came to invite Mr. Lang to serve as Protector of the Brockman Trust is set out in Mr Lang's affidavit evidence before this Court.) Notwithstanding, Mr. Lang proposed through his Counsel, Mr. John Machell QC, that the Court (if minded to grant any of the requested indemnities) authorise BCT Limited to either amend the Trust Indenture accordingly or to enter into a freestanding Deed of Indemnity.

10. With a similar tone of neutrality, BCT Limited confirmed its willingness to abide by any directions which might be ordered by this Court. However, where any such directions involved the granting of indemnities in favour of Medlands, BCT Limited suggested that the Court issue those directions in a Schedule to the Order of the Court rather than direct or authorise BCT Limited to enter into a deed or other formal agreement.

11. The Attorney General, through her Crown Counsel, remained altogether neutral and did not partake in the making of any substantive oral or written submissions to the Court. Notwithstanding, the Court was aided by Ms. Lauren Sadler-Best who explained that the interest of the Attorney General was peripheral and more focused on ensuring that the Trust will be administered by a company which has submitted to the jurisdiction of Bermuda and which will be regulated by the Bermuda Monetary Authority.

12. The Originating Summons was supported by affidavit evidence from Ms. Dorothy Brockman. That evidence was sworn on 30 December 2020, prior to the Court of Appeal hearing. Mrs Brockman also filed supporting evidence from her US Counsel, Ms. Miriam Fisher who is a partner at a global law firm, Latham & Watkins, LLP. Evidence was also filed by Ms. Kiernan Bell for Medlands and by Mr. Martin Lang, the protector of the trust. BCT Limited, which was joined to these proceedings by a Consent Order, relied on the evidence of its correspondence with Medlands, as exhibited to the evidence of Ms. Bell.

13. Having heard oral submissions together with the written submissions of Counsel for the Plaintiff, the Protector, Medlands and BCT Limited, I granted the Plaintiff's application for a representation order and I confirmed the change of trusteeship. This was subsequently formalized by a written Order of this Court dated 26 March 2021. However, I reserved my ruling on the disputed issues relating to the indemnities to be granted to Medlands to cover its liabilities as the outgoing trustee. This ruling contains the decision of the Court in respect of those indemnities together with my reasons for granting the Plaintiff's application for appointment in a representative capacity.

<u>The Plaintiff's Application for Appointment to Represent the Human Beneficiaries</u>

14. While the Trust has named discretionary beneficiaries, its distributions to date have been exclusively for charitable purposes. Against that background, Mrs Brockman applied for leave of this Court for her to partake in these proceedings in representation of the human discretionary beneficiaries. Mrs Brockman's application is made pursuant to RSC O.15/13 which provides:

"*15/13 Representation of interested persons who cannot be ascertained*

13 *(1) In any proceedings concerning—*

(a) the estate of a deceased person, or

(b) property subject to a trust, or

(c) the construction of a written instrument, including an Act or any other enactment,

the Court, if satisfied that it is expedient so to do, and that one or more of the conditions specified in paragraph (2) are satisfied, may appoint one or more persons to represent any person (including an unborn person) or class who is or may be interested (whether presently or for any future, contingent or unascertained interest) in or affected by the proceedings.

(2) *The conditions of exercise of power conferred by paragraph (1) are as follows:—*

- *(a)* *that the person, the class or some member of the class, cannot be ascertained or cannot readily be ascertained;*

- *(b)* *that the person, the class or some member of the class, though ascertained, cannot be found;*

- *(c)* *that, though the person or the class and the members thereof can be ascertained and found, it appears to the Court expedient (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to exercise the power for the purpose of saving expense.*

(3) Where in any proceedings to which paragraph (1) applies, the Court exercises the power conferred by that paragraph, a judgment or order of the Court given or made when the person or persons appointed in exercise of that power are before the Court shall be binding on the person or class represented by the person or persons so appointed.

(4) Where, in any such proceedings, a compromise is proposed and some of the persons who are interested in, or who may be affected by, the compromise are not parties to the proceedings (including unborn or unascertained persons) but—

- *(a)* *there is some other person in the same interest before the Court who assents to the compromise or on whose behalf the Court sanctions the compromise, or*

(b) *the absent persons are represented by a person appointed under paragraph (1) who so assents,*

the Court, if satisfied that the compromise will be for the benefit of the absent persons and that it is expedient to exercise this power, may approve the compromise and order that it shall be binding on the absent persons, and they shall be bound accordingly except where the order has been obtained by fraud or non-disclosure or material facts."

15. In Mrs Brockman's affidavit [17-24] she deposed:

"…

17. The beneficiaries of the Trust are designated in Article V A of the Trust Deed as being "Robert Theron Brockman, Dorothy Kay Brockman, Thomas David Brockman, Victoria Brockman, and any organization qualifying as a charitable organization under the laws of Bermuda, the United States, or Great Britain".

18. The other human beneficiaries of the Trust are my husband, Robert Theron Brockman (Bob), my brother-in-law, Thomas David Brockman and his wife, Victoria Brockman.

19. My son, Robert T. Brockman II, and his infant son (my grandson) are contingent beneficiaries of the Trust by virtue of clause VI D of the Trust Deed.

20. I have consulted all of the human discretionary and contingent beneficiaries about these proceedings. Their respective positions are set out below.

21. Sadly, Bob is in poor health. In view of this, he has written to me stating his reliance on me to represent his interests in this application. His letter to me dated 20 December 2020 appears at DKB-1 page 31.

22. Thomas and Victoria Brockman do not want to become involved in the proceedings and have told me that they do not consider themselves to have any relationship with the Trust,

whatever their legal position may be, and so take no application on this application. Their letter to me dated 22 December 2020 appears at DKB-1 page 30.

23. My son, Robert T. Brockman II, has asked that I represent his interests and those of my grandson. A copy of this letter to me appears at DKB-1 page 32.

24. On that basis and in order that all the respective interests are represented before the Court, I would ask that the Court make an order pursuant to RSC Order 15 rule 13 that I be appointed as a representative Plaintiff in these proceedings of the human discretionary and contingent beneficiaries."

16. No contention arose on the Plaintiff's application which I granted at the 26 March 2021, having considered RSC O. 15/13 and the supporting evidence.

Medlands' Request for Indemnities

17. Medlands was incorporated in Bermuda on 15 July 2019 as a private trust company, its sole function being to act as the trustee of the Trust. With Ms. Kiernan Bell and Mr. Daren Stainrod as its only directors, it is said that Medlands has limited assets of its own and is limited by guarantee. It is stated in Ms. Bell's affidavit evidence [11] that Medlands received some dividends from the shares it held (on behalf of the Trust) in the Bank of N.T. Butterfield & Sons Ltd (NYSE: NTB) and further liquidity in selling those same shares. Ms. Bell deposed that Medlands has its own limited cash balance and keeps its own funds separate from the funds of the Trust.

18. Mrs Brockman stated in her evidence that the Trust holds approximately US$2,500,000.00 (2.5 million) in liquid assets held in accounts with Bank of NT Butterfield ("BNTB"). She seemed to accept in her evidence that this sum is insufficient to satisfy the Trust's expenses, even in the short term. Mrs Brockman said that it is her understanding that BNTB recently gave the Trust 90 days' notice of its intention to close these accounts. Providing a more recent position, Ms. Bell said that Medlands, as trustee of the Trust, has a cash balance of approximately $1,000,000.00 (1 million). This sum is partly comprised of retainers held with professional

advisers to cover the costs of the ongoing litigation and the administration of the trust up to the date of the transition. Giving a further factual but non-contentious update, Mr. Ham QC informed the Court that the balance was now (at the time of the hearing) in the region of $490,000.00. Referring to Medlands' actual liability, Mr. Ham QC informed the Court that the shortfall sum needed by Medlands by the end of April 2021 to cover the operational and administrative costs of the Trust would come to the approximate sum of $680,000.07.

Medlands' Request for Indemnities (The Indemnity Agreements entered by Medlands)

19. The indemnities sought by Medlands are partly non-contentious. The controversy arises on Medlands' pursuit of indemnities which extend beyond its standard liabilities to its own directors and officers in carrying out Medlands' role as the trustee. Thus no real issue is made out of the terms under clause 43.1 of Medlands' 5 June 2020 Amended & Restated Bye-Laws. Likewise, none of the objections made to the requested indemnities focused on the Indemnity Agreements made between Medlands and its current directors, Mr. Bell and Mr. Stainrod. However, the breadth of the 5 June 2020 Deed of Indemnification made between Medlands and Mr. James Gilbert ("the Gilbert Indemnities") did raise the eyebrows of the beneficiaries. (Further below I expound on the scope of the Gilbert Indemnities.)

20. Additionally, a real source of discord between the parties is Medlands' Indemnity Agreement with Conyers Dill & Pearman Limited ("CDP" or "Conyers") of 2 July 2020 ("the Conyers Indemnity"). Under the Conyers Indemnity, Medlands, in both its personal capacity and in its capacity as trustee of the Brockman Trust, agreed to indemnify Conyers against any liability arising out of what I shall later refer to as the 447 proceedings, in consideration for CDP's legal representation as special legal counsel to Medlands in both its personal capacity and in its capacity as trustee. The meaning of 'liability' in this regard is defined in the Conyers Indemnity as follows:

"*For the purposes of this Deed, a Liability means:*

(a) any and all actions, causes of actions, claims or demands, including costs and expenses, arising for the account of the Indemnified Party as a consequence of the Order of the Bermuda Supreme Court dated 26 March 2020 in the proceedings before

the Bermuda Supreme Court with Record No. 2019:447 (the "Proceedings" and the "Order"), and including but not limited to any claims, demands, costs or expenses arising to the account of the Indemnified Party as a matter of strict liability, now or hereafter brought against the Indemnified Party by way of legal proceedings or for contribution or indemnity by any person or corporation; or

(b) *any and all actions, causes of actions, claims or demands, including costs and expenses, arising for the account of the Indemnified Party as a consequence of or in preparation for any action or anticipated action by St. John's Trust Company (PTC) Limited against the Indemnified Party from or arising from the Indemnified Party's previous representation of St. John's Trust Company (PTC) Limited, including but not limited to injunctions or threatened injunctions against the Indemnified Party to prevent the Indemnified Party from representing the Indemnifier*."

Medlands' Request for Indemnities (Various Court Proceedings involving the Trust)

21. In her affidavit evidence, Ms. Kiernan Bell lists various costs factors as a relevant consideration for the transition of trusteeship. Specifically, referring to litigation involving the Trust, Ms. Bell identified the following proceedings:

(i) St. John's Trust Company (PVT) Limited and Spanish Steps Holdings Limited v Evatt Tamine and Tangarra Consultants Limited Case No. 390 of 2018 ("the 390 proceedings"). The relief sought in these proceedings is for the delivery of trust documents and for the recovery of several millions of dollars of trust monies said to have been transferred from the Trust fund to Tangarra Consultants, which is said to be a corporate vehicle controlled by Mr. Tamine. These proceedings have undergone a period of inactivity and remain at the pleadings stage.

(ii) St. John's Trust Company (PVT) Limited v James Watlington and Glenn Ferguson Case No. 447 of 2019 ("the 447 proceedings") (See *St John's Trust Company (PVT) Ltd v Watlington and Ors* [2020] Bda LR 25 where Hargun CJ struck out the application

for injunctive relief to restrain Messrs. Watlington and Ferguson from acting in their roles as directors of SJTC);

(iii) Mr. Tamine's criminal complaint in Geneva Switzerland against Medlands, its US Counsel and related persons in their personal capacities. (Mr. Tamine's appeal to the Court of Justice against the decision of the Public Prosecutor's Office not to proceed with his complaint was dismissed on 2 March 2021);

(iv) The Judicial Review Application brought by Medlands as the trustee of the Trust, Spanish Steps Holding Limited and Point Investments Limited against the Commissioner of Police in relation to the Applicants' challenge of a third protocol in respect of trust documents seized by the Bermuda Police Service for provision to the US Department of Justice ("the DOJ") in compliance with a request for Mutual Legal Assistance. (See *Medlands (PTC) Ltd et al v Commissioner of the Bermuda Police Service* [2020] Bda LR 26);

(v) Discontinued proceedings in which James Gilbert as the sole director of Medlands and Point Investments Limited filed a petition to wind up Point Investments Limited as a means of obtaining $3,000,000,000.00 (3 billion) worth of trust assets.

22. Ms. Bell stated in her evidence [34.8.1-38.8.3]:

> "*34.8.1 it is unlikely that its involvement in litigation will come to an end immediately on its replacement as trustee;*
>
> *34.8.2 even if its involvement in all litigation does come to an end, it is likely that it will be obliged to incur some costs in bringing the litigation to an end; and*
>
> *34.8.3 Medlands is likely to be asked to provide some support to BCT, at least in the short term, to assist it in understanding and managing the litigation involving it as trustee*."

Medlands' Request for Indemnities (Proposed Scope of Indemnities to be granted)

23. In addition to the indemnities to cover Medlands' liability to its current directors and its liability under the Conyers Indemnity, Medlands invites this Court to sanction the following indemnities out the trust fund:

Medlands' liability for the Gilbert Indemnities

(1) An indemnification of Medlands' liability to Mr. Gilbert for the reasonable costs and expenses associated with the negotiation and preparation of the Deed creating the Gilbert Indemnities.

(2) An indemnification of Medlands' liability to Mr. Gilbert in respect of the 447 proceedings. This would include coverage of any costs related to his prosecution of any appeal in the proceedings or from the orders for consequential relief. Further, the requested indemnity would cover not only Mr. Gilbert's litigation costs but also the expense of any adverse costs made against him in favour of other parties.

(3) An indemnification of Medlands' liability to Mr. Gilbert in respect of proceedings brought in the Cayman Islands against Mr. Gilbert by Messrs. Watlington and Ferguson.

(4) An indemnification of Medlands' liability to Mr. Gilbert for his communications and examination of information and documents regarding an investment fund called Point Investments Ltd ("PIL"), the common shares of which are wholly owned by the Trust.

(5) An indemnification of Medlands' liability to Mr. Gilbert for the reasonable costs and expenses associated with terminating his directorship in Medlands.

Legal Fees

(6) An indemnification of Medlands' liability for the legal fees in relation to its continued liaising with the DOJ in relation to the assets of the Trust.

(7) An indemnification of Medlands' liability for the legal fees of the work involved to transition the trusteeship from Medlands to BCT Limited.

(8) An indemnification of Medlands' liability for the legal fees related to continued work on the ongoing legal proceedings during the transition period.

Administration Costs

(9) An indemnification of Medlands' liability for the costs of the continued administrative services provided to it by the Zobec Group ("Zobec").

Court-directed Indemnities associated with Medlands' Liability to Former Trustees

(10) An indemnification of Medlands' liability in respect of its liability to indemnify its predecessor trustees. (In my 19 December 2019 Order made in the 376 proceedings wherein I appointed Medlands under section 31 of the Trustee Act 1975 as the new trustee, I directed Medlands to grant indemnities to SJTC as the outgoing trustee *de son tort*, in addition to former trustee HSBC Private Bank (Cayman Islands) Limited ("HSBC") and the other former trustees *de son tort*, namely Grosvenor Trust Company Limited, Northern Trust Fiduciary Services (Guernsey) Limited and CIL Trust International Corporation. I directed [19] Medlands to grant: "… *an indemnity for all actions and omissions that they would have been entitled to as trustees of the B Trust*". I granted liberty to HSBC to apply to the Court to claim any contractual entitlement it might have, citing *Meritus Trust Company Limited v Butterfield Trust (Bermuda) Limited* [2017] SC (Bda) 82 Civ

Medlands' Request for Indemnities (The Beneficiaries' Objections)

24. The position argued by Counsel for the Plaintiff on behalf of the beneficiaries is that Medlands cannot lawfully receive indemnities which exceed the scope of what is permitted under the Trust Indenture, which itself reflects the general law. On that footing, the beneficiaries are opposed to the granting of indemnities to Medlands in respect of its liabilities to Conyers and to Mr. Gilbert in relation to the 447 proceedings.

25. Medlands came under scathing criticism by the Plaintiff for the making of these demands. Mr. Tregear QC argued that Medlands is merely looking to 'gold-plate' its retirement package. In the written submissions for the Plaintiff, Counsel submitted [53]:

"*53. While it is recognized that Medlands accepts that the qualification that the indemnities in favour of its directors and Conyers must be shown to be valid and effective and enforceable obligations, it still wishes to burden the trust estate and the beneficiaries with the heavy cost of obligations it decided (without consultation with the beneficiaries) to undertake to its directors and lawyers. In the case of Mr. Gilbert and Conyers, those obligations were undertaken when Medlands knew that the 447 Proceedings had failed spectacularly and could predict that they would result in personal costs liabilities for Mr. Gilbert and Conyers who had advised that the 447 Proceedings should be pursued. The Trust and its beneficiaries became insurers of the trustee's directors and lawyers. It is hard to resist the inference that in providing such generous and extensive indemnities out of the trust fund, advantage was taken of the fact that the trust had assets that were so significant in value that the cost of these voluntary indemnities might go unnoticed."*

Medlands' Request for a Retention of Trust Assets

26. A real spire of dissension has grown out of Medlands' push for a retention of a lump sum out of the trust fund. Pointing to a 22 January 2021 letter from Medlands' London Solicitors, Macfarlanes LLP ("Macfarlanes"), Mr. Tregear QC highlighted Medlands' bid to retain a cash sum of $950,000.00. In that letter Macfarlanes sets out its basis for the requested retention as follows [3]:

"*3 Retention*

3.1 We recognise that seeking a cash retention is relatively unusual on transfer of trusteeship. However, the B Trust is far from a normal trust and the relevant context includes (i) attempts by Mr. Tamine and St John's to regain trusteeship of the trust seemingly without thought for the beneficiaries or the costs of doing so; (ii) continued DoJ scrutiny of current and proposed future trustees, and the positions taken by them in relation to the assets of the Trust and the administration of the

Trust; and (iii) the fact that when transfer of conduct of the litigation with which the Trust is involved occurs, there are likely to be numerous transitional issues and information requests/transfers which will need to be dealt with.

3.2 *We do not propose that Medlands retain sums against all potential contingent liabilities. Instead, we propose a more proportionate approach in which the sums retained reflect (i) the costs which may need to be incurred to deal with urgent issues and liabilities properly incurred; and (ii) any costs which may be incurred to enforce Medlands' rights should a dispute arise in the event further funds are required.*

3.3 *On that basis, based on the information available to us at present, we propose a retention of a cash sum of USD 950,000 by way of security for any amounts that it is or may become entitled to recover under its right of indemnity (including any costs properly incurred to enforce its rights or to protect its position as a former trustee of the Trust, and any sums incurred for the benefit of the beneficiaries of the Trust), for a period not exceeding six years from the date of the appointment of the successor trustee (and we are open to portions of the retention being released much earlier than this where appropriate).*

3.4 *This sum is intended to cover, in particular, liabilities arising in relation to the following:*

3.4.1 *immediately foreseeable work, being:*

3.4.1.1 *continued liaising with the DoJ to protect Trust assets and instruction of Cravath to represent Medlands' views to the DOJ in relation to the same;*

3.4.1.2 *work involved with the handover to the incoming trustee, the liabilities in respect of which we expect will consist of legal*

and other professional fees invoiced after Medlands' retirement; and

3.4.1.3 continued work in relation to ongoing proceedings whilst conduct of them is transferred, to the extent required; and

3.4.2 a contingency in the event that further issues arise, particularly in connection with Mr. Tamine and his continued attacks on the Trust and those connected with the Trust. In light of Medlands' experience in its time as trustee, we have had to advise it that further legal proceedings are possible or even likely, and it is of course crucial that Medlands be in a position to take urgent legal advice when needed (which is for the benefit of the Trust since any liabilities which Medlands incurs are more likely than not ultimately to be recoverable from the Trust fund).

3.5 This sum of USD 950,000 has been arrived at on the basis of the following estimates:

3.5.1 USD 275,000 in respect of Cravath's fees for ongoing work required in relation to the DoJ and the indictment insofar as it relates to or involves Medlands as former trustee of the Trust;

3.5.2 USD 200,000 as a contingency for any litigation arising in relation to the terms of the Trustee's equitable or contractual indemnities;

3.5.3 USD 275,000 for any work in relation to ongoing proceedings, handover of matters and information concerning the Trust and any matters which Medlands is otherwise entitled to reimbursement from the Trust fund as former trustee. In connection with this, Medlands would be happy to agree to provisions setting out expectations as to what information should be provided or actions taken, when, and how quickly; and

> 3.5.4 *USD 200,000 as a contingency for future litigation which may be brought against Medlands by third parties.*
>
> …"

27. Mr. Tregear QC remarked that the pleaded sum of $950,000.00 was 'plucked from the air' and invited me to contrast this request against the subsequent reduced figure of $500,000.00 pursued by Medlands in Macfarlane's 11 February email correspondence sent only some four weeks after the original 22 January proposal. In the 11 February email, Mr. Jonathan Arr of Macfarlanes stated, in its material parts:

   "*…Further to our letter dated 22 January, the CA's decision and my email last week, I attach our proposed deed of indemnity/release (which also incorporates provisions in relation to the proposed retention).*

   To aid your review, we have modelled this on the STEP standard precedent indemnities where possible, but inevitably given the nature of the trust and the present situation, much of the drafting is bespoke. Our approach to the indemnity and releases is informed by the fact that Medlands is a PTC with negligible assets of its own and its directors are private individuals. By having relatively broad releases and indemnities in this form, the intention is to provide a clean break and to allow BCT to have the freedom to take whatever stance it wishes in relation to historic matters.

   Given the relatively broad releases and indemnities, it seems to us appropriate that the proposed retention which we envisaged in our letter of 22 January be a reduced figure of $500,000 (diminishing over time), in respect of the risks referred to in that letter…"

28. Following the above 11 February correspondence, Medlands proposed an alternative reduction to the tune of $600,000.00. This reflects Medlands' current position. These varying figures, Mr. Tregear QC argued, wildly fluctuate because they are based on numbers that are speculative flowing from an entirely unnecessary work-stream. In the Plaintiff's written submissions Counsel contended [54-56]:

"*54. Further, Medlands has reinstated its demand for a retention. The demand for a retention is without merit and it is difficult to see any useful purpose in persisting in demanding a retention in view of the decision of the Supreme Court in Meritus Trustee v Butterfield…in which Kawaley CJ held that an outgoing trustee had no right to retain trust assets as security for indemnity rights under a trust. There is no good reason in the circumstances of this case for the position to be any different pursuant to the general supervisory jurisdiction.*

55. An attempt is made in §43.1 of Ms Bell's affidavit to justify the retention on the basis that BCT is incorporated in the Cayman Islands and is outside the jurisdiction of the Bermuda court. However, that overlooks the express undertaking given by MaplesFS that BCT would be subject to the jurisdiction of the Bermuda court. No or no significant additional costs can be attributed to this factor.

56. As to the amount of the retention, it will be submitted that is pitched an entirely unrealistic level. It is assumed by Medlands that it will be required to carry out substantial further work. Mrs Brockman's advisers have seen a letter from BCT's attorneys to Medlands' attorneys dated 17 March 2021 and Mrs Brockman would adopt the points made in that letter resisting the demand for a retention of US$600,000."

29. Addressing Medlands' view that it will have a continued duty, as a former trustee, to provide ongoing assistance to the DOJ, Mr. Tregear QC countered that the assistance to the DOJ would be more appropriately undertaken by BCT Limited as the new Trustee. Mr. Tregear QC pointed out that any consultation needed from Medlands should be channeled through the new Trustee leaving BCT Limited as the DOJ's point of contact. In a sagacious attempt to dismantle that contact chain, Mr. Ham QC retorted that Medlands could not be expected to be comfortable refusing assistance to the DOJ if it insisted on liaising directly with Medlands.

30. Beyond the mathematically based arguments, Medlands advanced three principal grounds for seeking the $600,000.00 retention sum:

(i) Medlands would be forced to wind-up without sufficient funding;

(ii) The Trust itself is illiquid; and

(iii) That BCT Limited is not domiciled in Bermuda which would leave Medlands in unenviable difficulty in having to enforce any judgment against it.

Medlands' Request for a Retention (Medlands' Financial Position)

31. Mr. Tregear QC further queried the basis for any need for Medlands to remain 'alive' as a registered entity. He argued that, as a private trust company, Medlands was incorporated for the sole purpose of carrying out its functions as the trustee for the Brockman Trust. On that basis, he submitted, Medlands should be placed into liquidation now that it is no longer trustee and has no operational purpose other than to facilitate the transition of trusteeship to BCT Limited. Mr. Tregear QC contended that should the need arise for Medlands to carry out any particular act after its winding-up, it can apply to be restored to the Company register. Mr. Ham QC, however, argued that any suggestion that Medlands should be wound up prior to their discharge of their contingent liabilities was unsatisfactory.

Medlands' Request for a Retention (The Trust Structure, Assets and Liquidity)

32. On Ms. Bell's evidence, the assets of the Trust total an estimated value of $6,000,000,000.00 (6 billion). As for the non-liquid assets of the trust, Mrs Brockman deposed that the Trust indirectly owns nearly 100% (96.51% on Ms. Bell's evidence) of the shares in Universal Computer Systems Holding, Inc. ("UCSH") which she estimates in her evidence to be worth approximately US$5,000,000,000.00 (5 billion). Mrs Brockman explained in her evidence that UCSH is a Delaware incorporated holding company of a computer software and professional services company (Reynolds & Reynolds).

33. It is also said that the Trust owns 100% of the common shares of an investment fund called PIL which controls assets to the approximate value of US$1,300,000,000.00 (1.3 billion). However, it is common ground that the bank accounts which hold these assets have been frozen for many months. [See para 26 of Mrs Brockman's affidavit]. Ms. Bell deposed that the Trust was historically funded from cash balances in excess of $1,000,000,000.00 (1 billion) held in various bank accounts in Switzerland. She stated that it was on account of the ongoing litigation, particularly in relation to PIL, that these accounts were frozen.

34. Mrs Brockman deposed that in the event that the Trust is unable to access its liquid investment assets it is nevertheless in a position to depend on UCSH for alternative funding, whether by the declaring of its own dividends or otherwise. Ms. Bell disclosed on her evidence that Medlands' primary source of funding has been UCSH.

35. In Mrs Brockman's affidavit [49] she says that UCSH is committed to providing additional funds to the Trust upon the appointment of BCT Limited as the new Trustee. Mr. Tregear QC directed this Court to Mrs Brockman's exhibit of a Unanimous Written Consent of the Board of Directors of UCSH where the following resolution was made:

"*RESOLVED FURTHER, that upon approval of Maples Group by the applicable court, the Corporation will issue a dividend to its shareholders in an amount necessary to cause the trust account designated by Maples Group to receive Spanish Steps' share of the dividend, on a "net payment" basis, to equal (i) the scheduled legal fees and trustee fees/expenses that will be incurred by Maples Group according to Maples Group's December 1, 2020 projection of 2021 expenses for the A. Eugene Brockman Charitable Trust, in its role as trustee, during the initial six month period following appointment, and (ii) $5,000,000, which the trustee has indicated will be held to fund unscheduled expenses which may arise between scheduled board meetings…*"

<u>Medlands' Request for a Retention (BCT Limited's Domicile)</u>

36. BCT Limited is incorporated and domiciled in the Cayman Islands. However, it has expressly acknowledged through its Counsel, Mr. Robinson, and in evidence before this Court that the Trust is governed by Bermuda law and that it will submit to the jurisdiction of this Court in carrying out its administration of the Trust. In the written submissions of BCT Limited, Mr. Robinson advanced the following hard-hitting points [15]:

"*No party to these proceedings has suggested (and nor could they) that BCT is likely to do anything in the discharge of its duties upon the effective date of its appointment other than discharge those duties in accordance with its obligation pursuant to Bermuda law taking, as appropriate, direction from the Supreme Court of Bermuda*."

37. This submission is evidentially supported by two letters of correspondence from Maples, one dated 21 January 2021 and the second dated 27 January 2021. These letters, both of which are addressed to Bermuda Counsel, Ms. Sarah-Jane Hurrion, are exhibited to the affidavit evidence of Mrs Brockman's US Counsel, Ms. Miriam Fisher. In the first letter, Maples stated, *inter alia*:

"*We can confirm the following in relation to BCT Limited:*

1. *That it is a fully licensed "controlling subsidiary" of MaplesFS Limited, which is BCT Limited's sole shareholder. As such, BCT Limited is regulated by the Cayman Islands Monetary Authority to the same extent as MaplesFS Limited itself and all of our licensed operating subsidiaries in the Cayman Islands;*

2. *The directors of BCT Limited are Peter W. Huber, who is also a director of MaplesFS Limited, and Peter A. Goddard, the head of MaplesFS Limited's Private Client Services Group; and*

3. *Before the Bermuda Court considers our appointments as trustee, BCT Limited will have paid in capital and surplus of US$1 million. In view of the current uncertainty as to the validity of the amendments to Article VII D, which were contained in the Order of the Supreme Court dated 19th December, 2019 in the matter 2018: No. 376, we have decided to comply with the original qualification provisions that included a requirement for a $1 million capital surplus.*

Certified copies of each of the Register of Members and Register of Directors for BCT Limited are attached.

Please also note that, in order to comply with a strict and literal interpretation of the provisions of Article XII, BCT Limited will delegate to its affiliate, Maples Trustee Services (Bermuda) Limited, the administration of the Trust from within Bermuda, although the management of the companies underlying the Trust will be conducted from our Cayman Islands' office."

38. The second letter reinforced BCT Limited's volunteered submission to this jurisdiction in the following statement:

> "***Submission to the Jurisdiction of Bermuda Government***
> *I confirm that, if we are appointed as trustee of the Trust, which is governed by Bermuda-law, BCT will submit to the jurisdiction of the Bermudian courts in relation to its administration of the Trust*."

The Relevant Law

The Legal Position on a Trustee's Right of Indemnity

39. Section 22 and 22A of the Trustee Act 1975 provides:

"***Implied indemnity of trustees***

22 (1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for those of any bank, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own deliberate, reckless or negligent breach of an equitable duty.

(2) A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

Remuneration of trust corporations

22A Subject to—

(a) any contrary intention in the terms of the trust;

(b) or any order of a court,

a trust corporation shall be entitled to reasonable remuneration for its services as trustee, in addition to reimbursement of its expenses under section 22(2)."

40. The applicability of Article 9 of the 26 May 1981 Trust Indenture as the provision governing the general position on indemnities available to a trustee of the Brockman Trust was more or less common ground. Where terms for reimbursement to a Trustee are ungoverned by any particular written agreement between the Trustee and the Trust Protector, Article 9 sets the threshold for expense reimbursements according to a "reasonable expenses" test:

"*Unless otherwise agreed in writing between the Trustee and the Trust Protector, the Trustee shall receive compensation and fees in accordance with its published terms, conditions, and service charges in effect from time to time, which fees shall be paid first from the current income of the Trust and then, as may be necessary, from the corpus of the Trust. The Trustee shall also be reimbursed in the same manner for all reasonable expenses incurred in the management of the Trust*."

41. I was invited by Mr. Tregear QC to consider extracts from Lewin on Trusts (Nineteenth Edition, 2015) ("*Lewin*") outlining the general principles applicable to a trustee's right of indemnity [27-111][2]:

"*The general principle is that a trustee is entitled to indemnity out of the trust fund in respect of costs and expenses properly incurred by him in connection with the performance of his duties and exercise of his powers and discretions as a trustee. The general principle extends to costs incurred in trust proceedings. The general principle is founded on what has been called the "contract" between the trustee and the author of the trust. Although this proposition has been established in the context of costs of trust proceedings, the proposition is of a general character, not a peculiarity of the right of indemnity concerning litigation costs, and the same proposition has been asserted outside the context of costs of trust proceedings. A contractual basis for trustees' rights has not found favour in other contexts. The entitlement of a trustee to costs as a matter of contract does not mean that the trustee has any contractual cause of action against the settlor in respect of costs, but rather that the trustee has a right of indemnity as between himself and his beneficiaries in respect of his proper costs incident to the execution of the trust. That right, we consider, is not dependent upon establishing any contract in the strict sense between the settlor and the trustee, but subsists as a matter of general law and*

[2] Footnotes in para 27-111 and para 17-034 further below are not included in the quotations from *Lewin*.

statute as between the trustee and his beneficiaries, in consequence of the trustee's having been appointed to office under the trust constituted by the settlor. In our view, trustees who have not been appointed by the settlor, and a trustee who is the settlor, have the same rights of indemnity in the context of costs of trust proceedings (as well as other contexts) as trustees appointed by the settlor, even though it is not possible to say, without considerable artificiality, that there is any form of contract between such a trustee and the settlor."

42. As to the continuance of a trustee's right of indemnity after the appointment of new trustees, I found the following commentary in *Lewin* particularly helpful [17-034]:

"*However, we consider that an outgoing trustee does not lose his rights of indemnity altogether by ceasing to hold office and parting with the trust assets. The rights of reimbursement, exoneration and realization are not rights which are dependent upon the exercise of legal control over trust assets in the hands of the trustee. A trustee who incurs some proper expense or liability as trustee is entitled to be reimbursed or exonerated in respect of the expense or liability and to have trust assets realised for the purpose. If he is a sole trustee he can exercise these rights simply by virtue of his legal control over the trust assets held by him. But if he is one of a number of trustees …The ability to exercise legal control over trust assets is thus not critical to the exercise of rights of indemnity. That being so, why should it make any difference that the trustee has given up legal control altogether? The trustee's rights of indemnity go further than simply giving him something like a common law lien which is dependent on the equitable charge over, or equitable interest in, the trust property and there is no reason why this charge or interest should disappear upon the appointment of new trustees*."

Whether a Trustee's Right of Indemnity includes a Right of Retention of Trust Funds

43. The decision of the former Chief Justice, Mr. Ian Kawaley, in ***Meritus Trust Company Limited v Butterfield Trust (Bermuda) Limited*** [2017] SC (Bda) 82 Civ was relied on by all to fortify the underlying opposing stances in relation to the question of a retention of trust funds. Mr. Tregear QC and Mr. Machell QC cited the judgment for establishing that an outgoing trustee had no right to retain trust assets as security for indemnity rights under a trust. This was consistent with Mr. Robinson's submissions. However, Mr. Ham QC relied on the same

decision in *Meritus Trust v Butterfield Trust* to reinforce his submission that the Court is entitled to order a retention fund and that there was no jurisdictional basis for refusing to allow Medlands to retain a fund to meet its future liabilities.

44. Mr. Robinson, on behalf of BCT Limited, highlighted the following passage from Kawaley CJ's judgment in *Meritus Trust v Butterfield Trust* [26-27]:

"*26. The above passages provide very cogent reasoned support for the Meritus position that there is no general right of retention as an incident of a former trustee's indemnity in respect of actual and contingent liabilities which is exercisable against the new trustee. The analysis is highly persuasive because the general law in England and Bermuda and the governing statutory provisions on vesting are essentially the same [Footnote 7]*[3]*. This base position, or starting assumption, may of course be altered through legislation or the express terms of the trust deed. In summary, I extract the following two further propositions from Lewin which were not or not clearly elucidated in Lemery Holdings Pty Ltd. -v- Reliance Financial Services Pty Ltd [2008] NSWSC 1344, in part perhaps because of a different statutory trust law context:*

(1) as regards those trust assets which automatically vest in the new trustee upon appointment (for present purposes all assets including cash except for shares), the right of retention is lost as against the new trustee by operation of law;

(2) as regards those trust assets which do not automatically vest, the former trustee can seek to postpone his statutory obligation to immediately vest them. This could happen either by agreement or with discretionary assistance from this Court, but it would be the only principled basis for obtaining legally valid retention rights against the new trustee.

<u>Summary</u>

27. For the above reasons, I find that Butterfield has no right to retain any trust assets (whether vested or unvested in Meritus) as security for its indemnity rights under the E and M Trusts. For the avoidance of doubt Mr Le Poidevin QC expressly confirmed that Butterfield was not in any way seeking to invoke the discretionary jurisdiction of the Court. That was a sensible

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[3] "*Sections 27(d) and 30 of the Trustee Act 1975 (Bermuda) are substantially based on sections 39(2) and 40 of the Trustee Act 1925 (England and Wales).*"

concession, because there is no material presently before the Court which would support a finding that Butterfield is not adequately protected by its equitable lien in respect of the actual and contingent liabilities of which it is presently aware."

45. By way of background, in *Meritus Trust v Butterfield Trust* the Defendant ("Butterfield") had been removed as Trustee and the Plaintiff ("Meritus") was the newly appointed Trustee. The transition was, in the words of the learned Chief Justice, 'somewhat prickly'. Butterfield took the position that it was entitled to a contractual indemnity and that it also had a right to retain certain trust assets for the purpose of enforcing its contractual indemnity rights in relation to its liability for contingent costs. These costs, which related to the costs of defending threatened litigation against Butterfield for mismanagement of trust assets, were estimated at $5,000,000.00 (5 million). However, Meritus argued that a former trustee's right of indemnity did not include, as a matter of law, a right to retain trust assets.

46. Arguing the case for the new Trustee, Mrs. Elspeth Talbot-Rice QC, submitted that a former trustee's right of indemnity under the Court's equitable jurisdiction constitutes a non-possessory lien. She pointed further to the statutory position under section 27(d) of the Trustee Act 1975 which she contended was consistent the Court's equitable powers. Section 27(d) requires, in obligatory wording, the performance of all steps requisite for vesting the assets of a trust to a new trustee (whether solely or jointly with other trustees) upon the appointment of the new trustee. It provides:

"***Supplemental provisions as to appointment of trustees***
27. On the appointment of a trustee for the whole or any part of trust property—
(a)-(c)….
(d) any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done."

47. Kawaley CJ was referred to the judgment of Wilberforce J (as he then was) in *Re Pauling's Settlement Will Trusts* [1963] 1 ALL ER 858. In that case the Plaintiffs brought an action against the Defendant bank who was the trustee of the settlement in question. The Bank was

alleged to have committed a breach of trust in making a payment of trust capital by way of advancement to beneficiaries at the instigation of one particular beneficiary. At the trial of that action, the judge found the Bank liable to replace nearly £15,000 as having been expended in breach of trust and concluded that two new trustees should be appointed to replace the bank. In doing so, the trial judge referred the matter to a judge in chambers for the appointment of two or more fit and proper persons as trustees pursuant to section 41 of the English Trustee Act 1925.

48. The Plaintiff's section 41 application, which was met by various objections from the bank, came before Wilberforce J. Of particular significance to the reasoning of Wilberforce J was the fact that the bank's appeal against the finding of breach of trust was underway. Notably, the Plaintiffs had also filed a cross-appeal for the reimbursement sum to be increased. Apprehensive about directing the bank to vest the assets of the trust to new trustees pending the appeal, Wilberforce J said [860]:

"*However, there is another point in that connexion* [sic] *which appears to have more substance and that is this. It is inevitable that some security should be held by the bank, as trustees, for their costs. The case was a very complicated one and there was a great deal of evidence to be gone through, and no doubt the appeal will occupy the Court of Appeal for a considerable time. Moreover, the Court of Appeal has authority not only over the costs in the Court of Appeal but also over costs of the action, and it may make an order as it regards those costs different from that which was made at trial. Therefore, there is the possibility of there being a large sum of costs, to which the bank may become entitled, in respect of the defence of their actions as trustees, the destination of which may not be seen until the Court of Appeal has given its decision. Now any trustee is entitled to have security as regards his costs, if those costs are properly incurred, and there is great difficulty in ordering the bank to part with the trust fund in their hands until it can be seen what rights the bank may have against the trust fund in respect of costs. Putting aside the matter in specific terms, it is a possibility that the Court of Appeal may say that the bank are [sic] not under a liability to repay anything and may order that the whole of the costs of the bank in the Court of Appeal and below shall be raised out of the trust fund. If that were so, the security for payment of those costs would be*

£20,000 odd, to which I have already referred as forming the remnant of the trust fund. There is, therefore, considerable objection to making an order by which the possession of that fund would be transferred at this stage out of the bank's possession."

49. Further to the Bank's objection to the appointment of new trustees for as long as the appeal against the trial judge's finding of breach by the Bank remained pending, other objections were made. One of those other objections was made on the basis of the Bank's claim to a right to continue controlling the investment of the trust fund. This particular ground was rejected by Wilberforce J. However, having found merit in another of the Bank's arguments which related to the uncertainty of charges payable for estate duty in addition to the pending status of the costs of the appeal proceedings, Wilberforce J decided against the appointment of new trustees. In the penultimate paragraph of his judgment in *Re Pauling's Settlement Will Trusts* Wilberforce J said:

"*These are the main objections taken by the bank and two of them seem to me to have considerable substance, viz., the question of the costs of the appeal and the question of estate duty. I have considered whether I should get over those difficulties by appointing the two new trustees now and leaving the question of the vesting of the assets to be dealt with at a later stage, after the Court of Appeal has given its decision; but on reflection, that seems to me to involve a formidable difficulty. To appoint new trustees, and at the same time to leave another person not in the position of a trustee in the possession of the trust fund, would be to create a most undesirable situation. Therefore, it seems to me (and I reach this conclusion with considerable regret) that I must leave this matter to be brought up again after the Court of Appeal has given its decision…*"

50. I would note that on appeal, the English Court of Appeal in *Re Pauling's Settlement Will Trusts* [1964] Ch 303 (constituted by Lord Justice Wilmer, Lord Justice Harman and Lord Justice Upjohn) found that the Bank had indeed committed the breach of trust and ordered the Bank to make various replacements from the sums improperly advanced. In the judgment of Wilmer LJ, he said [30] and [42]:

"30. *The Bank was in a delicate position. Their interest as bankers conflicted with their duties as trustees, as they had indeed shown themselves well aware in their letter earlier in the same year. The Bank acted in plain breach of their duty most unreasonably, and no question of relief under section 61 of the Trustee Act 1925 can arise. The appeal is allowed so far as this advance is concerned.*

…

42. The members of the court differ, however, upon the question whether the Bank should be relieved under section 61 of the Trustee Act, and if so to what extent. On this point alone, therefore, separate Judgments will be delivered."

51. In addition to *Re Pauling's Settlement Will Trusts*, Mrs. Talbot-Rice QC also referred Kawaley CJ to the *ex tempore* judgment of Mr. Justice Paul Brereton in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWC 1344. Sitting in the Equity Division of the New South Wales Supreme Court in Australia, Brereton J made the following criticism [31] of Wilberforce J's reasoning in *Re Pauling's Settlement Will Trusts*:

"*With great respect, the suggestion that appointing new trustees and vesting the trust assets in them would deprive the old trustees of security for their indemnity is incorrect. The cases already referred to establish that the security survives and can be enforced against the trust assets in the hands of the new trustees at the suit of the old trustee: see the eighth proposition above (at [21]). Thus, while Re Pauling's Settlement Trusts (No 2) suggests that an outgoing trustee is entitled to insist on retaining the trust fund as against the new trustee as security for its indemnity, it appears to overlook the cases that hold that the security survives and is enforceable against the assets in the hands of the new trustee. However, as to the undesirability of a person not in the position of the trustee being in possession of the trust fund, in this case the appointment of a new trustee has already taken place out of Court, so that that position will pertain if the trust fund is not now vested in the new trustee*."

52. Brereton J's criticism of Wilberforce J's reasoning was not only observed but benevolently scrutinized by Kawaley CJ in the *Meritus Trust v Butterfield Trust* case [15-16]:

"*15. On a careful reading of Re Pauling's Settlement, it does appear that Wilberforce J's decision to postpone approving the appointment of new trustees and the vesting of the trust assets in them until the appeal was determined was based on the assumption that the former trustee's indemnity could, in a practical sense, be 'lost' if the trust assets were passed to the new trustee and that the former trustee was entitled to security for its potentially substantial costs. This was not held to be the strict legal position. It is important to appreciate that:*

(1) the case concerned the scope of a statutory indemnity under section 62 of the Trustee Act 1925; and

(2) Wilberforce J expressly found (at page 861H-I, after citing Fletcher-v Collis [Foot note 2: [1905] 2 Ch 24 at page 35]) that the indemnity extended to a former trustee and that:

"It seems to me that this supports the view that the mere parting with the fund is not sufficient to take away from the trustee the right to claim the income. The plaintiffs…have inserted, in the minute of the order…a provision which expressly preserves the right of the trustee to claim recoupment out of the income…Therefore I do not feel that that objection by itself is sufficient to prevent me from appointing new trustees now";

(3) Wilberforce J was concerned with a case management decision of when to implement an earlier court order directing that new trustees be appointed, in circumstances where there was considerable uncertainty about the extent of a potential liability for estate duty and, by implication, the ability of the new trustee to ascertain what reserve to create for it in the way which ordinarily would be done by a new trustee;

(4) Wilberforce J was accordingly deciding as a matter of judicial discretion whether he should grant security to the outgoing trustee to enable it to exercise its indemnity rights. He was not deciding whether or not a former trustee having been replaced had an equitable right to retain funds as security for its indemnity rights.

16. In my judgment Brereton J was correct to decline to follow Re Pauling's Settlement, even if his reasons for so doing were unsurprisingly (in the context of an ex tempore judgment) based on a failure to fully grasp the finer nuances of the factual and legal context in which Wilberforce J made an essentially case management decision to postpone appointing new trustees. That case is not authority for the proposition that a former trustee has a positive legal entitlement to retain some of the trust fund by way of enforcement of its indemnity rights against a new trustee. However, Brereton J clearly appreciated the fundamental distinction between the discretionary jurisdiction vested in a court making a vesting order to authorise the former trustee to retain security and the strict legal position. He later referred in his judgment (at paragraphs 2 [1905] 2 Ch 24 at page 35 9 37-40) to various Australian cases where the courts on discretionary grounds, in the context of making vesting orders, permitted funds to be reserved by way of security for the former trustee's indemnity rights. He also cited, in contrast, the following authority which spoke directly to the strict legal position..."

The Law on the Court's Supervisory Role and *Public Trustee v Cooper* Applications

53. The Court's supervisory role in enforcing the duties and powers vested in trustees was outlined in a 1995 unreported judgment from Mr. Justice Robert Walker which was subsequently quoted in the English High Court by Mr. Justice Michael Hart in *Public Trustee v Cooper* [2001] W.T.L.R. 901. Mr. Machell QC referred to *Public Trustee v Cooper* in his written submission. In that case, Hart J formulated categories of applications where the Court may be called upon to enforce these powers. The relevant portion of Hart J's judgment is quoted in *Lewin* [27-070] as follows:

"*…[W]hen the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well).*

(1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open Court and only after hearing arguments from both sides…

It is not always easy to distinguish that situation from the second situation that I am coming to…

(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers…In such circumstances…they think it prudent and the court will give them their costs of doing so to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries.

(3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of a conflict of interest. Cases within category (2) and (3) are similar in that they are both domestic proceedings traditionally heard in Chambers in which adversarial argument is not essential although it sometimes occurs…The difference between category (2) and (3) is simply as to whether the court is (under category (2)) approving the exercise of discretion by trustees or (under category (3)) exercising its own discretion.

(4) The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court."

The Court's Statutory Powers under Section 47 of the Trustee Act 1975

54. Mr. Machell QC referred to the Court's discretionary powers under section 47 of the Trust Act 1975, comparing those statutory powers to section 57 of the English Trustee Act 1925. Section 47(1) entitles the Court to authorize transactions relating to trust property where the Court sees fit and considers it expedient to do so. Section 47(1) provides:

"***Power of court to authorize transactions relating to trust property***

47 *(1) Where any transaction affecting or concerning any property vested in trustees is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income*."

55. Subsection (3) entitles trustee(s) and/or beneficially interested persons to make an application under section 47, (i.e. whether it be to approve a transaction or whether it be to vary or discharge a transaction under subsection (2)). Subsection (3) states:

"*(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust*."

56. Subsection (4) offers a broad range of examples which qualify within the meaning of "transaction" for the purpose of subsection (1). Without triggering a polemic, Mr. Tregear QC submitted that the sanctioning of indemnities would qualify under the statutory definition of a transaction.

57. Section 57 of the English Trustee Act 1925 provides:

"***Power of court to authorise dealings with trust property.***

(1)Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2)The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

(3)An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

58. Having drawn the parallels between section 47 and section 57, Mr. Machell QC pointed to the decision of the English High Court of Justice Business and Property Courts before Chief Master Matthew Marsh in *Cotterell OBE et al v The Right Honourable Wentworth Peter Ismay Fourth Viscount Allendale* [2020] EWHC 2234 (Ch). Addressing his mind to the scope of section 57(1), Master Marsh relied on a passage [248] from the English Court of Appeal's judgment in *Re Downshire Settled Estates* [1953] 1 Ch 216, per Lord Evershed MR and Romer LJ. Master Marsh quoted that passage in his judgment [27]:

"*"In our judgment, the object of section 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual "emergency" had arisen or because the position which called for intervention was one which the creator of the trust could not reasonably have foreseen; but it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction." [emphasis added]*".

Analysis and Findings

Analysis and Findings on BCT Limited's Powers to grant Indemnities to Medlands

59. It is observed on the written submissions of Mr. Machell QC that under the existing terms of the Trust Indenture there is no express power to grant an indemnity in favour of an outgoing trustee. However, Mr. Machell QC accepted that it is arguable such a power may be exercisable under Article XI D where a trustee has a specific power of compromise in prosecuting or defending itself in litigation with respect to the Trust:

> "*D. LITIGATION*
> *The Trustee may commence or defend litigation with respect to the Trust, or any property included in the Trust Fund, as it may deem advisable, at the expense of the Trust. The Trustee may litigate, compromise, compound, adjust, submit to arbitration and be bound thereby, release, or otherwise settle or dispose of any claim or demands of the Trust against others, or of others against the Trust, in such manner and upon such terms as deemed proper by the Trustee, and this shall include extending the time for payment or abandoning any claims or demands in favor of or against the Trust Fund or any part thereof.*"

60. Mr. Machell QC also referred to "*'catch all' "broad administrative powers with respect to the Trust Fund…which may be exercised on such terms and in such manner as [the trustee] may deem advisable'*"".

61. It is suggested that I need not determine the scope of a trustee's power under the Trust Indenture because, as pointed out by Mr. Machell QC who described the issue as 'academic', BCT Limited do not propose to exercise any discretionary powers they may inherit as the new trustee in respect of the indemnities proposed by Medlands. Mr. Machell QC suggests that, had BCT proposed to exercise a power, this would have created a 'category two' type *Public Trustee v Cooper* application. However, if this Court is to consider whether it can exercise its discretionary powers under section 47 of the Trustee Act 1975, I must first satisfy myself that these same powers are not already vested in BCT Limited as the new trustee, whether by the Trust Indenture or by any provision of law. In my judgment, however, BCT Limited is

empowered under the Trust Indenture, which is recognized by the principles of equity, to reimburse Medlands as a former trustee for all if its reasonable expenses incurred in its acts as a trustee of the Brockman Trust.

62. It is convenient and indeed an appropriate next step to examine the position taken by BCT Limited in response to the requested indemnities. In a 3 March 2021 letter to Medlands' London solicitors, Macfarlanes, Counsel for BCT Limited wrote, *inter alia*:

"…
With respect to the Deed of Indemnity, it is BCT's position that whether any indemnity should be granted to Medlands and if so, the terms of any such indemnity, are matters for Subair Williams J. having heard the submissions of the parties. While we enclose herewith a mark-up of the Deed of Indemnity this is to assist the parties and should not be taken as an indication that BCT agrees to granting Medlands an indemnity in these terms- that is an issue for the Court. The Deed of Indemnity, as marked up by us (which you will note removes both the release and the retention), is the furthest that we think Medlands could reasonably request of BCT.
…"

63. In a subsequent letter dated 17 March 2021, Counsel for BCT Limited followed up as follows:

"…
The central thesis of Bell 1 is that your client both wants and claims to need indemnities for liabilities potentially going beyond those to which it is entitled by law and the security of a very substantial retention of Trust assets out of which to discharge those indemnities. We made clear in our letter of 3 March 2021 that the draft Deed of Indemnity enclosed with that letter (which did not include any retention) was the furthest that we think Medlands could reasonably request of BCT. Having reviewed Bell 1, that remains the position of our client and the points we raise below are for the assistance of the Court and the parties. It is not clear to us how Bell 1 can say that the proposed indemnity goes "a little" beyond the equitable to which an outgoing trustee is automatically entitled as a matter of law given the retention sought is

clearly at odds with the decision of the Supreme Court in *Meritus Trust Company Limited v. Butterfield Trust (Bermuda) Limited* *[2017] SC (Bda) 82 Civ.*

Before turning to the detail of the Deed of Indemnity, we must note that it appears unfortunate that in paragraph 39 of Bell 1 our client is subject to criticism for "…unhelpfully [not] indicating whether BCT would agree to an indemnity on such terms". As we made clear in our letter of 3 March 2021, the terms of any indemnity that might be granted by BCT to Medlands is not a function of negotiation or agreement between the parties but rather depends upon what the Judge orders in the exercise of the Court's supervisory jurisdiction. Both Bell 1 and the email from Kennedys Chudleigh Limited dated 15 March 2021 appear to suffer from a misapprehension – that BCT would be exercising a power or discretion in granting such an indemnity. BCT's position was (and is) that it will accept its appointment as trustee by the Court subject to whatever terms the Court sees fit to impose.
…"

64. Proceeding on the basis that the application before the Court (although not in the formal sense brought by BCT Limited as the incoming trustee) is akin to a category two *Public Trustee v Cooper* application, I must be clear on the following questions:

    (i) Is BCT Limited surrendering its discretionary power to the Court?
    (ii) If so, is it suitable for it to surrender that discretion?

Analysis and Findings (Is BCT Limited surrendering its discretionary power to the Court?)

65. BCT Limited was unequivocally clear in its letters of correspondence to Macfarlanes that it had formed a view on the extent of the indemnities that can reasonably be granted. So there is no doubt in my mind that BCT Limited is effectively seeking approval of an exercise already decided upon. Notwithstanding, it is equally clear in Counsel for BCT Limited's 17 March 2021 letter that BCT Limited does not intend to exercise its power or discretion to grant the requested indemnities. It has expressly sought to surrender this discretionary power to the Court. This is further evidenced by Mr. Robinson's proposal for the Court to make a decision

on the indemnities and to embody that decision in the Court's Order, rather than in the form of an approval for the new trustee to enter into a freestanding Deed of Indemnity.

Analysis and Findings (Is it suitable for BCT Limited to surrender its discretion?)

66. The suitability of the Court's acceptance of a trustee's surrender of power cannot be properly assessed without examining the exercisable jurisdiction of the Court. Generally speaking, there must be a good reason for the Court to take over the first instance decisions vested in a trustee. In the Court's trust administration jurisdiction, the Court is often called upon to make orders under section 47 of the Trustee Act 1975.

67. An application under section 47 is compatible with a category one *Public Trustee v Cooper* application where the trustee likely opines that its powers are insufficient to exercise the power independently. However, the Court will not make an Order under section 47 when faced with a category two *Public Trustee v Cooper* application where *there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise those powers*. The same is so, in respect of section 57 of the English Trustee Act 1925. The authors of *Lewin* state [45-014][4]:

"*Jurisdiction – power not available*
The court cannot authorise a transaction under section 57 of the Trustee Act 1925 which the trustees have power to carry out either under the trust instrument or by law. Thus, the court cannot authorise a sale which is permitted by section 3 of the Trustee Act 2000, as incident to the investment power given by that section. If it is doubtful whether the trustees have power to do what is proposed, the court can be asked whether they have power to do so, and (if desired) whether the power should be exercised in the manner proposed, and an order can be sought in the alternative authorising them under section 57 to do what is proposed."

68. In considering the general position when it is suitable for the Court to accept a surrender of a trustee's discretion, *Lewin* provides [27-082 and 27-083]:

[4] Footnotes omitted.

"*Application surrendering discretion – when suitable*

The court is not obliged to accept a surrender of the trustees' discretion. It will not, for example, accept a surrender of a discretion to be exercised from time to time in changing circumstances, such as a discretion to distribute income under a discretionary trust. The trustees have accepted office under the terms of the particular trust instrument and are not entitled to hand over the trusteeship to the court. Otherwise no principles have been laid down to determine when the court will and when it will not accept a surrender but there must be a "good reason" for the surrender [footnote 263: *Public Trustee v Cooper…*] *Good reasons include*[5]*:*

(1) Cases in which there is deadlock between the trustees, of a kind which cannot be resolved by removing one trustee rather than another;

(2) Cases in which the trustees are disabled from acting by a conflict of interest… and like cases; and

(3) Cases in which the trustees are faced with a proposed compromise of litigation against a third party where the beneficiaries take strong and opposed views as to the merits of accepting it and perhaps even where they do not.

Where trustees are faced with a proposed compromise, however, they may instead seek the court's approval for their own decision to accept it or reject it or may do so without applying to court at all. Likewise it, it is not every conflict of interest which requires the trustees to surrender their discretion: except in those cases in which there is an absolute rule vitiating a transaction with the trust property, such as cases within the self-dealing rule, they may instead seek the court's approval for their own decision or else act without applying to court, though if they do the latter they bear the burden of establishing that the transaction was fair and reasonable [footnote 272: *Public Trustee v Cooper*… …].

Application surrendering discretion – role of court

[5] Save footnote 272, footnotes are not quoted for the remainder of the extract.

Where the trustees surrender their discretion to the court, it acts in their place by giving directions. In doing so, the court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. The court has, however, no greater powers than the trustees have either ender the trust instrument or under the general law."

69. I accept that this Court previously directed Medlands in the 376 proceedings to grant indemnities to the outgoing and former trustees. Be that as it may, it is doubtful that I would have enforced the Court's view of the appropriate indemnities to grant had I addressed my mind to the principles outlined further above. Turning to the present application, I see no good reason to justify usurping the trustee's power of discretion in this regard. I, therefore, find myself bound to decline any invitation for this Court to accept BCT Limited's power of discretion to grant indemnities or to decide the issue of a retention of trust funds.

70. However, I do think it appropriate to instead outline the extent of this Court's approval and blessing. In the end, the scope of indemnities will be determined by BCT Limited as a first instance decision of the new trustee. By restraining the Court's interference in this way, it will become necessary for BCT Limited to take its own administrative steps, independent of any Order of this Court, if it grants Medlands any indemnities, whether approved or not by this Court.

<u>Analysis and Findings on the Exercisable Jurisdiction of this Court</u>

71. This brings me to a more critical stage of my analysis which is the role of the Court when exercising its supervisory and equitable jurisdiction in granting approvals. Mr. Ham QC, citing *Cf. Turner v Hancock* (1882) 20 Ch D 303, 305 per Sir George Jessel MR, stated in his written submissions [9] "…*While the main guide to the exercise of the jurisdiction is the welfare of the beneficiaries, proper execution of the trusts must also cover the rights of trustees to recover the costs and expenses incurred by trustees*." During his oral submissions, Mr. Ham QC suggested that this case was one in which the Court should lean in favour of the trustee, meaning Medlands, over the beneficiaries.

72. Placing emphasis on the importance of prioritizing beneficiaries when the Court is sitting in its general supervisory jurisdiction, Mr. Tregear QC flagged an early judgment of the Privy Council in *Letterstedt (now Vicomtesse Montmort) v Broers and Another* [1884] UKPC 1 where Lord Blackburn said [387]:

"*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 greater nicety. But they proceed to look carefully into the circumstances of the case…*"

73. While *Letterstedt v Broers*, on its facts, differs from the present case to the extent that the Privy Council was concerned with the sufficiency of the Court's supervisory powers to remove a trustee, Lord Blackburn in delivering the judgment of their Lordships appears to have endorsed the Court's focus on the welfare of beneficiaries as a general touchstone of the Court's supervisory jurisdiction. Whether or not this Court is bound by that observation, I accept as a general legal principle that this Court's supervisory and administrative jurisdiction is purposed for the preservation trust assets for the ultimate distribution to the beneficially entitled parties. That balancing exercise does not, however, disentitle an outgoing trustee from being reimbursed from the trust fund for all of its reasonable expenses incurred in its acts as a trustee.

74. Mr. Ham QC submitted that the inherent jurisdiction of the Court is a wide one. While that is true, the category of cases in which the Court's inherent jurisdiction would permit it to depart from the terms and spirit of the trust instrument is indeed narrow [see Lewin para 45-011] and does not apply to this case.

<u>Analysis and Findings on the Indemnities for Actual and Contingent Liabilities</u>

75. Article 9 of the 26 May 1981 Trust Indenture prescribes a test of "reasonableness" in relation to reimbursing a trustee for its expenses incurred in its capacity as a trustee. This aligns with the position under the general law. As I have declined to accept or exercise BCT Limited's discretionary power to decide on the indemnities to be granted, I will only express the opinion

of the Court as to the appropriate scope of indemnities to be granted to Medlands. This is done on the basis that the sums of money involved in those indemnities render the subject of indemnities in this case sufficiently momentous.

Court's Approval of Indemnity for Medlands' liability to other Former Trustees

76. Medlands' request for it to be indemnified out of the trust fund for its Court-ordered liability to indemnify the former trustees creates no friction between the parties. During Medlands tenure as trustee, it was responsible for the indemnities granted to the former trustees in accordance with my 19 December 2021 Order [19]. Any costs and expense incurred by Medlands in making good those indemnities (subject to my comments and findings below in respect of SJTC and the 447 proceedings) while it was the trustee should, in the opinion of this Court, be paid for out of the trust fund. With the change of trusteeship, Medlands' liability for those indemnities should pass on to the new trustee.

Court's Opinion of Indemnity for Medlands' liability to Mr. Gilbert and Conyers

77. I move on to Medlands' request for it to be indemnified for its liability to Mr. Gilbert for the reasonable costs and expenses associated with the negotiation and preparation of the Deed creating the Gilbert Indemnities. Such a request is reasonable in my view because Medlands was incorporated as a private trust company to administer the Trust. So, I do not think Medlands ought to be personally liable for the costs associated with bringing Mr. Gilbert's directorship in Medlands to an end.

78. I am, however, especially apprehensive about the granting of any indemnity to Medlands in respect of its liability to Mr. Gilbert for his costs of defending the Cayman Islands Court proceedings commenced by Messrs. Watlington and Ferguson. Against the background of the legal and factual findings made by Hargun CJ in the 447 proceedings, there is hardly any room to form a reasonable view that this is an expense which ought to burden the assets of the beneficially entitled. However, on the subject of Medlands' liability to Mr. Gilbert for his communications and examination of information and documents regarding PIL, I consider that activity to fall within the reasonable scope of the functions of the trustee.

79. I now turn to the more controversial subject of the 447 proceedings and the Conyers Indemnity. In so far as the 447 proceedings are concerned, on 19 December 2019 I directed Medlands to "*raise and pay from the B Trust the Plaintiff's* [SJTC's] *reasonable costs and expenses of and incidental to, and any other liabilities arising in* [the 447 proceedings]". So, it follows that Medlands is entitled to claim its Court-approved indemnity in respect of the 447 proceedings before Hargun CJ. This would include payment of the adverse costs orders made in favour of the appearing parties.

80. However, where an indemnity is sought in respect of any appeal from those 447 proceedings and in respect of the Conyers Indemnity, I have good cause to pause. My 19 December direction applied to any costs related to the prosecution of an appeal in the 447 proceedings and/or any appeal from the orders for consequential relief. However, in light of the change of trusteeship and the serious factual findings made by Hargun CJ, this Court would be duty-bound to exercise its *Beddoe* jurisdiction for the purpose of considering whether it should review, vary or set aside the directions approving the prosecution of any appeal from the 447 proceedings. For that reason, the only proper course available to this Court is to qualify the requested endorsement of an indemnity for Medlands so that it excludes any appeal proceedings. In a reassessment of my previous direction sanctioning appeal proceedings, I would undoubtedly address my mind to the below points raised in *Lewin* [27-262]:

"*Unforeseen new and adverse development in the main action after order made*

27-262 Where an order is made permitting a trustee to commence, continue or defend proceedings, down to a certain stage in the proceedings or until trial, it may happen that some important new adverse development in the litigation occurs before that stage is reached, or before trial, not foreseen or taken into account by the court when the order was made, which throws serious or at least significant doubt on the propriety or utility of the continuance of the action or defence. Instances are a change or development in the law as a result of statute or judicial decision, or the discovery of important new evidence. In our view, the correct procedure in such a case, if the trustees are advised that the new development destroys the action or the defence, is for them to extricate themselves from the litigation on the best terms that can reasonably be obtained. The correct procedure, if the trustees are advised that the

new development raises a significant doubt, is for them to seek further directions from the court, so that the court may consider the impact on its previous order of the new and averse development which has occurred. If the trustees conduct themselves in accordance with the above procedure, then their indemnity for costs as against the beneficiaries is, in our view, safe. But if the trustees press on regardless, they should not, in our view, assume that they can safely continue to rely on the previous order as regards additional costs incurred after the new development in the litigation, even if the additional costs which they incur are, on the face of the order, covered."

81. The criticism made of Medlands for having entered the Conyers Indemnity is coruscating. That indemnity was made on 2 July 2020 after a series of findings were made by Hargun CJ in March 2020. In the written judgment of the learned Chief Justice, dated 14 December 2020, he recapitulated his March 2020 findings as follows [15]:

"*March 2020 Judgment findings*

15. In the March 2020 Judgment, the Court made the following material findings of law and fact:

1. "Mr Gilbert was validly appointed [as a director of SJTC] on 23 June 2017" (at paragraph 28).

2. "Both Mr Watlington and Mr Ferguson were examined at the inter partes hearing primarily to determine whether there was any "collusion" between them and Mr Tamine. However, the suggestion of "collusion" was never put to either Mr Watlington or Mr Ferguson in cross examination and indeed has been disavowed in correspondence" (at paragraph 58).

3. "Mr Watlington and Mr Ferguson were validly appointed on 5 October 2019 as a result of the operation of the Duomatic principle. I do not accept the submission that in this case the Duomatic principle does not apply because the underlying transaction is dishonest or not bona fide; or that the appointments were made by Cabarita with a view to furthering the interests of Mr Tamine, its sole director and shareholder, and they were not made properly in the interests

of SJTC but rather for an ulterior advantage; or that there were defects in compliance with procedural formalities designed to protect the interest of a third party (Bye-law 31)" (at paragraph 83).

4. "It follows that from 25 October 2019 onward the Board of Directors of SJTC comprised Mr Gilbert, Mr Watlington and Mr Ferguson. The commencement of the proceedings on 1 November 2019 required a resolution of the Board of Directors. Mr Gilbert, acting alone, had no authority to institute these proceedings on behalf of SJTC. As no relevant board resolution authorizing these proceedings was passed, it follows that these proceedings were commenced without any proper authority from SJTC" (at paragraph 84).

5. "For the reasons set out above, Mr Gilbert, in my judgment, had no authority to institute these proceedings on behalf of SJTC and it follows that these proceedings were commenced without any proper authority from SJTC. That finding applies equally to the Trust Law Claims set out in paragraphs 76 to 86 above. The lack of authority to commence these proceedings remains even if this court was minded to give leave to SJTC under section 47A (5)(d) of the Trustee Act 1975" (at paragraph 88).

6. "I conclude that these proceedings, commenced by Writ of Summons dated to 1 November 2019, in the name of SJTC were brought without proper authority; SJTC has no locus to pursue the claims made in these proceedings, and the Amended Writ of Summons discloses no reasonable cause of action. In the circumstances, I order that the Amended Generally Endorsed Writ of Summons be struck out" (at paragraph 115).

7. "It necessarily follows that the ex parte Order made on 6 November 2019, restraining Mr Watlington and Mr Ferguson from acting as directors of SJTC, must be discharged and I so order" (at paragraph 116).

8. "I wish to add that even if I had come to the view that the underlying proceedings should not be struck-out I would still have discharged the injunction. Having heard full argument, I

am persuaded that it is in principle, wrong for the Court to reconstitute, even on a temporary basis, the board of a company" (at paragraph 117).

9. "I would also have discharged the injunction on the ground that the result of the Order made by Subair Williams J dated 19 December 2019, appointing Medlands as the trustee of the Brockman Trust, was to render SJTC an empty vessel and in the circumstances interim relief was unnecessary and could no longer be justified" (at paragraph 120).

10. "It is unnecessary to review the many other grounds which were relied upon in support of the application to discharge the ex parte injunction" (at paragraph 121).

82. Medlands entered the Conyers Indemnity in not only its personal capacity but also in its capacity as a trustee. In doing so, it did not seek the approval of the Court. Strictly speaking, it was not bound to do so. However, in the ordinary course of business it would have been expedient of Medlands to first canvass the Court's position before it assumed direct or indirect liability for any litigation costs. Of course, the obvious reality in it all is that there was no real prospect of the Court sanctioning the Conyers Indemnity as those costs would only arise in the face of some degree of professional negligence or misconduct on the part of Conyers. More so, by 2 July 2020 the writing was already on the wall. Notwithstanding, this Court is now asked to assess the appropriateness of Medlands re-opening the trust purse strings to expense its materialised liability to Conyers. In undergoing that assessment, I would have to pay regard to the findings made in Hargun CJ's 26 March 2020 judgment [15-17]:

"*17. Medlands apparently had been incorporated on 15 July 2019 with the intention that it would be used in the corporate structure through which the Brockman Trust is administered. The Beddoe Proceedings had been commenced, at Mr Gilbert's instigation, in the name of SJTC with the particular application which led to the appointment of Medlands being made in the name of SJTC on 22 July 2019*[6].

[6] Medlands was appointed as the new trustee of the Brockman Trust under my Order made on 19 December 2019.

18. No attempt was made by Mr Gilbert either prior or after the ex parte hearing to update the Court as to these potentially momentous developments before they occurred.

19. Cabarita, Mr Watlington and Mr Ferguson complain bitterly that SJTC persuaded the Court to grant an ex parte injunction based upon the representation that its sole purpose was "to hold the ring" and having obtained the ex parte injunction, proceeded to make an application in confidential proceedings which rendered SJTC an empty vessel."

83. Hargun CJ's conclusion that "*no attempt was made by Mr Gilbert either prior or after the ex parte hearing to update the Court as to these potentially momentous developments before they occurred"* constituted a serious finding against Conyers confirming a breach of its duty to provide full and frank disclosure to the Court. Between 26 March 2020 and 2 July 2020, both Conyers and Medlands would have been privy to a bird's eye view of the likelihood of an adverse costs order being made against both Conyers and Mr. Gilbert. In the 14 December 2020 judgment which followed, Hargun CJ ordered indemnity costs against Mr. Gilbert [165]:

"*165. In the circumstances, subject to consideration of the other points made by Mr Chivers, this is, in the Court's view, a classic case where the Court should make an order that Mr Gilbert should be liable to pay Mr Watlington's, Mr Ferguson's and Cabarita's costs of the proceedings. The conduct of Mr Gilbert in this case, as set out in paragraphs 162 to 164 above, is exceptional and calls for an order for indemnity costs to be made in the exercise of discretion under RSC Order 62 rule 3 (4) and I make that Order*".

84. In ordering costs against Conyers, Hargun CJ said [237-247]:

"*237. ...However, the failure by Mr Gilbert and Conyers to advise the Court on 3 December 2019, or soon thereafter, of the impending application in the Trust Proceedings to remove SJTC as trustee and appoint Medlands as successor trustee, falls in a different category. In this respect the Court refers to paragraphs 58 to 80 above.*

238. On any basis, this was a momentous application. It resulted in SJTC being removed as a trustee of the Brockman Trust and replaced by Medlands, a company of which Mr Gilbert was the sole member and sole director. All the legal professional advisors continued to provide

their services as before to Medlands, as the successor trustee. This was achieved without any reference to Mr Watlington and Mr Ferguson, the majority directors of SJTC or the Court, which had restrained Mr Watlington and Mr Ferguson from acting as directors of SJTC. The commercial effect achieved by the Order of 19 December 2019 was to render the injunction proceedings and the proceedings challenging the appointments of Mr Watlington and Mr Ferguson as directors irrelevant and academic.

239. Conyers has not suggested that the application to replace SJTC as trustee of the Brockman Trust was an immaterial development. Instead, it is said that since by 3 December 2019 the injunction proceedings were fully inter partes there was no obligation upon Mr Gilbert or Conyers to advise the court of this momentous development. For reasons set out at paragraphs 68 to 73 above, and having regard to the fact that Mr Watlington, Mr Ferguson and Cabarita had no means of finding out that such an application to change the trustee was contemplated by SJTC, Mr Gilbert and Conyers were under a duty to advise the Court in relation to this momentous development. As the review of the authority shows, this has been the legal position since at least 2004 and is reflected in standard practitioner texts.

…

241. The Court has also noted, as urged by Mr Chapman, that Conyers was part of a much larger team of professional advisors to SJTC. However, the position remains that only Conyers, as attorneys of record in the proceedings before this Court, had the responsibility for ensuring that the duty of full and frank disclosure to the Court was discharged by the client and by Conyers. Likewise, only Conyers had the personal responsibility of ensuring compliance with Rule 39 of the Barristers Code of Professional Conduct 1981 to inform the Court that its representation, that the ex parte injunction was required and would only be used to "hold the ring", could no longer be relied upon, after Conyers had been instructed by Mr. Gilbert on 3 December 2019 to make an application, on behalf of SJTC in the Trust Proceedings, to change the trustee of the Brockman Trust. Conyers could not possibly accept advice or instruction from other professional advisors in the team that it did not have to comply with its obligations of full and frank disclosure either under the general law or under Rule 39 of the Barristers Code of Professional Conduct 1981.[7]

[7] Footnote 3 of Hargun CJ's judgment is not quoted.

…

244. As the Court indicated during the hearing, had Mr Gilbert or Conyers advised the court, at any time before the hearing on 19 December 2019 in the Trust Proceeding, that SJTC was intending to make an application to replace the trustee of the Brockman Trust, the Court would have discharged the ex parte injunction. Such an application would have been entirely contrary to the representation made by Mr Gilbert and Conyers that the ex parte injunction was required to maintain the status quo. As Mr Brownbill correctly submitted, the likely effect of the discharge of the injunction would have been that Mr Watlington and Mr Ferguson, as the majority directors of SJTC, would have disavowed these proceedings and the proceedings would have been discontinued. On that basis the inter partes hearing in February 2020 would have been entirely unnecessary and would not have taken place. In the circumstances, the failure to advise the Court of the intended application to replace SJTC as trustee of the Brockman Trust, likely resulted in waste of costs.

245. As stated earlier at paragraph 80, Conyers was obliged to advise Mr Gilbert of his obligation to advise this Court of his decision to make an application in the Trust Proceedings to replace SJTC as trustee with Medlands. If Conyers failed to so advise Mr. Gilbert, it committed a serious breach of the duty to the Court. If Mr Gilbert refused to follow this advice, Conyers was obliged to cease acting for Mr Gilbert and SJTC. By continuing to act for Mr Gilbert and SJTC after becoming aware of Mr Gilbert's intention to apply for the appointment of Medlands Conyers committed a serious breach of duty to the Court.

246. In view of the Court, the application to change the trustee prior to the inter partes hearing, was in clear breach of the representation made to the Court that the sole purpose of the ex parte Order was to preserve the status quo. The ex parte Order of 6 November 2019 conferred no authority on Mr Gilbert to make an application, on behalf of SJTC, to change the trustee of the Brockman Trust. The statement made by Mr Gilbert and Conyers, in the Trust Proceedings, that paragraph 3 of the ex parte Order gave Mr Gilbert the authority to make the application to change the trustee was not an accurate statement of the authority 108 conferred on Mr Gilbert. These manoeuvres resulted not only in a serious breach of the duty of full and frank disclosure to the Court but also deprived SJTC of its right to make appropriate representations

to protect its interests at the hearing before Subair Williams J on 19 December 2019. The conduct set out in paragraphs 21 to 50 and highlighted above, reaches, in the Court's view, the threshold of serious negligence.

247. In the circumstances, the Court considers that Conyers should be responsible for part of the costs of these proceedings incurred by Mr Watlington, Mr Ferguson and Cabarita. An appropriate order in the circumstances is that Conyers should be liable to pay Mr Watlington, Mr Ferguson and Cabarita (i) 30% of the costs of these proceedings incurred during the period 3 December 2019 and 26 March 2020; and (ii) that the costs be taxed on the indemnity basis. Given the exceptional circumstances of this case, the Court considers that an order for costs on the indemnity basis is justified. It is further ordered that the liability of Conyers to pay costs up to the extent stated above is on a joint and several basis with Mr Gilbert."

85. Against this background, Mr. Tregear QC's remarks that the Trust was being used like an insurance policy are particularly persuasive. Undeniably, it would be inappropriate for this Court to sanction the Conyers Indemnity. Any liability that Medlands has under the Conyers Indemnity should, in the clear opinion of this Court, resort to Medlands' personal capacity.

Court's Approval of Indemnity for Medlands' liability to Zobec

86. It seems only fair to me that Medlands is entitled to recover the costs associated with its liability for Zobec's administrative services during its tenure as trustee and in bringing that trusteeship to an end. As for its legal professional services, it is clearly the case that Medlands should be indemnified for any legal fees arising out of any cooperation it has provided to the DOJ in relation to the Trust. The same is so for Medlands' legal fees relating to the handover process between Medlands and BCT Limited and Medlands' legal fees associated with any Court-approved trust litigation leading up to the appointment of the new trustee.

Scope of Court's Approval of Indemnity for Medlands' Costs to remain 'Alive'

87. Medlands contends that its company registration costs and other like costs associated with keeping it 'alive' should be borne out of the trust fund. Barring any particular contractual entitlement, I am not aware of any legal or equitable principle which would render a trust fund

responsible for the costs of the basic infrastructure needed by its trustee to exist as a registered entity. That being said, I am cognizant of the reality that Medlands was incorporated as a private trust company and would likely be spared from the financial burden of further registration fees, but for the fact that it will likely continue to partake in trust litigation proceedings e.g. the ongoing 376 appeal proceedings.

88. So, in this case, equity calls for Medlands' company registration costs to be paid for out of the trust assets. This is not to discard Mr. Robinson's submission that Medlands' obligations are also personal and extend beyond its liabilities as a former trustee. However, in my final analysis, the expense of its registration and compliance with any regulatory requirements needed for it to see the 376 proceedings through to completion is paramount. As for any other ongoing trust litigation, for example the 390 proceedings, I would expect for that litigation to be overtaken by BCT Limited as the new trustee of the Brockman Trust.

Analysis and Findings on the Question of a Retention

89. In this case it is common ground between the parties that Medlands' equitable rights to an indemnity do not, as a matter of general legal principle, extend so far as to create a right to a retention of trust funds. It is not suggested by Medlands that it has the benefit of a contractual right to retain trust funds in security for its contingent liabilities. In fact, Medlands' London solicitors in correspondence placed before this Court recognised that Medlands' request for a retention order is 'relatively unusual'. Thus, any grant of a retention order would be purely an exercise of the new trustee's discretion. In expressing a view of the trustee's power of discretion, I must be remind myself that I am sitting in the Court's supervisory jurisdiction where the Court's administrative powers and duties are ultimately aimed to protect the trust assets for the eventual distribution to those beneficially who are interested. Of course, a trustee is also required to use that same measuring stick.

90. Applying the principles outlined by Bereton J in *Lemery Holdings Pty Ltd. v Reliance Financial Services Pty Ltd*, I would point out that a trustee's right of indemnity against personal liability to a third party for expenses incurred in the capacity of a trustee is ordinarily executed by recoupment of expenditure and exoneration from liability. This right of indemnity is secured

by an equitable lien over the trust assets and takes priority over the claims of beneficiaries. Most importantly, if the trust property is transferred to a new trustee, the lien survives and the new trustee's legal ownership of the trust assets is subject to the lien of the old trustee. However, that equitable lien is non-possessory and does not entitle the outgoing trustee to retain trust property.

91. These principles illustrate the exceptional nature of any allowance for a former trustee to retain trust assets to cover its contingent liabilities. With that said, there should be a good reason for the Court's approval of a departure from the normal recoupment process and that reason must be consistent with the Court's ultimate priority to the preservation of the assets for the beneficially entitled. In this case, the beneficially entitled are the charitable transferees or objects.

92. Looking through those lenses, I see no good reason for this Court to sanction a retention. This is reinforced by my assessment of the realistic scope of Medlands' contingent liabilities. For example, Medlands' assertion that it will undergo significant continued expense in liaising with the DOJ in furtherance of its investigation into the Trust is, in my judgment, unconvincing. It seems more likely to me that Medlands' assistance to the DOJ would be minimal and transitional for the purpose of facilitating direct contact between the DOJ and the new trustee.

93. So, in respect of the draft Orders placed before the Court at the hearing, I would point out that the removal of references to "Director Advice" and "Director Advice Costs" from the draft Order provided by Medlands ("the Medlands draft") is unobjectionable for two reasons. The first reason is tied to my impression that it is improbable that Medlands will incur significant and prolonged costs arising out of its assistance to the DOJ. The second reasonable basis for removing these references is because Medlands, with or without the inclusion of that wording, would enjoy an equitable right of indemnity for the reasonable costs incurred by it as trustee. So acts performed by Medlands' directors in furtherance of Medlands' capacity as a trustee would already be cost-protected.

94. Medlands' pursuit of a retention is also grounded on their expressed concerns about the liquidity of the Trust. However, the evidence of UCSH funding from Mrs Brockman in my view is sufficient to dispel any notion that Medlands will not likely receive the funds needed to meet their contingent liabilities.

95. I am also mindful that the effect of Clause 1.5 in the draft Order provided by Carey Olsen for BCT Limited ("the CO Draft") is such that any portion of a capital sum of up to $1,000,000,000.00 (1 billion) may be transferred out of the Trust without triggering a requirement for further indemnities by a transferee pursuant to 3.1.4. This, in my view, is sufficient cushion to allay Medlands' concern about the trustee's ability to make timely payments to Medlands as may be required.

96. Further, I am not persuaded that Medlands would encounter any real difficulty in enforcing payment of their indemnities against BCT Limited who has expressly submitted to the jurisdiction of this Court in relation to its administration of the Trust. In my judgment, BCT Limited's submission to the jurisdiction of this Court for the purposes of its administration of the trust could not have been made any clearer.

Conclusion

97. I have granted the Plaintiff's Originating Summons application for a Representative Order pursuant to RSC O. 15/13.

98. While I have declined to accept BCT Limited's discretion and powers as a new trustee, I have nevertheless expressed this Court's opinion on the various indemnities sought by Medlands. The expressed approvals and disapprovals of this Court to not bind BCT Limited or prevent it from taking first instance management of the decisions and administration underlying the indemnities requested by Medlands.

99. This means that the execution of any decision by BCT Limited to grant indemnities will need to be carried out by way of a Deed or a formal Agreement with Medlands. I have also withheld this Court's approval of Medlands' request for a retention of trust assets, without prohibiting

BCT Limited from permitting Medlands to retain any portion of the trust fund in the exercise of its discretion as the new trustee.

100. The 26 March 2021 Order of this Court was made to give effect to the change of trusteeship by 1 April 2021. A new Order bearing the same heading and date of this Ruling shall be drawn to give effect to this Court's findings made herein. Any Schedule containing the terms of a Court-approved transfer from Medlands to BCT Limited shall be described as 'the terms of Medlands' discharge which have been approved by the Court' or in words to that effect, so long as the Schedule is not capable of being construed as obliging BCT Limited to act in accordance with the opinions of this Court. Where I have not commented on any specific portion of the CO Draft, I confirm that this may be construed as the Court taking no adverse view of those particular proposals made by Mr. Robinson for BCT Limited.

101. Paragraph 9 of my Order dated 26 March 2021 provided that all parties' costs of the hearing should be paid out of the Trust. Any party desiring to be heard on the issue of any additional costs arising out of this Ruling shall file a Form 31D within 21 days of the date of this Ruling. Otherwise, the parties shall be indemnified out of the Trust for the costs of this application.

Dated this 12th day of May 2021

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THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT