In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019: No. 447

BETWEEN:

ST JOHN'S TRUST COMPANY (PVT) LIMITED

Plaintiff

-and-

(1) JAMES WATLINGTON
(2) GLENN FERGUSON
(3) CABARITA (PTC) LIMITED
(Sued in its personal capacity and in its capacity as trustee of The Waterford Charitable Trust)
(4) THE ATTORNEY GENERAL
(5) JAMES GEOFFREY STEPHEN GILBERT

Defendants

(6) MEDLANDS (PTC) LIMITED
(7) CONYERS DILL & PEARMAN LIMITED

Non-Parties

Before: **Hon. Chief Justice Hargun**

Appearances: **Edward Cumming QC, Katie Tornari and Mark Diel of Marshall Diel & Myers Limited for the Plaintiff and the First and Second Defendants**

David Brownbill QC and Paul Harshaw of Canterbury Law Limited for the Third Defendant

David Chivers QC and Nicole Tovey of Walkers (Bermuda) Limited for the Fifth Defendant

Hodge Malek QC and Jeffery Elkinson of Conyers Dill & Pearman Limited for Medlands (PTC) Limited

Graham Chapman QC and John Wasty of Appleby for Conyers Dill & Pearman Limited

Dates of Hearing: **2-5 November 2020**

Date of Ruling: **14 December 2020**

RULING

(Consequential Relief)

Consequential relief following an Order wrongly made; Scope of relevant jurisdiction; Court's power to order discovery in aid of consequential relief; ability of successor trustee to assert legal professional privilege against a former trustee in respect of documents provided by former trustee to the successor trustee; scope of ratification by conduct; scope of duty of full and frank disclosure after proceedings become inter partes; personal liability of a barrister and attorney for breach of duty of full and frank disclosure; liability of an attorney for costs for (i) breach of warranty of authority; (ii) under inherent Jurisdiction of the Court

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HARGUN CJ

(A) Introduction

1. These proceedings relate to the claim brought in the name of St John's Trust Company (PVT) Limited **("SJTC")** that the appointment of Mr James Watlington and Mr Glenn Ferguson as directors of SJTC, by a unanimous written resolution of its sole member, Cabarita (PTC) Limited **("Cabarita")**, is void and of no legal effect. The Statement of Claim seeks a final injunction against Mr Watlington and Mr Ferguson to prevent them from purporting to act as directors of SJTC; a declaration that Mr Watlington and Mr Ferguson are not directors and have no authority; and a declaration that the purported appointments by Cabarita are void.

2. By Judgment dated 26 March 2020 **("the March 2020 Judgment")** the Court ordered that the Amended Writ of Summons be struck out and the *ex parte* Order dated 6 November 2019, restraining Mr Watlington and Mr Ferguson from acting as directors of SJTC be discharged.

3. The present applications relate to consequential relief sought by SJTC, Mr Watlington and Mr Ferguson, and Cabarita, following the discharge of the *ex parte* injunction.

4. First, SJTC, Mr Watlington and Mr Ferguson, and Cabarita seek an order that Mr James Gilbert, the Fifth Defendant, and Conyers Dill & Pearman Limited **("Conyers")**, should be liable to pay the costs of all parties on the indemnity basis.

5. Second, SJTC, Mr Watlington and Mr Ferguson, seek information, as set out in the draft order, from Conyers as the former attorneys or purported attorneys and/or agents or purported agents of SJTC. SJTC, Mr Watlington and Mr Ferguson, also seek information, as described in the draft order, from Mr Gilbert, as a former director and or agent of SJTC. Cabarita also seeks information from Mr Gilbert as set out in the draft order.

6. Third, Mr Gilbert seeks leave of this Court to appeal the March 2020 Judgment to the Court of Appeal.

(B) Background to the Applications for information and costs

7. As set out in paragraphs 2-7 of the March 2020 Judgment, on 6 November 2019 the Court heard an *ex parte* application in the name of SJTC seeking an interim injunction against Mr Watlington and Mr Ferguson to prevent them from acting as directors of SJTC or holding themselves out as such. Mr Adamson and Mr Elkinson of Conyers purported to appear on behalf of SJTC at the *ex parte* hearing.

8. Counsel explained that SJTC is a private trust company and is a corporate trustee administering a very valuable trust, the A. Eugene Brockman Charitable Trust ("**the Brockman Trust**"). SJTC's sole shareholder, Cabarita, is a private trust company, domiciled in Nevis. Cabarita is also a corporate trustee of a charity called the Waterford Charitable Trust, a Bermudian charitable trust. The shareholding in SJTC is a trust asset of the Waterford Charitable Trust.

9. Mr Adamson advised that SJTC has commenced litigation against a Mr Evatt Tamine, a former director of SJTC, for, in part, stealing trust assets of the value of more than $20 million and SJTC is currently seeking, in separate proceedings pending in this Court (the "**Tangarra Proceedings**"), a full accounting to determine whether Mr Tamine has stolen additional trust assets. The allegations of theft and other wrongdoing are strenuously denied by Mr Tamine. Mr Tamine, counsel explained, is also a shareholder and director of Cabarita and recently, more than a year after resigning his position with SJTC and the week before his defence to the litigation against him in the Bermuda proceedings was due, has used his position with Cabarita to appoint Mr Watlington and Mr Ferguson as directors of SJTC. The expanded board of directors of SJTC would now consist of Mr Gilbert, Mr Watlington and Mr Ferguson. Mr Adamson explained that SJTC's fear is that the appointment of additional directors is an attempt by Mr Tamine to derail the investigations into his activities and/or to obtain information about SJTC's litigation strategy against him.

10. Mr Watlington and Mr Ferguson were appointed directors of SJTC by a unanimous written resolution of Cabarita, the sole member of SJTC. Mr Adamson submitted that while the Bye-laws do contemplate and provide for written resolutions of the members (Bye-law 27), the wording of the Bye-law is narrowly drawn. Bye-law 27, submitted Mr Adamson, only permits members to use written resolutions where the members were entitled to attend "the Meeting and vote on the resolution", so that "the Meeting" must be convened before the written resolution process can be utilised. Counsel submitted that only the Company (acting through its directors and secretary) can convene a meeting/circulate the resolution.

11. Further, Mr Adamson submitted that sections 79 and 80 of the Companies Act 1981 **("the Act")** provided a detailed statutory mechanism for members to require companies to circulate members' resolutions in advance of general meetings. The statutory mechanism, Mr Adamson submitted, is inconsistent with members having a freewheeling power to circulate resolutions to themselves, by-passing the scheme. The Bye-laws provide that the directors are entitled to receive notice of and attend any general meeting (Bye-law 31). This seemingly renders, submitted Mr Adamson, impossible the by-passing of members of

the need to: (a) hold any general meeting at all and (b) at the very least provide notice to the director.

12. Mr Adamson also advised the Court that SJTC anticipated an action against Cabarita for seeking to derail the current litigation through, what appears to be, a clear fraud on a power/improper exercise of a fiduciary duty for an improper purpose. He submitted that if Cabarita acted in excess of its powers as a trustee in appointing Mr Watlington and Mr Ferguson as directors, as a matter of trust law, their appointment was void in equity.

13. At the conclusion of the *ex parte* hearing on 6 November 2019, the Court made an order that Mr Watlington and Mr Ferguson acting together or independently, be restrained from purporting to act as directors of SJTC or in any way holding themselves out as such. Paragraph 3 of the Order provided that:

> "*the Plaintiff [SJTC] may continue to conduct its business in accordance with its Bye-laws, as if Mr James Gilbert is the sole director, without regard to the Member's Decision dated 25 October 2019".*

14. The Court and the parties had expected an *inter partes* hearing within the next 2 to 3 weeks. However, for various reasons the *inter partes* hearing did not take place until 19 February 2020. At that hearing the Court considered two applications. First, an application by Cabarita seeking an order that the Amended Generally Endorsed Writ of Summons, issued in the name of SJTC, be struck out on the grounds that the proceedings were commenced without the named Plaintiff's authority and/or pursuant to RSC Order 18, r. 19. Second, an application by Mr Watlington, Mr Ferguson and Cabarita that the *ex parte* Order made by the Court on 6 November 2019, restraining Mr Watlington and Mr Ferguson from acting as directors of SJTC, be set aside.

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).

Pre-action correspondence

16. As noted above, these proceedings resulted from the decision by Cabarita, the sole shareholder of SJTC, to appoint Mr Watlington and Mr Ferguson as the additional directors of SJTC, on 25 October 2019. On 30 October 2019, Marshall Diel & Myers **("MDM")** wrote to Conyers, at the time acting for SJTC, advising that they had been instructed by Mr Watlington and Mr Ferguson in that:

> *"We are informed that it is the wish of these gentlemen that we be instructed to advise the Company [SJTC] generally and specifically in regard to the Bermuda litigation regarding the Company.*
>
> *In that regard, a resolution is being drafted and will be sent to all three directors tomorrow morning and in the event that for some reason there is no unanimity in this decision a meeting of the board is to be held by telephone at 3:30 PM Atlantic time on 31 October 2019.*
>
> *We would be grateful to receive copies of all your files in this matter according copies of all email in relation to this matter."*

17. Conyers responded to MDM's letter the next day, 31 October 2019, asserting that the appointment of Mr Watlington and Mr Ferguson as directors was void as a matter of trust law because *"it is plain that Cabarita acted in excess of powers when it purported to vote, its decision is void, and the Board of SJTC stands unaltered."* Secondly, Conyers asserted that it cannot be correct that "*as a matter of company law they were added to the Board of*

the Company as you have set out." The letter suggested a "*practical solution*" in the following terms:

> *"The Purported Directors, Mr Watlington and Mr Ferguson, should (without prejudice to the voidness of their appointment and only for the avoidance of doubt) resign immediately as purported directors. If they do not do so, and other proceedings are necessitated in Bermuda to regularise the position, they are on notice to costs.*
>
> *…we invite them to agree (without prejudice to the voidness of the appointment and only for the avoidance of doubt) that Mr Gilbert may in general supervise and administer all of the business and affairs of SJTC whilst any dispute regarding the purported appointment is being determined. We will assume that this is agreed if we do not hear from you by 3:30 PM today, but will welcome positive assent for the avoidance of doubt. We also place the Purported Directors on notice to costs in this regard as well (including if by not responding they give the impression of having assented but then resile from that position)."*

18. There was further correspondence from MDM. By letter dated 1 November 2019 Conyers advised MDM that:

> *"Our client will commence proceedings in the Supreme Court to seek resolution of this question of your clients' authority to have any role in the business of the Company and will seek further urgent injunctive relief to prevent harm to the Company from the actions resolved be taken by your clients."*

19. The threat of proceedings by Conyers on behalf of SJTC elicited the clear response from MDM that Conyers had no authority to commence any such proceedings. In the MDM letter of 5 November 2019 MDM advised Conyers:

"We note in your letter that you have threatened proceedings to seek resolution of the question of our clients' authority to have any role in the business of the Company and injunctive proceedings. Mr Gilbert cannot institute proceedings in the name of the Company and our clients do not approve any such action, which will not be in the best interests of the Company and, in any event, will serve further to delay the substantive action. If Mr Gilbert wishes to commence and pay for the proceedings in his capacity as a Director, then that is his decision but any such proceedings will of course be contested and our clients will be seeking indemnity costs against Mr Gilbert. Given the above, it is self-evident that Conyers cannot represent the Company in any new proceedings."

20. A similar position was taken by Cabarita in the letter from Canterbury Law to Conyers of 8 November 2019:

"That is entirely wrong since Mr Gilbert, as one of three board members, has no right to act unilaterally without the agreement of his fellow directors… We will draw this letter to the attention of the Court in relation to any application that may be made by our client in due course in relation to any relief sought and in relation to the costs of any proceedings."

The application for an ex parte injunction

21. Following this correspondence there was an *ex parte* application, filed by Conyers, seeking to restrain Mr Watlington and Mr Ferguson from acting as directors of SJTC. The *ex parte* application was supported by Mr Gilbert's First Affidavit. Mr Gilbert expressed concern that Mr Watlington and Mr Ferguson may seek to control the bank accounts of SJTC and also seek to slow down or prevent the litigation which SJTC had commenced against Mr Evatt Tamine. In his affidavit Mr Gilbert stated:

"20. My concern is that the new directors will seek to take control of the Plaintiff's bank accounts or by their actions have those accounts suspended. I am concerned

that Mr Tamine, who has close relationship with the bankers for the Trust accounts, will seek to use the purported directors to obtain control over the Trust's accounts…

21. My concern is also that Mr Tamine will seek to use the purported directors to slow down or prevent the litigation which the Plaintiff has commenced or interfere with the Trust's legal rights. It would clearly be inappropriate for the Plaintiff to share information with the Defendants for example on its litigation strategy against Mr Tamine when the Defendants have been purportedly appointed by Evatt Tamine, and are, I assume, being funded by him and being indemnified by him (or rather the trust Tamine controls)."

22. Mr Gilbert emphasised that the purpose of the *ex parte* injunction was to hold the ring and that there was no prejudice to Mr Watlington and Mr Ferguson by restraining them on a temporary basis from acting as directors of SJTC:

"24. I ask for an injunction to hold the ring. There is no prejudice to the Defendants if they are prevented from holding board meetings while their authority (and their interactions with Mr Tamine) is scrutinized. There is certainly prejudice to the Trust (which of course is my main concern). The danger of allowing the Defendants to purport to hold directors meetings, to potentially derail the litigation, and to have access to the trust funds is extreme."

23. In the written submissions filed by Conyers and dated 6 November 2019, it was submitted that:

"*The balance of convenience is all one way. There is no prejudice in the purported directors standing down. The potential prejudice of allowing two purported directors and their attorneys who all are, we must assume, funded by Mr Tamine to have control of the litigation against Mr Tamine is enormous."*

24. In his oral presentation in the name of SJTC Mr Adamson justified the need for an urgent *ex parte* injunction restraining Mr Watlington and Mr Ferguson along the lines that this was essentially a hijack of the Brockman Trust by Mr Tamine:

> *"I appreciate all I need to show is a serious issue to be tried, and here you have evidence Tamine is essentially what we would call a bad actor. The concern of course is that Mr Tamine now is seeking to take control of the very litigation into his conduct…*
>
> *It is a takeover of an enormous Trust in circumstances where it is Mr Tamine who appears to be holding all the strings….in my submission there is a real concern and I need go no further that it is all been controlled, funded and masterminded by Mr Tamine, and all designed to potentially derail the investigations and litigation against him. So the Duomatic principle is the battle line and I say the answer to Duomatic is the concern we have, the serious issue which we have raised, that there is no honesty here, that this is essentially a hijack."*

25. The need for paragraph 3 of the *ex parte* Order was justified by Mr Adamson on the following basis:

> "*We do ask for an order that the Plaintiff may continue to conduct its business in accordance with its Bye-laws as if Mr James Gilbert is the sole Director without regard to member's decision dated 25th October because otherwise the result we will get ourselves into is even if these two directors are enjoined from acting,…, we are left in the position where the Company could technically be seen as inquorate permanently and therefore we need an order to allow it to carry on going; and I do point out that this is a Charitable Trust; the only thing we are currently doing is proceeding with litigation to protect the assets of the Trust."*

26. There was no hint or suggestion in the affidavit sworn by Mr Gilbert, the written submissions filed by Conyers or the oral presentation made by Mr Adamson that there was

any issue in relation to the validity of SJTC's appointment as trustee of the Brockman Trust or that a successor trustee might be appointed within the next six weeks in separate trust administration proceedings pending before Subair Williams J **("the Trust Proceedings").** There was in fact no mention of the Trust Proceedings in Mr Gilbert's affidavit, the written submissions filed by Conyers or the oral presentation by Mr Adamson.

Advising the Court of Medlands' appointment as successor trustee

27. The Court was advised about the momentous development that SJTC was no longer trustee and that Medlands (PTC) Limited **("Medlands")** had been appointed successor trustee of the Brockman Trust in a curious way. On 3 January 2020 Mr Gilbert swore his Third Affidavit in this action, served on other parties on 6 January, and at the end of his affidavit advised the Court:

    "The trusteeship of the Trust

    25. By Order dated 19 December 2019, Subair Williams J appointed Medlands (PTC) Limited ("Medlands") as trustee of the Trust and has directed Medlands, in that capacity, to pay St. John's' reasonable costs and expenses of, and incidental to, and any other liabilities arising in, proceedings 2019: No. 447. The Order was made in confidential proceedings but her Ladyship has directed that this statement may be made available to the Court and to the parties to these proceedings. I confirm that I am a director of Medlands."

28. No further information was provided in Mr Gilbert's Third Affidavit in relation to the appointment of Medlands as successor trustee on 19 December 2019. No attempt was made to explain the need for a successor trustee pending the determination of the *inter partes* hearing in these proceedings. Mr Gilbert did not explain whether the application was made by SJTC or whether he had authorised Conyers to make that application in the Trust Proceedings. Mr Gilbert provided no particulars as to the role played by him, SJTC or Conyers in procuring the Order dated 19 December 2019 and whether Conyers had

represented to Subair Williams J that SJTC consented or did not oppose the terms of the Order made on 19 December 2019.

29. On 14 January 2020 Julica Shannon-Leigh Harvey swore her affidavit on behalf of Cabarita and in that affidavit she requested the Court to make an order requiring a responsible officer of SJTC and/or Medlands and/or Mr Gilbert to swear an affidavit providing information about Medlands and the Trust Proceedings so that Cabarita can determine whether, by failing to inform the Chief Justice about the Trust Proceedings, there was any breach of the duty of full and frank disclosure when the injunction was granted in the present proceedings.

30. In response, Mr Gilbert filed his Fourth Affidavit sworn on 24 January 2020 and confirmed that on 3 December 2019 he had decided to instruct Conyers to make an application in the Trust Proceedings to appoint Medlands as successor trustee. This decision and the reasoning which led to it appears from paragraphs 33-34 of his Fourth Affidavit:

> *"33… By around 3 December, having considered the evidence in these proceedings filed by that date and St John's under my direction having taken advice, I reached the conclusion that I could no longer conscionably advocate to the Beddoe Court that it would be in the best interests of the Trust for St John's to be appointed as the trustee of the Trust, given the efforts of Mr Tamine to take over St John's apparently for his own benefit and given his apparent lack of regard for any fiduciary obligation he owed in respect of the Trust. In particular, I decided that I could not conscionably suggest to the Beddoe Court that it would be in the best interests of the Trust for the trustee of the Trust to be an entity wholly owned by an entity owned and controlled by an individual accused of serious, indeed fraudulent, breaches of fiduciary duty and misappropriation of the Trust assets given the risk that he may, through St John's shareholder, cause such disruption as he has recently to the continued administration of the Trust.*
>
> *34. I therefore decided on or around 3 December 2019 to instruct St John's counsel to apply for (among other things) an order appointing Medlands as trustee of the*

Trust with a view to the application being heard at the further hearing already directed by the Court to take place on the first available date after 1 December 2019."

31. There was a directions hearing in relation to the injunction proceedings on 12 December 2019. By this time both Mr Gilbert and Conyers knew that an application would be made in the Trust Proceedings for SJTC to be replaced by Medlands as successor trustee of the Brockman Trust. Indeed, it now appears from the Ruling delivered by Subair Williams J in the Trust Proceedings (2018 No: 376) delivered on 23 July 2020 **("the Trust Ruling")** that Conyers filed the relevant summons in the Trust Proceedings on 10 December 2019, two days before the directions hearing. This appears from paragraph 4 of Mr Gilbert's Seventh Affidavit filed in the Trust Proceedings, sworn on 13 December 2019, and referred to in paragraph 53 of the Trust Ruling. Mr Watlington, Mr Ferguson and Cabarita were wholly unaware at the time of the directions hearing on 12 December 2019 that Mr Gilbert and Conyers had filed an application for the removal of SJTC as trustee and the appointment of Medlands as successor trustee of the Brockman Trust. No attempt was made by Mr Gilbert and Conyers to draw the Court's attention to this important development at the directions hearing or any time thereafter prior to 6 January 2020.

Order of Subair Williams J of 19 December 2019

32. The Trust Ruling shows that the principal application before Subair Williams J was for the replacement of SJTC by Medlands. The application was supported by Mr Gilbert's Seventh Affidavit. The parties to the proceedings appear to be SJTC, Medlands, the Attorney General, HSBC Private Bank (C.I.) Limited, Martin Lang and Grosvenor Trust Company Limited.

33. The rationale for making the application was said to be the risk associated with the appointment of the two new directors such that SJTC might fall under the influence of Mr Tamine. The application was therefore directly related to the subject matter of the proceedings in which SJTC had obtained an *ex parte* order restraining the two majority

directors from acting as such. It also appears that the application was agreed to by all parties appearing before Subair Williams J on 19 December 2019. This is confirmed by paragraphs 57 and 58 of the Trust Ruling:

> *"57. Driven by his efforts to avoid the alleged interference of Mr. Tamine via his steps to appoint new directors, Mr. Gilbert outlined a need for the replacement of SJTC as trustee. Unsurprisingly, this move has come under scathing attack by Mr. Ferguson and Mr. Watlington who would forcefully contend that Mr. Gilbert had no lawful authority to represent himself as a sole director of SJTC while simultaneously making an application to the Court against the interests of SJTC.*
>
> *58. At paragraphs 13 and 14 of Mr. Gilbert's Seventh Affidavit, he pleaded that it was agreed by all parties that it was necessary to replace SJTC as Trustee to protect the B Trust from further damage by Mr. Tamine:*
>
>> *"Notwithstanding the advice I have received as to the merits of the proceedings concerning the Purported Directors (which is in the confidential Exhibit), the fact that Cabarita, which is under Mr. Tamine's control, is the sole member of St. John's and has taken the steps I summarised above means that I have concerns about whether it is in the best interests of the beneficiaries and the due administration of the Trust that St. John's be appointed to act as trustee of the Trust. In my view, it is* too great a risk to the *Trust to have a trustee that may fall into the clutches of Mr. Tamine, who is accused of misappropriating Trust assets and who seems intent on delaying and stymying any accounting of his conduct that may be achieved in the litigation against him."* (Emphasis added)

34. The commercial result sought to be achieved by the application in the Trust Proceedings appears to be that Mr Gilbert would continue in his role as before but through the medium of Medlands. At that time Mr Gilbert was the sole director and sole member of Medlands.

This is explained in paragraph 14 of Mr Gilbert's Seventh Affidavit (referred to in paragraph 58 of the Trust Ruling):

> *"…I confirm, however, that I am director of a new entity that has been incorporated in Bermuda, Medlands (PTC) Limited ("Medlands"), which is willing and has consented to act as the trustee of the Trust. I believe, with the agreement of Martin Lang and RTB, that Medlands is a proper and appropriate candidate for appointment as trustee because it will enable me, along with Darren Stainrod who has agreed to join as a second director, to continue the administration of the Trust and avoid the disruption that would otherwise arise were the new trustee to be an entity with no prior knowledge and experience of the administration of the Trust."*

35. Mr Gilbert relied upon paragraph 3 of the *ex parte* order made by this Court on 6 November 2019 as giving him the requisite authority to make the application on behalf of SJTC in the Trust Proceedings to remove SJTC as trustee and appoint Medlands as successor trustee of the Brockman Trust. This appears from paragraph 5 of Mr Gilbert's Seventh Affidavit (referred to in paragraph 53 of the Trust Ruling):

> *"5. I believe I am duly authorized by St. John's to make this Affidavit on its behalf (<u>and, to the extent necessary, I rely in this regard on the Order of the Chief Justice dated 6 November 2019</u> referred to in paragraph 87 below)."* (Emphasis added)

36. Mr Gilbert confirmed at paragraph 6 of his Seventh Affidavit (referred to in paragraph 53 of the Trust Ruling) that *"In preparing this Affidavit, I have been assisted by St John's lawyers in Bermuda, Conyers Dill & Pearman ("CDP") in England, Stephenson Harwood LLP ("SH"), and in the US, Miller & Chevalier ("M&C")."*

37. The Court has been provided with a redacted copy of the Order made by Subair Williams J on 19 December 2019 (the "**Redacted Order**"), the terms of which were apparently agreed to by all the parties before the Court and in particular it appears, on the instructions of Mr Gilbert and SJTC.

38. Recital (3) records that: *“**And Upon** the Court being of the opinion that the Plaintiff [SJTC] is not, in the circumstances set out in the evidence (including in light of the issues arising in the proceedings 2019: No. 447 [the injunction proceedings]), a proper and appropriate candidate for appointment as trustee of the B Trust and that any new trustee should be an entity unrelated and unconnected to Mr Evatt Tamine…”*

39. Paragraph 15 records that SJTC was not validly appointed and acted as trustee *de son tort*: *“The Plaintiff, as trustee de son tort, had the standing to issue the July Summons and the December Summons and seek the relief set out therein (subject to recital (1) above.”*

40. Paragraph 18 appoints Medlands as successor trustee: *“Pursuant to section 31 of the Trustee Act 1975 and the inherent jurisdiction of the Court, the Fourth Defendant [HSBC Private Bank (C.I.) Limited, the last validly appointed trustee] is hereby discharged as a trustee of the B Trust and replaced as trustee by Medlands on the terms set out below.”*

41. Paragraph 23 seeks to vest legal advice taken by SJTC as trustee in Medlands and paragraph 23 is now relied upon by Mr Gilbert, Conyers and Medlands against SJTC in the present applications before the Court. Paragraphs 23 and 24 provide:

> *“23. All legal advice taken by the Plaintiff [SJTC] in its capacity as trustee of the B Trust and/or paid for by the B Trust fund shall vest immediately in Medlands as the trustee of the B Trust and shall cease to be the property of the Plaintiff [SJTC].*
>
> *24. Medlands shall procure that its director, James Gilbert, takes all necessary steps to implement para 23 above.”*

42. Paragraph 32 denies SJTC any future access to the Court file and was apparently agreed to, at the instructions of Mr Gilbert, by SJTC. Paragraph 32 provides:

"The Plaintiff [SJTC], upon ceasing to be a party to these proceedings pursuant to paragraph 31 above, shall not be permitted to access the Court file without permission of the Court and any application for permission shall be made and heard on notice to Medlands."

43. Paragraph 35 contains an unusual provision whereby the Court directs the successor trustee as to who should be appointed as the professional advisers to the successor trustee. Paragraph 35 provides:

*"Medlands is directed to engage as its lawyers and agents in its capacity as trustee of the B Trust, those barristers, solicitors, attorneys and other agents ("**the representatives**") who have to date acted for the Plaintiff [SJTC] in its capacity as purported trustee of the B Trust (save that this direction shall not fetter Medlands' discretion to change any of the representatives in the future)".*

44. Paragraph 36 contains an important provision allowing the trustee to disclose the Redacted Order to the Court in the present proceedings. Paragraph 36 provides:

"Medlands and any duly appointed future trustee shall be at liberty to provide a copy of this Order or disclose information about the contents of this Order to any person that it deems expedient in the interests of the Trust (save that paras 33, 34, 35 (2) and 35 (4) shall be redacted and shall not be otherwise disclosed unless the Court directs otherwise, such application by Medlands (or by any duly appointed future trustee) to be made and determined on papers) and without prejudice to the foregoing, the Plaintiff is expressly authorised to provide a copy of the statement at Schedule 2 to this Order to other parties and/or the Court in proceedings 2019: No. 447."

45. Despite the fact that paragraph 36 allowed Medlands to provide a copy of the Redacted Order to the Court in the injunction proceedings, a copy was not provided to the Court until after the *inter partes* hearing in February 2020. A copy of the Order was in fact provided

by Mr Gilbert in the redacted form on 15 April 2020. The Court accepts Mr Brownbill's submission that the unusual terms of the Redacted Order appear to be specifically designed to deny SJTC, the new directors and Cabarita any means of finding out what Mr Gilbert had done to secure the Redacted Order or the basis upon which the Order was obtained.

46. The overall effect of the Order of 19 December 2019 made in the TrustProceedings was, in the Court's view, as follows:

    1. SJTC was removed as trustee of the Brockman Trust.

    2. A company of which Mr Gilbert was the sole member and sole director, Medlands, was appointed as successor trustee.

    3. All legal professional advisers continued to provide their services as before to the successor trustee, Medlands.

    4. 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.

    5. The practical effect of the order of 19 December 2019 was to render the injunction proceedings and the proceedings challenging the appointment of Mr Watlington and Mr Ferguson as directors, an academic exercise.

Conflict of interest on the part of Mr Gilbert and Conyers

47. A concerning feature of the application to appoint a successor trustee in the Trust Proceedings is that both Mr Gilbert and Conyers were acting as agents for both the existing trustee (SJTC) and the proposed successor trustee (Medlands).

48. Mr Gilbert was a director of SJTC with power to act alone under the terms of paragraph 3 of the *ex parte* Order dated 6 November 2019. At the time of the application he was also the sole director and sole member of Medlands. Mr Gilbert appreciated that he was in a position of conflict in making the application on behalf of SJTC to replace SJTC as trustee with Medlands, given that he was a director of both companies. Nevertheless he urged the Court not to delay in making such an order given its implications for the administration of the Trust. He explained at paragraph 5 of his Seventh Affidavit (referred to in paragraph 53 of the Trust Ruling):

> *"Nevertheless, given the unusual and invidious situation in which I presently find myself, I propose to adopt as neutral a position as possible and simply provide the Court with all of the information which I believe it requires in order properly to consider what, if any, further directions and orders need to be made at this stage in order to secure the proper administration of... (the B Trust), which St. John's has recently been administering under the directions of this Court. It is my personal view that the relief sought in the Summons and the December Summons ought not to be delayed given its implications for the proper administration of the Trust but I of course defer to the Court and its views."* (Emphasis added)

49. Conyers purported to act as attorneys for SJTC in relation to the trust application and indeed filed the relevant Summons on 10 December 2019, the supporting Seventh Affidavit of Mr Gilbert and represented SJTC at the hearing on 19 December 2019.[1] Conyers was also acting for Medlands at the time.

50. However, the interests of SJTC and Medlands were not aligned in relation to that application and indeed would appear to be in conflict. It is unlikely to be in SJTC's interest to accept the agreed position that it was never validly appointed. Further, it would not

[1] The Court accepts Mr Cumming's submission, made on behalf of SJTC, that Conyers was purporting to act as an agent for SJTC and accordingly assumed fiduciary duties towards SJTC. This submission is supported by the judgment of Lord Denning in *Phipps v Boardman* [1965] 1 Ch. 992 at 1017G: *"There are many cases in the books where a person assumed to have the authority when in truth he has none. It has always been held that he is accountable just as if he had in fact the authority which he assumed."* The Court does not accept, as contended by Mr Chapman for Conyers, that this statement by Lord Denning is limited to the giving of an account of an unjust benefit.

appear to be in SJTC's interest to agree to the terms of paragraph 23 providing that *"All legal advice taken by the Plaintiff [SJTC] in its capacity as trustee of the B Trust and/or paid for by the B Trust fund shall vest immediately in Medlands as trustee of the B Trust and shall cease to be the property of the Plaintiff*." It is this very paragraph which is now prayed in aid by Medlands, Mr Gilbert and Conyers for resisting information sought by SJTC in these proceedings. Likewise paragraph 32 is unlikely to be in the interests of SJTC providing that SJTC will not be permitted to access the Court file without the permission of the Court and with notice to Medlands.

51. By the very nature of conflicting interests both Mr Gilbert and Conyers were placed in an untenable position when they appeared before Subair Williams J to represent the "agreed position" of SJTC and Medlands. In this context it is relevant to recall the statement of principle made by Millett LJ (as he then was) in *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 19 G-H:

> *"Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see* <u>*Moody v Cox and Hatt*</u> *[1917] 2 Ch. 71;* <u>*Commonwealth Bank of Australia v Smith*</u> (*1991), 102 ALR 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule"."*

Breach of duty of full and frank disclosure to the Court

52. The Court was referred to a number of cases dealing with the duty of full and frank disclosure in the context of *ex parte* relief. In *Brink's Mat Ltd v Elcombe* [1988] 1 WLR 1350 Ralph Gibson LJ summarised the relevant principles at 1356F to 1357G:

"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts:" see Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 K.B. 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v. Kensington Income Tax Commissioners, per Lord Cozens-Hardy M.R., at p. 504, citing Dalglish v. Jarvie (1850) 2 Mac. & G. 231, 238, and Browne-Wilkinson J. in Thermax Ltd. v. Schott Industrial Glass Ltd. [1981] F.S.R. 289, 295.

(3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] F.S.R. 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) *The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order*

on the defendant: see, for example, the examination by Scott J. of the possible effect of an *Anton Piller* *order in* *Columbia Picture Industries Inc. v. Robinson* *[1987] Ch. 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade L.J. in* *Bank Mellat v. Nikpour* [1985] F.S.R. 87, 92—93.

(5) *If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty:" see per Donaldson L.J. in* *Bank Mellat v. Nikpour,* *at p. 91, citing* *Warrington L.J. in the Kensington Income Tax Commissioners' case* *[1917] 1 K.B. 486, 509.*

(6) *Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.*

(7) *Finally, it "is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:" per Lord Denning M.R. in* *Bank Mellat v. Nikpour* *[1985] F.S.R. 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order,*

nevertheless to continue the order, or to make a new order on terms.

> *"when the whole of the facts, including that of the original non disclosure, are before [the court, it] may well grant ... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:" per Glidewell L.J. in* <u>*Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Plc*</u>*., ante, pp.1343H-1344A."*

53. In *Fundo Soberano De Angola et al v Jose Filmeno Dos Santos* [2018] EWHC 2199 (Comm) Popplewell J emphasised three aspects of the duty to give full and frank disclosure. First, the court must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make (paragraph 50). Second, in a complex case with a large volume of documents, it is not enough that disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of evidence and its significance is obscured by an unfair summary or presentation of the case (paragraph 52). Third, it is the duty of the legal team to ensure that the lay client is made aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged (paragraph 53).

54. Mr Brownbill, on behalf of Cabarita, submits that allegations about Mr Tamine's motivations in appointing Mr Watlington and Mr Ferguson were central to the case advanced at the *ex parte* hearing. For example, Mr Tamine was referred to on at least three occasions by Mr Adamson as a "*bad actor*". He points out that Mr Gilbert would have been aware from Mr Tamine's Defence in the Tangarra Proceedings that Mr Tamine had

expressly stated that he believed that the Tangarra Proceedings were an abuse of process designed to interfere improperly with the US tax investigations. Mr Brownbill complains that although the Defence in the Tangarra Proceedings was exhibited to Mr Gilbert's affidavit, this point was never drawn to the Court's attention in Mr Gilbert's affidavit, in Conyers skeleton argument, or in oral submissions.

55. In this regard the Court was invited by Mr Elkinson to read the Defence in the Tangarra action filed by Mr Tamine, which was reviewed by the Court before the start of the adjourned hearing the next day. Whilst certain points could have been emphasised by counsel, the Court does not consider that presentation was so deficient on this ground so as to constitute a breach of the duty of fair presentation to the Court.

56. Mr Brownbill further submits that to the extent paragraph 3 of the injunction Order of 6 November 2019 purported to give Mr Gilbert the authority to conduct the affairs of SJTC as if he was the sole director, there are very considerable jurisdictional issues which ought to have been (but were not) drawn to the Court's attention before the order was made. He argues that it should have been pointed out that the Court has no inherent power to reconstitute (whether on an interim or permanent basis) the board of the company. It should also have been pointed out that there is no inherent power to prospectively validate or authorise the acts of the person who purports to be the sole director of the company pending the determination of his status. Mr Brownbill submits that the relevant authorities in this regard of *MacDougall v Gardiner* (1874-75) LR 10 Ch App 606 (Mellish LJ) and the Privy Council decision in *Burland v Earle* [1902] AC 83 (referred to at paragraphs 117-118 of the March 2020 Judgment) should have been referred to the Court. He also submits that the Court should have been referred to the House of Lords decision in *IRC v Bibby* [1945] 1 All ER 667, holding that a company is bound by the decision of its registered shareholders even if that decision constitutes a potential breach of trust on the part of the registered shareholders (referred to in paragraphs 100-101 of the March 2020 Judgment).

57. Mr Adamson in his written submissions and in his address to the Court presented the application for an *ex parte* injunction restraining the two directors from acting as directors as an ordinary and common application. Indeed, he submitted that the only test the Court needed to be concerned with was the *Cyanamid* test of a serious issue to be tried. Whilst a statement was made in the skeleton argument that the Court generally does not intervene to block invalid appointments which can be validly done if proper procedures are followed, no reference was made to the above relevant authorities and their application to the facts of this case. For the reasons set out in paragraphs 99-105 and 117-119 of the March 2020 Judgment the above cases should have been referred to the Court as they arguably present substantial obstacles to the grant of an *ex parte* injunction in the circumstances of this case. Accordingly, I accept the submission that in this respect the presentation made to the Court on 6 November 2019 was not a fair presentation.

58. Both Mr Brownbill, for Cabarita, and Mr Cumming, for SJTC and Mr Watlington and Mr Ferguson, submitted that the failure by Mr Gilbert and Conyers to come back to the Court in these proceedings to inform the Court of the application to appoint Medlands before the hearing on 19 December 2019, at which Subair Williams J declared that SJTC had never been appointed a trustee of the Brockman Trust and appointed Medlands as the successor trustee, was a most serious breach and stood in a different category.

59. The Court recalls the application for an injunction was justified on the basis that unless the Court granted the injunction there was (i) a risk that the assets of this charitable trust may be dissipated by Mr Tamine (paragraph 20 of Mr Gilbert's First Affidavit); and (ii) the concern that Mr Tamine will seek to use the new directors to slow down or prevent the litigation which SJTC had commenced against him (paragraph 21 of Mr Gilbert's First Affidavit). The fact that the Court was dealing with assets belonging to a charitable trust was emphasised by counsel.

60. Mr Gilbert emphasised on behalf of SJTC that (i) the injunction was required *"to hold the ring"* pending the determination of the *inter partes* hearing and (ii) there was no prejudice to Mr Watlington and Mr Ferguson if they were prevented from holding board meetings

while their authority was scrutinised (paragraph 24 of Mr Gilbert's First Affidavit). The sole purpose of the injunction was to preserve the *status quo* pending an *inter partes* hearing. The Court advised the parties that it was prepared to hear the *inter partes* application on an expedited basis.

61. Authorities emphasise that in considering whether to grant an *ex parte* injunction the court needs to know the likely consequences of acceding to the application and any use which the applicant intends to make of it if such an injunction is granted. This aspect of the duty of full and frank disclosure to the court was emphasised by Teare J in *Todaysure Matthews Limited v Marketing Ways Services Limited* [2015] EWHC 64 (Comm) at [20]:

> *"Whilst it is undoubtedly the case that if a fact or matter removes the basis on which an injunction is granted it must be disclosed (as stated by Eder J. in Speedier Logistsics) that is not the extent of the duty of full and frank disclosure. That duty extends to disclosure of all facts "which reasonably could or would be taken into account by the Judge in deciding whether to grant the application"; see Siporex Trade SA v Comdel Commodites [1986] 2 Lloyd's Rep. 428 at p.437 per Bingham J. Where a person who applies ex parte for an injunction intends to use the grant of the injunction to support an application for an injunction from another court in a foreign jurisdiction such intention is a matter which "reasonably could or would be taken into account by the Judge in deciding whether to grant the application". That is because the intention affects or may affect the consequences of granting the injunction. Any judge of this court when asked to grant an injunction ex parte wishes to know the likely consequences of acceding to the application and making the requested order. If the judge is not informed of the applicant's intention to use the order in support of another application abroad the judge will have an inadequate or incomplete appreciation of the likely consequences of making the requested order. In my judgment the fact that the judge may still make the requested order having been told of the applicant's intention does not make the intention immaterial. The judge would expect to be told what the applicant intends to do with*

> *the injunction so that he or she can consider whether it remains appropriate to grant the injunction."*

62. As stated above, the purpose of the grant of the injunction to SJTC was "*to hold the ring*" or preserve the status quo pending the determination of the *inter partes* hearing. As the Court indicated during argument, if the Court had been advised by SJTC that it intended to use the *ex parte* injunction to launch an application to replace SJTC with Medlands as the trustee of the Brockman Trust, the Court would have refused the application for the *ex parte* injunction.

63. It is material to note that the application in the Trust Proceedings was directly linked to the main proceedings in which the *ex parte* injunction had been obtained. It is clear from the Trust Proceedings that (i) it was the appointment of Mr Watlington and Mr Ferguson as the majority directors which led Mr Gilbert to seek the appointment of Medlands as successor trustee; (ii) Mr Gilbert was concerned that this Court might not invalidate the appointment of Mr Watlington and Mr Ferguson with the result that SJTC would be under the control of Mr Watlington and Mr Ferguson and potentially under the control of Mr Tamine; and (iii) the appointment of Medlands as the successor trustee would neutralise any adverse decision of this Court in relation to the validity of the appointments of Mr Watlington and Mr Ferguson as directors of SJTC, as SJTC had already been rendered an empty vessel. This seems reasonably clear from paragraphs 57, 58 and 60 of the Trust Ruling.

64. Having regard to the matters set out in the last two paragraphs above, it would have been obvious to Mr Gilbert, Conyers in Bermuda, Stephenson Harwood LLP in England and Miller and Chevalier in the US, that the proposed application in the Trust Proceedings to appoint Medlands as the successor trustee was highly material to the proceedings in which SJTC had obtained the *ex parte* injunction on 6 November 2019.

65. It is accepted by Mr Gilbert that he had decided to seek the appointment of Medlands by no later than 3 December 2019 and he had instructed Conyers to make an application for that purpose by that date (paragraph 34 of Mr Gilbert's Fourth Affidavit).

66. It follows, as noted earlier, that both Mr Gilbert and Conyers were therefore fully aware of this important development by the time of the directions hearing in these proceedings on 12 December 2019 and yet no attempt was made to draw this Court's attention to it at that time. The first time, as noted above, this information about the appointment of Medlands was provided to the attorneys for Cabarita and Mr Watlington and Mr Ferguson was when Mr Gilbert's Third Affidavit was served upon them on 6 January 2020.

67. It does not appear that Mr Gilbert denies that the application to appoint Medlands as successor trustee in the Trust Proceedings was a material development. Instead, he relies upon the legal argument that he had no duty to disclose this development before the application to appoint Medlands was heard because these proceedings were by that stage *inter partes*. This legal contention was advanced in the written submissions filed by Conyers (on the instructions of Mr Gilbert) on 14 February 2020. At paragraph 185.d. of the written submissions Conyers assert:

> *"By the time that the progress of the [Trust Proceedings] became material (i.e. when it became clear that the [return date in these proceedings] would be taking place considerably later than originally envisaged), these proceedings were fully inter partes such that Cabarita cannot retrospectively pray in aid in order to allege a material breach of full and frank disclosure at the time the Injunction Application was made*" and the decision in *JSC BTA Bank v Ablyazov* [2012] EWHC 648 (Comm) is cited in support of this proposition.

68. I accept Mr Brownbill's submission that this argument does not assist Mr Gilbert or Conyers in the circumstances of this case. Whilst Cabarita, Mr Watlington and Mr Ferguson were aware of the existence of the Trust Proceedings, they did not know and had no means of finding out about the application to appoint Medlands in the Trust

Proceedings. In those circumstances, both Mr Gilbert and Conyers had a duty to draw these matters to the attention of this Court before the application was heard.

69. In *Commercial Bank of the Near East v A* [1989] 2 Lloyd's Rep 319, Saville J (as he then was) makes clear at 323 that the duty of full and frank disclosure is a continuing duty which extends to material development after the hearing at which the *ex parte* injunction has been granted:

> *"In my opinion [counsel for the defendant] is right to the extent that while the proceedings remain on an ex parte basis, in the absence of agreement by the parties enjoined or unless the Court otherwise directs, it is the duty of the party who obtains ex parte Mareva relief to bring to the attention of the court any subsequent material changes in the situation, i.e. any new or altered facts or matters which, had they existed at the time of the application, should have been disclosed to the Court. It must always be remembered that the granting of ex parte relief provides (albeit so that justice can be done) an exception to the most basic rule of natural justice-that both parties should be heard. Thus, the need for full disclosure by the party seeking relief and as to my mind the need to continue to make full disclosure while the proceedings remain on an ex parte basis."*

70. If subsequent developments falsify the information already presented to the Court, in principle it is irrelevant whether the later developments take place at the *ex parte* stage or at the *inter partes* stage. In *Network Telecom v Telephone Systems International* [2004] 1 All ER (Comm) 418, Burton J (dealing with an application to serve proceedings out of the jurisdiction) held at [72] that:

> *"As Mr Gee points out in his book, there can be no distinction, as a matter of principle, between subsequent developments, which falsify or cast doubt on the information as known at the time of application, and information coming to hand which shows that the earlier information was either false or incomplete."*

71. The editors of *Gee on Commercial Injunctions* explain at 9-028 that the duty to return to the court extends to material developments which occur after the making of the order and service on the respondents but are known only to the applicant:

> *"In Commercial Bank of the Near East Plc v A. Saville J said that the duty continued while the proceedings remained on an ex parte basis. The circumstances in question there, however, were also known to the defendants, so that once the defendants had been fully apprised of what had occurred on the ex parte application, they would themselves have been in a position to apply to the court to discharge or vary the order in light of the change of circumstances. A situation could also arise where new information becomes available only to the applicant, after the defendant has been fully apprised of what had occurred ex parte and:*
>
> *(1) the defendant does not know or have full information of the new development of fresh information; and*
>
> *(2) the new development of fresh information means either that the information given to the court on the ex parte application was misleading, or that the basis on which the relief has been granted ex parte could no longer be supported or has been substantially impugned."*

72. The argument that there is no duty to disclose material developments at the *inter partes* stage, relied upon by Mr Gilbert and Conyers, was expressly considered in *Speedier Logistics v Aardvark Digital* [2012] EWHC 2776 (Comm) where Eder J went on to reject the applicant's submissions that there could be no duty to return to the court to inform the court of a material development which occurs after an *inter partes* hearing, or that any such duty only applies to freezing injunctions, holding at [24-25] that:

> *"24. I approach the basis as a matter of principle. It seems to me that the original application before Tomlinson J was an application to the court to invite the court*

to exercise the court's discretion under Section 37 of the Senior Courts Act 1981. In circumstances where the court is exercising its discretion, certainly on an ex parte *basis (and I did not understand Mr Piccini to suggest otherwise) it is important that the information given to the court is full and frank. I have already quoted paragraph 42 of Mr Brown's affidavit in relation to the balance of convenience and what the court was told in support of the application for the injunction at that time. That was, of course, at the* ex parte *application. Thereafter, there was the* inter partes *hearing before Flaux J. Mr Piccini suggested that, once there had been an inter partes hearing, there was no longer any obligation on the part of a claimant to revert to the court, even in circumstances where the basis of the information given to the court had subsequently changed.*

25. I am unable to accept that submission. I cannot see any reason in principle, in circumstances where the claimant becomes aware of information which renders what that claimant told the court originally incorrect, not being under a duty to go back before the court to inform the court that there has been that relevant change, or, at the very least, to inform the defendant of those new circumstances. Mr Piccini submitted that, even if there was such a duty in relation to what he described as a "freezing injunction", there was no equivalent duty in relation to what I might describe as an "ordinary injunction". I accept, of course, that there are important differences between a freezing injunction (which is often described as a "nuclear weapon", to the extent that it may freeze assets generally, both within the jurisdiction and outside of the jurisdiction) and other injunctions. Of course, Mr Piccini is right to say that there are differences between those injunctions. However, in relevant respects I do not accept that there is here any relevant distinction in terms of the continuing duty on a claimant who has sought the exercise of the court's discretion on a certain basis. If that basis changes, it seems to me important, as a matter of principle, that the claimant does revert to the court to inform the court of the position. The main reason for that is that the exercise of the court's discretion was originally on a particular basis and, if that basis changes, it seems to me, as a matter of principle, that the court must be informed of that

> *change in the ordinary circumstances. Mr Piccini might be right that there is no authority in support of that general proposition, and in the time available I have not found any authority either. Nevertheless, simply as a matter of principle it seems to me that what I have just said must be right.* (Emphasis added)

73. Accordingly, in the Court's judgment, the duty of full and frank disclosure to the Court required Mr Gilbert to return to the Court as soon as he had decided to seek the appointment of Medlands, or at the very least inform Cabarita and Mr Watlington and Mr Ferguson of that development well in advance of the hearing on 19 December 2019. His failure to do so constituted a clear breach of that duty.

74. Mr Chivers, on behalf of Mr Gilbert, contends that the Supreme Court was advised of Mr Gilbert's intention to change the trustee when the application was made to Subair Williams J in the Trust Proceedings. He contends that it is immaterial, for purposes of discharging the duty of full and frank disclosure, that the Supreme Court was not advised in these proceedings in which the *ex parte* order was granted.

75. The Court is unable to accept that submission. The primary purpose of the continuing duty of full and frank disclosure is to advise the Court of any material developments which occur after the hearing at which the *ex parte* injunction was granted, is to provide the Court with an opportunity to consider whether the *ex parte* order should continue, and whether any additional conditions should be imposed. Only the Court dealing with this action could undertake that review. Subair Williams J, sitting in the Trust Proceedings, was not concerned with considering whether the *ex parte* injunction should continue or be modified in some way. Had this Court been advised of the pending application by SJTC to change the trustee prior to the *inter partes* hearing it is likely that the Court, as submitted by Mr Brownbill, would have required SJTC to either agree to postpone the successor trustee application until after the *interpartes* injunction hearing or accept that the *ex parte* injunction be discharged immediately.

76. Furthermore, an important aspect of the continuing duty of full and frank disclosure is to allow parties affected by the *ex parte* injunction to make appropriate applications and/or representations to the Court in light of the further developments disclosed to the Court. Any disclosure to Subair Williams J in the Trust Proceedings necessarily meant that the parties affected by the *ex parte* injunction, Cabarita, Mr Watlington and Mr Ferguson, were wholly unaware of Mr Gilbert's and SJTC's application to replace SJTC as trustee, and as a result were denied the opportunity to make any representation to this Court as to whether the *ex parte* Order should be discharged in the light of this momentous development.

77. Conyers, as the attorneys acting on Mr Gilbert's instructions, was under a duty as soon as the firm became aware of Mr Gilbert's intention to apply for the appointment of Medlands to inform Mr Gilbert that these matters must be drawn to the attention of the Court in these proceedings. Conyers received Mr Gilbert's instructions in this regard on 3 December 2019. In the event that Mr Gilbert refused to follow the advice of Conyers to advise this Court of his intention to apply to appoint Medlands as the successor trustee, the firm was obliged to cease acting for Mr Gilbert. In *Myers v Elman* [1940] AC 282 Viscount Maugham considered that solicitors, as officers of the court, have an obligation to advise their client as to the duties which he owes to the court and if the client refuses to follow that advice then it is the obligation of the solicitor to cease acting for that client. At page 293, Viscount Maugham said:

> *"The swearing of an untrue affidavit of documents is perhaps the most obvious example of conduct which his solicitor cannot knowingly permit. He must assist and advise his client as to the latter's bounden duty in that matter; and if the client should persist in omitting relevant documents from his affidavit, it seems to me plain that the solicitor should decline to act for him any further. He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon the file."*

78. The duty identified in *Myers v Elman* applies equally in relation to an attorney's obligation to the Court in the context of injunctions. This is confirmed by Burton J in *Network Telecom v Telephone Systems International* [2004] 1 ALL ER (Comm) 418 at [70-72]:

> *"70. Mr Hochhauser QC has, by reference to a passage in Gee on Mareva Injunctions and Anton Piller Relief (Fourth Edition) at pages 143 following, compared this jurisdiction to that in Myers v Elman [1940] AC 282; whereby the Court concluded that a solicitor, who became apprised of facts which showed that an affidavit previously sworn and relied upon by the court was now falsified, was obliged so to notify the Court.*
>
> *71. It is, in my judgment, quite clear that there is the same dramatic effect of serving an order obtained on an ex parte basis which may be unfounded, as of applying for one to start with.*
>
> *72. As Mr Gee points out in his book, there can be no distinction, as a matter of principle, between subsequent developments, which falsify or cast doubt on the information as known at the time of application, and information coming to hand which shows that the earlier information was either false or incomplete."*

79. Mr Chapman, on behalf of Conyers, rightly makes the point that as a firm of barristers and attorneys instructed in this matter, Conyers is constrained in relation to what information it can impart to this Court given its obligations of confidentiality and privilege owed to its clients. The Court accepts this proposition as a general principle. However, it is not clear to the Court how this constraint has any material impact in the present context. This is not a case where an attorney has provided advice to the client who was entitled to follow or reject the advice. This is a case where the client had no option but to accept the advice in relation to his continuing obligation to make full and frank disclosure to this Court. If the client refused to accept the advice tendered by Conyers in this regard, it was the duty of Conyers to cease acting for the client. In the circumstances it is difficult to see how the duty of confidentiality owed by Conyers has any material relevance.

80. In the circumstances, Conyers, in the Court's judgment, was duty bound to inform the Court that Mr Gilbert was seeking to remove SJTC and appoint Medlands as the successor trustee of the Brockman Trust in the Trust Proceedings and that the firm was assisting Mr Gilbert in that regard. Conyers was duty bound to inform the Court in this regard before the Order was made in the Trust Proceedings on 19 December 2019. This duty to advise the Court arose both as a result of the authorities discussed above at paragraphs 52 to 72 and as a result of the professional obligation set out in Rule 39 of the Barristers' Code of Professional Conduct 1981.[2] Accordingly, the Court accepts Mr Brownbill's submission that by failing to inform Mr Gilbert of his duty or continuing to act in these proceedings on Mr Gilbert's instructions after becoming aware of Mr Gilbert's intention to apply for the appointment of Medlands, Conyers committed a serious breach of its duty to the Court.

(C) **The applications for information from Mr Gilbert and Conyers**

81. The applications for information by Cabarita, SJTC, Mr Watlington and Mr Ferguson ("**the Applicants**") are justified on the following basis. It is said by the Applicants that the Court needs to know what steps Mr Gilbert has taken in the name of SJTC which fall outside the scope of paragraph 3 of the Order of 6 November 2019 and, therefore, are clearly invalid. The Court also needs to know what steps, if any, Mr Gilbert has taken which fall within paragraph 3, so as to enable the Court to determine whether the steps, if otherwise valid, should be set aside. The Applicants say the Court further needs to know what orders of the Court had been obtained by Mr Gilbert, purportedly acting in the name of SJTC, and the basis upon which they were made.

[2] Rule 39 provides that "*A barrister must at all times act with due courtesy to the court before which he is appearing and to opposing counsel. He must in every case use his best endeavours to avoid unnecessary expense and waste of the court's time. He should, when asked, inform the court of his estimate of the length of his case; and he should also inform the court of any developments which affect the information already provided*." (emphasis added)

The relevant jurisdiction

82. The Applicants rely upon the principle that, following the reversal of the wrongly made order, the Court should restore the parties to the position that they were in before the order was made. A number of cases were cited establishing this principle and the jurisdiction.

83. In *Rodger v Comptoir D'Escompte* (1871) LR PC 465, a decision of the Privy Council, the Board ordered the respondent to an appeal to pay interest on the sum which the appellant had been ordered to pay by a lower court in addition to ordering the return of the principal sum which had been paid over. Lord Westbury (delivering the advice of the Board) stated the principle at page 475:

> *"their Lordships are of the opinion, that one of the first and highest duties of all Courts is to take care that the act of the court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."*

84. In *Jai Berham v Kedar Nath Marwari* [1922] UKPC 58, certain land had been sold by auction as a result of an order made against the judgment debtors which was subsequently set aside. The proceeds of sale had been distributed to secured creditors before the order was set aside. The purchasers were ordered to return the property that had been sold to the judgment debtors subject to the purchase price first being repaid. Lord Carson, delivering the advice of the Board, held on page 3 of the judgment that:

> *"It is the duty of the Court under section 114 of the Civil Procedure Code to "place the parties in the position which they would have occupied, but for such a decree of such part thereof as has been varied or reversed". Nor indeed does this duty or*

> *jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved."*

85. In the particular context of an *ex parte* injunction which is wrongly obtained and then subsequently set aside following the *interpartes* return date, in *R v Kensington ex parte Polignac* [1917] 1 KB 486 (CA), Warrington LJ held at 509 that:

> *"It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it."*

86. This passage was cited with approval in the Bermuda Court of Appeal in *Locabail v Manios* [1988] Bda LR 26 at page 15, per da Costa JA.

87. The Court accepts that these cases illustrate the principle that, having set aside the injunction, the Court should make any necessary ancillary orders to restore the parties to the position they were in before the injunction was made as part of the consequential relief following the setting aside of the earlier order. Further illustrations of this principle are to be found in cases cited by Mr Brownbill and in particular *Heavener v Looms* (1924) 34 CLR 306, *Cox v Hakes* (1890) 15 App Cas 506, *Commonwealth v McCormack* (1984) 55 ALR 185 and *A-Pak Plastics v Merhone* (1995) 17 ACSR 176.

88. In response, Mr Chivers for Mr Gilbert, contends that cases such as *Rodger v Comptoir D'Escompte* and *Jai Berham v Kedar Nath Marwari* do not establish any general principle whereby the court has an open-ended jurisdiction to put the parties in a position as if the

ex parte order had not been granted. He says that these cases are examples of what happens when a judgment is reversed on appeal and they are dealing with repayment of monies paid under the earlier judgment. In particular, he says that these cases are not dealing with injunctions. Mr Chivers submits that the Court does not have a general jurisdiction to restore the parties to the position they were in before the injunction was granted. He argues that if there was such a general jurisdiction to restore the parties to the position they were in prior to the injunction, cross undertakings in damages would be irrelevant.

89. The cases referred to were indeed dealing with the scope of orders to be made in the event of a successful appeal. However, the statements of principle made in those cases are not limited to repayment of monies already paid by the unsuccessful party. They express a general principle that a party *"will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him"* (*R v Kensington, ex parte Polignac*).

90. The decision in *A-Pak Plastics v Merhorne* (1995) 17 ACSR 176 illustrates that the principle is not limited to mere repayment of monies. In that case the New South Wales Court of Appeal considered the effect of an appeal against a decision to set aside the statutory demand and held that where an appeal was successful the statutory demand should be reinstated to take effect from the date on which it was served. Sheller JA held at page 180 that:

> *"if an order setting aside a statutory demand is reversed on appeal, the appellant court should, ordinarily, reinstate the statutory demand to take effect from the date it was served on the principle stated by Lord Field in Cox v Hakes (1890) 15 App Cas 506 at 547 that restitution in integrum is the right of every successful appellant: see generally Commonwealth v McCormack (1984) 155 CLR 273 at 276-5; 55 ALR 185."*

91. The Court is unable to accept that this principle does not apply in relation to injunctions wrongly granted. *R v Kensington, ex parte Polignac* was a case dealing with injunctions which was cited with approval by the Bermuda Court of Appeal in *Locabail v Manios*

[1988] Bda LR 26, another case dealing with the grant of a *Mareva* injunction which was reversed on appeal. Further, whilst the Court accepts that a practice has developed in the granting of injunctions for undertakings as to damages to be given, it does not follow that the Court did not have the power to compensate for the damage in the absence of such an undertaking. The grant of an injunction is a common instance of when damage might be incurred and in the circumstances it is not surprising that the Court developed an additional procedure of requiring the applicant to give an undertaking as to damages.

Cabarita's claim for information from Mr Gilbert

92. Cabarita claims that, as a preliminary step to the exercise of the Court's power to set aside or order the reversal of the steps taken by Mr Gilbert he should be ordered to swear an affidavit within 7 days:

    (1) Setting out a narrative description of each step he has taken, or purported to take, on behalf of SJTC (including all instructions given to and received from attorneys) since the appointment of Mr Watlington and Mr Ferguson as directors on 25 October 2019.

    (2) In relation to each such step, exhibiting any documentary evidence of the step that was the taken.

93. In relation to the appointment of Medlands as trustee of the Brockman Trust, Cabarita requests that Mr Gilbert should be required to provide the following documents:

    (1) The application materials which resulted in the determination that the proper law of the Brockman Trust had never been changed from Bermuda law, including:

        a. copies of all instructions that he gave or advices that he received in relation to the making and pursuit of that application;

b. copies of all instructions to Counsel for the purpose of making and pursuing that application;

c. the originating process;

d. any application within the proceedings in relation to that issue;

e. any evidence filed by any party in the proceedings in relation to that issue;

f. all skeleton arguments filed in relation to that issue;

g. a copy of the hearing bundle(s) for any hearing relating to the determination of this issue;

h. a transcript of the hearing leading to the determination of this issue;

i. any judgment of the Court in relation to that issue; and

j. any Order of the Court dealing with that issue.

(2) The application materials which resulted in (a) the determination that SJTC had never been validly appointed as trustee of the Brockman Trust and (b) the appointment of Medlands as trustee of the Brockman Trust, including (*mutatis mutandis*) the material specified at paragraph 93 (1)(a)-(j) above.

94. Cabarita has made it clear that it does not seek to obtain any information or documents containing legal advice. Cabarita submits that there should be no practical difficulty readily identifying information and documents containing the substance of legal advice and excluding that material from that which is to be provided to Cabarita. Cabarita's position is that if Mr Gilbert is ordered to produce an affidavit describing the steps he took,

or purported to take, in reliance on the Order of 6 November 2019, then details of legal advice that he sought or received can readily be identified and redacted from the version of the affidavit to be provided to Cabarita.

95. Cabarita correctly submits that the materials relating to the issues raised in the Trust Proceedings concerning the proper law of the Brockman Trust and the validity of the appointment of trustees or protectors were not in any sense Beddoe proceedings since they did not involve the authorisation of proceedings by the trustee of the Brockman Trust. The Court accepts that these matters should have been dealt with in *inter partes* proceedings and would not have involved reliance on any privileged materials. Cabarita contends that in so far as Mr Gilbert has complicated matters by seeking Beddoe relief in the Trust Proceedings at the same time as dealing with non-Beddoe matters, any privileged material should be readily identifiable.

96. Mr Gilbert contends that whilst he accepts that this Court has jurisdiction over him in relation to the issue of costs, he has not submitted to the jurisdiction of this Court in relation to any other issue and in particular the claims by Cabarita, SJTC, Mr Watlington and Mr Ferguson for information. Mr Gilbert contends that he is not resident within Bermuda and such a claim can only be pursued against him after he has been properly served outside the jurisdiction under the relevant provisions of RSC Order 11.

97. The Court does not accept Mr Gilbert's submission that he has not submitted to the jurisdiction of this Court for the purposes of the application to obtain information from him. It is accepted that Mr Gilbert was originally joined as a party in relation to the issue of costs. However, by Notice of Motion dated 9 April 2020, Mr Gilbert asserts that he is "*a person aggrieved*" by the March 2020 Judgment and seeks leave to appeal the entire March 2020 Judgment and reverse the Orders made. Mr Chivers, for Mr Gilbert, appeared in this Court on his behalf on 5 November 2020 seeking leave from this Court to appeal the Judgment to the Court of Appeal. By launching an appeal on the merits of this Court's decision Mr Gilbert has, in my judgment, unequivocally waived any objections he might otherwise have been able to raise in relation to his joinder to these proceedings and he has

also submitted to the jurisdiction. By inviting this Court to exercise its discretionary jurisdiction to give him leave to appeal, Mr Gilbert has clearly submitted to the jurisdiction of this court. It is no longer open to him to challenge joinder or the jurisdiction of this Court.

98. In terms of the Court's jurisdiction to require Mr Gilbert to produce the affidavit and the relevant documents, Cabarita submits that the Court has the power to order its own officers (or former officers) to disclose relevant material to all parties in order to determine issues in the proceedings. In the context of considering what consequential relief should be given, the Court requires Mr Gilbert to state and produce documentation dealing with the actions he has taken on behalf of SJTC since the grant of injunction on 6 November 2019.

99. In *Expandable Ltd v Rubin* [2009] B.C.C. 443 Patten J (as he then was) recognised the existence of this jurisdiction and said at paragraph 41:

> *"This last point has a bearing on the final basis on which the application for inspection is made, namely the rule in* ex parte James*. I have no doubt that in a proper case the court has the power to order one of its own officers to put all relevant material before the parties in order to enable the court properly to determine relevant issues in liquidation or bankruptcy. This might in certain-probably rather rare-cases include what would otherwise be privileged material."*

100. The reference to *Ex P. James* in the judgment of Patten J above is a reference to *Re Condon, ex parte James* (1874) LR 9 Ch App 609 where the English Court first recognised that an officer of the Court should not behave in a way which a reasonable member of the public, knowing all the facts, would regard as either dishonest, unfair, or dishonourable. The principle stated is one of general application as made clear by the Court of Appeal in *Re Tyler* [1907] 1 K.B. 865. Vaughan Williams LJ held at page 868:

> *"In truth and in fact the object of this appeal is to induce the Court to say that the decisions in* Ex parte James *and* Ex parte Simmonds *are limited to the particular*

case of money paid under a mistake of law. In my opinion, in those two cases the Court of Appeal did not intend to limit their decision to that particular case, but intended to decide as a general principle that which James L.J. at the end of his judgment in Ex parte James *laid down as the duty of the Court."*

101. Farwell J held at page 871 that:

> "*In administering estates, whether in Chancery, bankruptcy, or the winding up of companies, the Court itself by its officer often finds itself in the position of a quasi-litigant. As I understand the principle laid down in the cases to which my Lord has referred, it comes to this, that the officer of the Court is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life. It would be insufferable for this Court to have it said of it that it has been guilty by its officer of a dirty trick."*

102. In these proceedings, argues Mr Brownbill, the Court will need to determine the extent of any consequential relief it should grant to reverse or declare ineffective steps taken in reliance on, or as a result of, the injunction. The Court's jurisdiction to grant such consequential relief arises as a necessary incident of having now discharged the injunction and determined that it should never have been granted (see paragraphs 82 to 91 above). However, it is impossible for the Court to consider and determine these matters if the Court (and the parties) are not fully and properly informed about the steps that Mr Gilbert took (or purportedly took) in reliance on the injunction, or events which have occurred as a consequence of the injunction.

103. Whilst not explicit in its terms, the House of Lords decision in *Myers v Elman* [1940] AC 282 does, in the Court's view, support the position that the Court has the power to order discovery in aid of achieving a just result under *the ex parte James* jurisdiction. The case shows that there was an enquiry into the conduct of the solicitor which lasted five days and the court had access to "*considerable correspondence between Mr Elman and his clients*". At pages 287 and 300, Viscount Maugham described the process as follows:

> *"The learned judge directed notice to be served on the respective solicitors of the grounds of complaint against each of them respectively, and, this having been done, he re-heard the application and (holding that there was not sufficient justification for an order against one of the solicitors concerned) directed an inquiry into the conduct of three other solicitors, one of whom was the present respondent, which, after further and elaborate particulars had been delivered, was specially fixed to be heard by the learned judge on the first day of the following sittings, April 26, 1938. The hearing lasted for five days. The learned judge, in addition to the evidence he had heard during the trial, heard the evidence of the plaintiff's solicitors' managing clerk. He also heard the evidence of Mr. Elman (the respondent) and of Mr. Osborn, his managing clerk. He had before him a considerable correspondence between Mr. Elman and his clients which the appellant's advisers had not previously seen.*
>
> *(At page 300) He had heard and seen the witnesses, and in view of the knowledge which Mr. Elman admittedly possessed of the activities of the Rothfield family, and to his statements and those of his clerk in the witness-box, which I have read with care, and to the correspondence which was disclosed, it is my opinion that Singleton J. was amply justified in concluding that Mr. Elman was guilty of professional misconduct in not insisting on his clients disclosing the relevant documents as soon as he knew that they were or had been in their possession, custody or power, and in preparing and putting on the file."* (Emphasis added)

104. Cabarita submits that Conyers, as an officer of the Court, can clearly be required by the Court to disclose relevant information so that the Court can properly determine the issues before it. Cabarita also submits that as far as Mr Gilbert is concerned, he is also subject to the Court's jurisdiction as being in a position which is at least analogous to an officer of the Court in the circumstances of the present case.

105. The judgment of Slade LJ in *Re TH Knitwear* [1998] Ch 275 holds that the essential quality of an officer of the Court is that the Court has conferred power on that person and

that person is answerable to the Court. Thus, as the decision holds, a liquidator appointed under voluntary liquidation is not an officer of the Court as the Court itself has conferred no authority upon him. However, a liquidator appointed in a compulsory winding up is an officer of the Court because his authority is conferred upon by the Court under the order appointing him.

106. In the judgment of the Court, Mr Gilbert can appropriately be considered to be in a position which is at least analogous to an officer of the Court for two principal reasons. First, paragraph 3 of the Order of 6 November 2019 conferred express power upon Mr Gilbert:

> *"[SJTC] may continue to conduct its business in accordance with its Bylaws, as Mr James Gilbert is the sole director, without regard to the Member's Decision dated 25 October 2019."*

107. Paragraph 3 of the Order gave authority to Mr Gilbert to take steps which were in the ordinary course of business of SJTC for purposes of "*holding the ring*". Whilst the Order was in force, paragraph 3 necessarily conferred authority on Mr Gilbert to take steps which he alone (as one director out of three) would not otherwise have had the authority to take on behalf of SJTC. Mr Gilbert is therefore to be considered as being in a position which is at least analogous position of an officer of the Court during this period.

108. Mr Chivers argues that in this case Mr Gilbert did not derive his authority from the Court order but under the constitution of SJTC. The Court is unable to accept this submission. The effect of restraining Mr Watlington and Mr Ferguson from acting as directors did not have the effect that they ceased to be directors. Paragraphs 1 and 2 of the Order did not have the effect that Mr Gilbert could act as a sole director. It was no doubt for this reason that Mr Adamson specifically sought the additional power and authority in terms of paragraph 3. As Mr Adamson explained at the hearing*: "we do ask for an order that [SJTC] may continue to conduct [its] business in accordance with its Bylaws as if Mr James Gilbert is the sole director without regard to the member's decision dated 25th of*

October because otherwise the result we will get ourselves into is even if these two directors are enjoined from acting...we are left in the position where the Company could technically be seen as inquorate permanently and therefore we need an order allow it to carry on going…"

109. Second, the power conferred upon Mr Gilbert by paragraph 3 of the Order was akin to the power ordinarily conferred upon a court-appointed manager of the company. Indeed, Mr Gilbert and Conyers accepted and asserted that the effect of paragraph 3 of the Order was to confer upon Mr Gilbert the powers of a court-appointed manager of the company. Thus, in the skeleton argument filed by Conyers on Mr Gilbert's instructions for the hearing in February 2020 it was asserted:

    (1) "the Court has expressly conferred authority on Mr Gilbert to conduct the business of the company as, in effect, a "manager", pursuant to the Injunction" (paragraph 84).

    (2) "Mr Gilbert's role as the court-appointed manager of the company… is analogous to the role of the liquidators…" (Paragraph 91.c.).

    (3) "the Bermuda court..has the power...to (1) confer authority to conduct a business on an identified person… The injunction does precisely this: it confers authority on Mr Gilbert in the interim to conduct the business of [SJTC]" (paragraphs 180 to 181).

110. In the circumstances it seems clear that Mr Gilbert has recognised that the powers granted to him by the Court, under paragraph 3 of the Order, put him in a position at least analogous to that of an officer of the Court.

111. In any event, the Court has the power or jurisdiction to require Mr Gilbert to make an affidavit setting out the actions he has taken and provide relevant documents under the inherent jurisdiction referred to by Gloster JA in *Credit Suisse Life (Bermuda) Limited v*

Bidzina Ivanishvili and Ors. [2020] CA (Bda) 13 Civ, referred to by Mr Cumming in his reply submissions. The issue in that case was whether the Court had the power or jurisdiction to order the defendant to provide an affidavit setting out information in relation to the conduct of the discovery and the methodology it had employed. Counsel for the defendant argued that there was no such power under RSC Order 24 rule 7. The Court of Appeal held that the Court had such power either under RSC Order 1A (the overriding objective) or under the inherent jurisdiction of the Court. Gloster JA explained the relevant jurisdiction at paragraphs 31-33:

> *"31. … In order to ensure that such an application, and indeed the whole discovery process, is robust and effective, it may well be necessary in circumstances, such as the present, for the types of order to be made as the judge made in this case. Such orders are clearly ancillary to the discovery process and, in my judgment, a judge clearly has power, or jurisdiction, to make them, whether under the inherent jurisdiction or under the case management powers as contained in RSC 1A/4(2) to give directions to ensure that the trial of a case proceeds quickly and efficiently and that the parties are on an equal footing in accordance with the overriding objective. In such circumstances, the fact that, in my view, the express provisions of Order 24 rule 7 do not of themselves authorise a judge to make the type of orders made by the Chief Justice in this case, or cannot legitimately be construed as so doing (even with the aid of the overriding objective) is irrelevant. Accordingly, I have no doubt that the Chief Justice had power (or jurisdiction) to make such orders.*
>
> *32. It follows that I reject Mr Moverley Smith's arguments to the effect that, because Order 24 rule 7 contains express provisions for provision of an affidavit, that excludes any exercise of the powers of the court, whether under Order 1A or the inherent jurisdiction, to require provision of an affidavit explaining the methodology of the discovery process adopted…*
>
> *33. As Mr Hollander pointed out, the English civil procedure rules have codified the court's inherent jurisdiction to "…make any other order for the purpose of*

managing the case and furthering the overriding objective" see the CPR 3.1(2)(m). As the commentary in the White Book explains, this rule simply duplicates the inherent jurisdiction already enjoyed by the court; see White Book (2020), vol 1, paragraph 3.1.13; and paragraph 9A-68 vol 2, ibid. Although the RSC has not similarly codified the Bermuda Court's inherent jurisdiction, in my judgment the exercise of such jurisdiction by the Bermuda Court is undoubtedly expansive enough to cover the orders made by the Chief Justice in the present case. As the UK Supreme Court explained in <u>Al Rawi and others v Security Service</u> [2012] 1 AC 531 at [20]:

> *"There are many examples of the court in the exercise of its inherent power introducing procedural innovations in the interests of justice. Thus it invented the power to grant <u>Mareva</u> injunctions (see <u>Mareva Navigation Co Ltd v Canaria Armadora SA</u> [1977] 1 Lloyd's Rep 368) and make Anton Piller orders: see <u>Anton Piller KG v Manufacturing Processes Ltd</u> [1976] Ch 55. These orders were devised to prevent misuse of the court's procedure and to ensure that its procedure is effective. The PII procedure was also a creature of the common law devised by the court in the exercise of its inherent power to regulate its own procedures. The remedy of discovery (now known as disclosure) was developed by the courts of equity in order to aid the administration of justice. Upon the amalgamation of the Court of Chancery and the common law courts into the High Court by the Judicature Acts, that remedy came to be governed by the Rules of Court. It is now contained in CPR Pt 31. The rules governing disclosure recognised that conflict may arise between the public interest in the administration of justice and other public interests which preclude the disclosure of all relevant materials. The law of PII was developed to deal with such situations. The court was exercising its inherent power in controlling its own procedures by deciding the scope of disclosure in cases involving confidential material. The scope of disclosure has long been seen as a matter on which the court has jurisdiction to decide.""*

112. Accordingly, the Court has the power, in the exercise of its inherent jurisdiction, to require Mr Gilbert, as the recipient of the authority given to him under paragraph 3 of the Order of this Court dated 6 November 2019, to set out in an affidavit what he has done on behalf of SJTC whilst the Order was in effect. This inherent jurisdiction also empowers the Court to order that he produces relevant documents. The existence of this power is essential if the Court is going to give effect to the jurisdiction identified in *R v Kensington ex parte Polignac* [1917] 1 KB 486 (CA):

> "*if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him.*"

113. Cabarita also relies upon RSC Order 24 rule 7 in support of its application seeking discovery from Mr Gilbert. For the sake of completeness, the Court considers that without resorting to the inherent power of the Court to order discovery, the terms of Order 24 rule 7 are unlikely to be wide enough to allow the Court to order Mr Gilbert to swear an affidavit setting out a narrative description of each step he has taken since the appointment of Mr Watlington and Mr Ferguson on 25 October 2019. Accordingly, it is unlikely to provide an additional basis to provide the discovery sought.

114. Mr Chivers argues that the claim by Cabarita for information can be ignored on the basis that Cabarita was not the subject of the injunction at all. He argues that the injunction made no difference whatsoever to the information which it would receive from Mr Gilbert and to provide Cabarita with information concerning the conduct of a director would be to put it in a better position than it would have been had no injunction been granted. He says that Cabarita was, save in a theoretical reflective sense through SJTC, wholly unaffected by the injunction and it can claim no consequential relief from its reversal.

115. In this connection Mr Chivers referred the Court to *Broadcasting Investment Group Limited v Adam Smith and Ors*. [2020] EWHC 2501 (Ch) where Andrew Simmonds QC, sitting as a Deputy Judge of the High Court, summarised at [29] the salient features of the rule in *Prudential Assurance Co Ltd v Newman Industries Ltd (No. 2)* [1982] Ch 204, as explained by Lord Reed in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31:

> *"(1) It is a "rule of company law" applying to companies and their shareholders with "no wider ambit".*
>
> *(2) It is a "highly specific exception" to the general rule that concurrent claimants may all pursue their own individual claims against the wrongdoer.*
>
> *(3) It requires, for its application, that the shareholder's claim is for reflective loss in the sense that it is "in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant".*
>
> *(4) It only applies where the company has a cause of action against the wrongdoer. This, of course, is axiomatic as the rule is one which is concerned with concurrent claims against the wrongdoer.*
>
> *(5) The rule applies as a matter of law: the effect of the rule in Prudential is that "the shareholder does not suffer a loss which is recognised in law as having an existence distinct from the company's loss". It follows that, when the rule is invoked, the Court is not exercising a discretion and is not evaluating the risk of double recovery. The rule either applies, in which case the shareholder's claim is barred, or it does not, in which case the concurrent claimant is free to proceed.*

(6) *The rule is not confined to claims for damages; it applies irrespective of the nature of the remedy sought by the shareholder claimant. This is necessary to prevent circumvention of the rule in Foss v Harbottle."*

116. Mr Chivers relies in particular on the proposition that the rule is not confined to claims for damages and it applies irrespective of the nature of the remedy sought by the shareholder claimant.

117. In considering the application of the principle of reflective loss, it has to be borne in mind that the present case is not the typical case where a shareholder's claim is for reflective loss in the sense that it reflects the diminution in value of his shareholding in the company.

118. The shareholder in this case, Cabarita, is in fact a defendant in these proceedings against whom specific claims are brought which are peculiar to Cabarita. The Amended Generally Endorsed Writ of Summons dated 15 November 2019, filed by Conyers at the instructions of Mr Gilbert, adds Cabarita as a defendant *"in its personal capacity and in its capacity as trustee of the Waterford Charitable Trust"*. The pleaded claims against Cabarita are as follows:

(1) By paragraph 4 it is said that Cabarita is a trustee of a Bermudian charitable trust called the Waterford Charitable Trust ("**the Charity**") and is the sole shareholder of SJTC.

(2) Paragraph 4A pleads that the objects of the Charity are exclusively charitable, being in summary for the benefit of the purposes recognised as charitable by the laws of Bermuda.

(3) Paragraph 6 pleads that the appointments of Mr Watlington and Mr Ferguson on 31 October 2019 by Cabarita are invalid and of no legal effect since, *inter-alia*, the purported appointment was not one made to further the purposes of the Charity and that alone rendered it excessive and thus void and without prejudice

to this contention, Cabarita's purported appointment was motivated by an improper purpose, namely the disruption of the litigation against Mr Tamine, and was a fraud on a power and/or breach of fiduciary duty.

(4) By paragraph 8A it is pleaded that it is in the best interests of the Charity that the appointment of Mr Watlington and Mr Ferguson be set aside and/or Cabarita be directed under the inherent jurisdiction of the Court forthwith to remove and/or procure the resignation of Mr Watlington and Mr Ferguson as the directors of SJTC. Furthermore, it is in the best interests of the Charity that Cabarita is removed and/or replaced as trustee of the Charity under the inherent jurisdiction of the Court.

(5) Relief is sought against Cabarita by SJTC in terms of paragraphs (3) and (4) above.

119. In relation to the *ex parte* injunction itself, it was specifically aimed at reversing the actions which Cabarita had taken. Paragraph 3 expressly provided that Mr Gilbert may continue to conduct the business of SJTC "*without regard to the Member's Decision dated 25 October 2019".* The Member's Decision referred to is the written resolution signed by Cabarita, as the sole member of SJTC, appointing Mr Watlington and Mr Ferguson as directors of SJTC. In the circumstances, as Mr Brownbill correctly submits, it would have been open to Cabarita to commence proceedings seeking a declaration as to the validity of the appointments it had made and/or to seek to set aside the injunction as being in breach of the right of Cabarita as a shareholder under SJTC's constitutional documents and the general law. These are rights which only Cabarita could enforce in its capacity as the sole shareholder of SJTC.

120. In the circumstances, the Court concludes that the principle of reflective loss does not preclude Cabarita from seeking to set aside the *ex parte* Order as it was directly affected by it in its capacity as a shareholder of SJTC. As the Court has held that the *ex parte* Order

was wrongly obtained, Cabarita, as any other affected party, it is entitled to consequential relief.

121. Finally, Mr Chivers raises the objection relating to whether the relief sought by Cabarita against Mr Gilbert is truly consequential. The Court accepts that the relief sought must be connected with the reversal of the Order wrongly made. For present purposes, the Court is satisfied that the present application by Cabarita requiring Mr Gilbert to swear an affidavit setting out a narrative description of each step he has taken on behalf of SJTC since the appointment of Mr Watlington and Mr Ferguson on 25 October 2019, as set out in paragraph 92 (1), and to exhibit any documentary evidence of the steps taken, as required by paragraph 92 (2), are properly to be considered consequential relief. The reference to "steps taken" in this context must refer to steps taken by Mr Gilbert in his capacity as director of SJTC (or purporting to act in that capacity). The court also considers that the documents required under paragraphs 93 (1) and (2) are also necessary for the Court to properly consider whether any further order should be made under the jurisdiction identified in *R v Kensington ex parte Polignac* [1917] 1 KB 486 (CA). The Court accepts that the application in the Trust Proceedings relating to the proper law of the Brockman Trust is closely related in time and substance to the change of trustee, which occurred during the relevant period, and therefore documents and information in relation to that application should properly be disclosed.

122. In conclusion, the Court makes the order sought by Cabarita and as set out in paragraphs 92 and 93 above, subject to the limitation that "steps taken" is confined to steps taken by Mr Gilbert in his capacity as a director of SJTC (or purporting to act in that capacity).

SJTC, Mr Watlington and Mr Ferguson's claim for information against Mr Gilbert

123. SJTC, Mr Watlington and Mr Ferguson ("**SJTC Applicants**") seek an order requiring Mr Gilbert to swear an affidavit detailing every decision he has made (or purported to make) and every act he has taken (or purported to take) in connection with the affairs and interests of SJTC since Mr Watlington and Mr Ferguson were appointed on 25 October 2019 (to

include, for the avoidance of any doubt, details of any instructions given to any lawyers purportedly on behalf of SJTC and any other instructions given to any third parties purportedly on behalf of SJTC).

124. The SJTC Applicants also seek copies of all documents in Mr Gilbert's possession or control that (i) belonged to SJTC (in any capacity) while Mr Gilbert was a director of SJTC or (ii) concern or contain information regarding matters that were the affairs of SJTC (in any capacity) while Mr Gilbert was a director of SJTC (including, for the avoidance of doubt, all email communications and all documents received or created by Mr Gilbert as a director of SJTC).

125. The SJTC Applicants also seek the documentary material sought by Cabarita in relation to the determination that the proper law of the Brockman Trust remained Bermuda law; the determination that SJTC had never been validly appointed as a trustee of the Brockman Trust; and the appointment on 19 December 2019, of Medlands as trustee of the Brockman Trust, as set out in paragraph 93 above.

126. In relation to the issue of jurisdiction to require Mr Gilbert to provide the information requested, the SJTC Applicants rely upon the fact that Mr Gilbert was a director and purported to act on behalf of SJTC. Accordingly, he was unquestionably an agent of SJTC. Mr Cumming, on behalf of the SJTC Applicants, submits that as a general rule, it is a legal incident of the agency relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal. Reliance is placed upon *Fairstar Heavy Transport NV v Adkins* [2013] 2 CLC 272 where Mummery LJ confirmed at [53] and [56]:

> *"53. Secondly, as a general rule, it is a legal incident of that relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal.*
>
> *56. Quite apart from the existence or non-existence of property in content, Mr Adkins was under a duty, as a former agent of Fairstar, to allow Fairstar to inspect*

emails sent to or received by him and relating to its business. The termination of the agency did not terminate the duty binding on Mr Adkins as a result of the agency relationship."

127. Secondly, SJTC Applicants rely upon the fact that while Mr Gilbert was still a director of SJTC, Mr Gilbert held the material that SJTC now seeks, in whatever format, as trustee for the Brockman Trust, since it was the property of SJTC and in support of that proposition they rely upon *Burnden Holdings (UK) Ltd (in liquidation) v Fielding* [2018] AC 857.

128. Third, the SJTC Applicants rely upon their contention that Mr Gilbert has acted in breach of his fiduciary duties to SJTC by retaining the materials that SJTC and Mr Watlington and Mr Ferguson now seek. In relation to this ground I accept the submission made by Mr Chivers that any allegation in relation to breach of fiduciary duties by Mr Gilbert requires SJTC to issue separate proceedings and plead a proper cause of action. An allegation of breach of fiduciary duty cannot be determined in this summary procedure.

129. However, in principle, the Court is satisfied that it is proper that Mr Gilbert should be required to produce the appropriate information on the basis that he was at the relevant time an agent and a director of SJTC. It is also proper to require Mr Gilbert to produce the appropriate information under the inherent jurisdiction of the Court discussed at paragraphs 111 to 112 above. The Court considers that the disclosure of this information is necessary in order for the Court to properly consider whether any further order should be made in relation to the jurisdiction identified in in *R v Kensington ex parte Polignac* [1917] 1 KB 486 (CA).

130. In relation to the issue of what is the proper scope of the information which Mr Gilbert should be required to produce it is relevant to bear in mind that this application is being made in aid of consequential relief. The proper period of enquiry for the purposes of consequential relief is, in the Court's judgment, the period from the date of appointment of Mr Watlington and Mr Ferguson to the discharge of the *ex parte* Order. Accordingly,

the appropriate period is between 25 October 2019 and 26 March 2020. The Court accepts that the application in the Trust Proceedings relating to the proper law of the Brockman Trust is closely related in time and substance to the change of trustee, which occurred during the relevant period, and documents and information in relation to that application should properly be disclosed. Further, for the purposes of this application, Mr Gilbert is not required to disclose any documents relating to proceedings by SJTC and Medlands against Mr Tamine or in relation to any Beddoe application in the Trust Proceedings seeking the guidance of the Court as to whether proceedings should be commenced by SJTC against Mr Tamine.

131. The Court does not consider that it is necessary or appropriate for the Court to consider, in the context of consequential relief, what other documents or information the SJTC Applicants are entitled to from Mr Gilbert on the basis that Mr Gilbert acted as an agent of SJTC and as a director of SJTC. Any claim to any such further entitlement to documents or information should, if required, be pursued in separate proceedings.

132. The issue of Legal Professional Privilege ("**LPP**"), as it may apply to this limited disclosure, is discussed at paragraphs 147 to 156 below.

133. Accordingly, the Court orders that Mr Gilbert should be required to produce the affidavit, documents and information set out in paragraphs 123 to 125 above subject to the limitations which the Court has identified in paragraph 130 above.

SJTC's claim for information from Conyers

134. SJTC seeks an order that Conyers shall provide to SJTC copies of the files (both electronic and hardcopy) (including all email communications) relating to the purported instruction in any matter on behalf of the Plaintiff (in any capacity).

135. The jurisdiction or power to require Conyers to disclose the information to SJTC is justified on a number of distinct bases. First, it is said that the Court has the power to order

officers of the Court, such as Conyers, to deliver up to the parties to the proceedings material that is required properly to determine the issues that are before the Court. Reliance is again placed upon *Myers v Elman* [1940] AC 282 and *Expandable Ltd* [2009] BCC 443. For the reasons set out in paragraphs 103 to 105 above the Court accepts that the court does indeed have power under this head to order Conyers to deliver relevant documents required properly to determine the issues that are before the Court.

136. Second, as set out in footnote 1 in paragraph 49 above, I accept Mr Cumming's submission, made on behalf of SJTC that Conyers was purporting to act as an agent for SJTC and accordingly assumed the fiduciary duties towards SJTC. This submission is supported by the judgment of Lord Denning in *Phipps v Boardman* [1965] 1 Ch. 992 at 1017G: *"There are many cases in the books where a person assumed to have the authority when in truth he has none. It has always been held that he is accountable just as if he had in fact the authority which he assumed."* I do not accept, as contended by Mr Chapman for Conyers, that this statement by Lord Denning is limited to the giving of an account of an unjust benefit. Conyers could be required to provide information to SJTC in relation to actions which they took in the purported representation of SJTC during the period 25 October 2019, when Mr Watlington and Mr Ferguson were appointed, ending on 26 March 2020, when the *ex parte* injunction was discharged.

137. Third, the position taken by Conyers before this Court in relation to the provision of information to its former client, SJTC, is highly unsatisfactory. As noted earlier, Conyers had acted as attorneys for SJTC prior to the appointment of Mr Watlington and Mr Ferguson as directors on 25 October 2019 and no issue arises as to its authority to act on behalf of SJTC prior to that date. However, after the appointment of Mr Watlington and Mr Ferguson, Conyers was put on notice that Mr Gilbert had no authority to instruct the firm unilaterally and in particular Conyers had no authority to commence proceedings on behalf of SJTC. Despite that warning given on behalf of the newly appointed directors, Conyers continued to act on behalf of SJTC on the basis of the instructions given by Mr Gilbert.

138. Conyers accepts that as a matter of fact it provided legal advice and representation to SJTC during the period 25 October 2019 to 26 March 2020. During this period Conyers commenced the present proceedings in this Court on behalf of SJTC; the firm was responsible for obtaining the *ex parte* injunction on behalf of SJTC from this Court on 6 November 2019; and the firm also represented SJTC in the Trust Proceedings and obtained the Order of 19 December 2019 resulting in the removal of SJTC as trustee and the appointment of Medlands as successor trustee. By the March 2020 Judgment this Court has held that Mr Gilbert, acting alone, had no power to instruct Conyers on behalf of SJTC and that Conyers acted without proper authority on behalf of SJTC in these proceedings.

139. Given these extraordinary circumstances SJTC has sought information from Conyers as to what it has done in the name of SJTC and what documents it has issued, filed with the Court or received on behalf of SJTC during the period 25 October 2019 and 26 March 2020. Before this Court, Conyers has taken the position that as it was never properly instructed by SJTC, there was never any attorney/client relationship and therefore there is no obligation on the law firm to provide any information to SJTC, as the "client", on whose behalf it acted during the period 25 October 2019 to 26 March 2020. This position is taken by Conyers in circumstances where SJTC contends that Conyers did not act in the best interests of SJTC as Conyers was in a position of actual conflict.

140. If the submission made by Conyers is correct in law, it exposes a scandalous state of affairs where an attorney in Bermuda can apparently represent a party in Court without any authority from the client but is under no obligation whatsoever to advise that "client" what steps the attorney has taken in the name of that purported client. For reasons set out in paragraph 136 above, the Court is satisfied that this submission is not correct in law. However, given the highly unsatisfactory position contended for by Conyers, the Court would, if necessary, exercise its inherent jurisdiction, referred to at paragraphs 111 to 112 above, to ensure that relevant information is provided by Conyers to SJTC, so that this Court can properly consider what, if any, consequential relief should be granted to SJTC.

141. As a separate ground as to why no order should be made against Conyers to provide information to SJTC, Conyers argues that the application by SJTC for information from Conyers constitutes a collateral attack on the Order of 19 December 2019 and the Trust Ruling.

142. As noted earlier, the Order of 19 December 2019 appears to have been obtained from Subair Williams J on an unopposed basis. At this application SJTC was represented by Conyers, acting on the instructions of Mr Gilbert and Conyers, in the name of SJTC, apparently agreed to the terms of this Order including paragraph 23 which provides that:

> "*all legal advice taken by [SJTC] in its capacity as trustee of the B Trust… shall vest immediately in Medlands… and shall cease to be the property of SJTC*."

143. Mr Malek, appearing for Medlands, submitted that paragraph 23 of the Order was merely intended to reflect the legal position that a successor trustee is able to assert against third parties relevant LPP. The issue here is whether the successor trustee can invoke LPP against SJTC, a former trustee, in the circumstances of this case. That issue is considered at paragraphs 149 to 156 below. No issue of collateral attack on the Order of 19 December 2019 properly arises if SJTC is able to maintain that no proper claim for LPP is maintainable in respect of the information it seeks.

144. As far as the Trust Ruling is concerned, it expressly envisages and allows an application such as the one made by SJTC against Conyers. At paragraph 118 of the Ruling, Subair Williams J expressly carved out applications such as the one presently made by SJTC against Conyers:

> *"118. My refusal to direct disclosure to SJTC in these proceedings is, of course, without prejudice to any entitlement that SJTC might establish at the civil procedure discovery stage in any such separate litigation."*

145. The present application by SJTC against Conyers is for information necessarily required so that SJTC may make an appropriate application for consequential relief. The present application for disclosure against Conyers is ancillary to the jurisdiction to grant consequential relief. SJTC's entitlement to information from Conyers is based upon the procedural rules identified in paragraphs 135 to 140 above. Accordingly, this application is expressly envisaged in paragraph 118 of the Trust Ruling and no issue of collateral attack on the Ruling arises.

146. In relation to the scope of the information required from Conyers the Court repeats the limitations expressed in relation to Mr Gilbert at paragraph 130 above. Conyers should be required to produce the relevant information during the period from the date of appointment of Mr Watlington and Mr Ferguson and the discharge of the *ex parte* Order. Accordingly, the Court orders that Conyers shall provide to SJTC copies of the files (electronic and hard copy) (including all emails) relating to the purported instruction in any matter on behalf of SJTC (in any capacity) during the period 25 October 2019 to 26 March 2020. The Court accepts that the application in the Trust Proceedings relating to the proper law of the Brockman Trust is closely related in time and substance to the change of trustee, which occurred during the relevant period, and documents and information in relation to that application should properly be disclosed. Further, for the purposes of the consequential relief application, Conyers is not required to disclose any documents relating to proceedings by SJTC and Medlands against Mr Tamine or in relation to any Beddoe application in the Trust Proceedings seeking the guidance of the Court as to whether proceedings should be commenced by SJTC against Mr Tamine. These limitations are without prejudice to any application, in separate proceedings, which SJTC, Mr Watlington and Mr Ferguson may pursue against Conyers for information and documents which they contend they are entitled to having regard to their former relationship.

Legal Professional Privilege

147. Turning to the issue of LPP, it is relevant to keep in mind, as submitted by Mr Brownbill, that whilst it is perfectly proper for a new trustee to obtain documents and information from a former trustee, a former trustee (even a trustee *de son tort*) would ordinarily need, and be entitled, to keep copies of documents received or created in its capacity as trustee. It is only through this material that a former trustee can account for its trusteeship and respond to third-party claims and allegations of breach of trust.

148. Indeed, in this case, paragraph 26 (1) of the Order of 19 December 2019 expressly preserves SJTC's liability for any acts or omissions which constitute breaches of trust for which it would have been liable if validly appointed as trustee. In the event an action was commenced against SJTC for breach of trust, SJTC would, in principle, be entitled to obtain copies of all relevant documents which were in the possession or control of SJTC during its tenure as trustee. No doubt it is for this reason that there does not appear to be any reported case where LPP has been invoked by a successor trustee against a former trustee in relation to documents or information which were in the possession or under the control of the former trustee during its tenure as a trustee. Most of the reported cases deal with the factual situation where a successor trustee is claiming books and papers belonging to the trust from the former trustee and the issue arises as to whether the former trustee can claim LPP against the successor trustee (see, for example, *Rawlinson & Hunter v ITG Limited* (Royal Court of Guernsey, 30 January 2017)).

149. Given the scope of the order proposed, the impact of any claim of LPP has, in the Court's view, been overstated. As a general principle, the Court accepts that a successor trustee may be able to assert against a third party a claim of LPP in relation to trust property. The Court accepts Mr Malek's submission that rights to LPP are properly to be analysed as ancillary rights to property. On this analysis when property passes from a former trustee to a successor trustee the ancillary rights to LPP are attached to the trust property and transferred to the successor trustee, with the result that a successor trustee is able to assert

those rights against a third party. This is supported by the judgment of Goff J (as he then was) in *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch. 553 at 562:

> *"Then in my judgment it is dearly established that legal professional privilege of a predecessor in title does enure for the benefit of his successor. This is so stated in* Halsbury's Laws of England*, 3rd ed., vol. 12 (1955), pp. 42 and 49, and in my judgment correctly so. The point was first clearly settled in* Minet v. Morgan *(1873) 8 Ch App 361"*

150. The Court accepts Mr Cumming's submission that legal advice in isolation, divorced from the underlying trust property, is unlikely to be considered as trust "property", capable of being conveyed to or assigned to a successor trustee or a third party. Support for this view is to be found in the judgment of Birt, B. in *In the Matter of the Bird Charitable Trust* [2012] (1) JLR 62 at 67:

> *"19 Article 34(1) of the Trusts (Jersey) Law 1984 ("the 1984 Law") provides as follows: "Subject to paragraph (2), when a trustee resigns, retires or is removed, he or she shall duly surrender trust property in his or her possession or under his or her control." In turn, "trust property" is defined in art. 1(1) of the 1984 Law as meaning "the property for the time being held in a trust."*
>
> *21... In our judgment, the expression "trust property" refers to the assets in the trust which are being held for the benefit of the beneficiaries and may be paid or applied for their benefit. It is not possible to distribute legal advice; it is simply something which is obtained by a trustee in order to help him in connection with the administration of the trust. This is so even where the legal advice is paid for out of the trust property.*
>
> *22 One must therefore revert to general principles of trust law in order to ascertain the nature of a trustee's duty to pass on legal advice to his successor as trustee.*

23 One starts from the position that a successor trustee is stepping into the shoes of a retiring trustee. He is assuming the same duties as the retiring trustee towards the beneficiaries. He is therefore on the face of it entitled to be placed in the same position as the retiring trustee so far as possible. Thus, if the retiring trustee has information or documents about the administration of a trust, he must normally make these available to the incoming trustee."

151. As noted at paragraph 147 above, a former trustee (even a trustee *de son tort*) would ordinarily need, and be entitled, to keep copies of documents received or created in its capacity as trustee, so that the trustee can account for its trusteeship and respond to third-party claims and allegations of breach of trust. Some such documents may contain legal advice and may be subject to LPP but yet may be required by the former trustee to account for its trusteeship.

152. In the Court's judgment, the trustee has, at the very least, the same access to documents which are subject to LPP as a former director of a company. The Court considered the position of a former director's access to a company's documents which are subject to LPP in *Medlands (PTC) Limited v The Commissioner of the Bermuda Police Service* [2020] SC (Bda) 20 Civ (26 March 2020) at [46], [49]:

"46. Counsel for Mr Tamine relies upon Derby v Weldon (No.10) [1991] 1 WLR 660 in support of the proposition that if a director has seen the privileged document in his capacity as a director then LPP cannot be asserted against him, even after he has ceased to be a director. In that case a senior in-house counsel prepared three memoranda which contained advice as to the steps that needed to be taken by the company to comply with the relevant regulatory body in the United States, the Commodities, Futures and Tradings Commission ("C.F.T.C."). The documents were plainly privileged and the issue was whether that privilege could be asserted against a director who had seen and considered that the documents in his capacity as a director. In relation to that argument Vinelott J said at page 670 F-H:

> *"Mr Purle submitted that privilege is not lost merely because a document is communicated by a company to an officer or employee. That is no doubt true where the question arises in litigation between the company and a third party. But it does not follow that the company can rely on the privilege attaching to, for instance, instructions and advice passing between the company and its solicitors, copies of which have been supplied to the director, if there is subsequently litigation between the company and the director and the advice or instructions are material to an issue raised in the litigation, for instance, if the question is whether the director acted in accordance with the directions of the company. The three documents in this category, as I see it, are material to the question whether Mr Weldon acted within guidelines laid down in negotiations with the C.F.T.C."*

49. On the basis of Derby v Weldon (No. 10) Mr Tamine would be able to take the position that privilege has been waived in relation to documents which he has seen whilst he was a director of the Applicant Companies and which are relevant to the issues in the pending proceedings between him and the Applicant Companies."

153. By analogy with *Derby v Weldon (No. 10),* SJTC would, in view of the Court, be able to take the position that the claim for LPP has been waived in relation to the documents of the Brockman Trust of which SJTC had knowledge and which are relevant to the present application for consequential relief. In this regard it is to be noted that these proceedings were commenced, at the instructions of Mr. Gilbert, without requisite authority, in the name of SJTC, to protect the interests of the Brockman Trust. The *ex parte* order of 6 November 2019 was obtained for the purposes of protecting the assets of the Brockman Trust. The Brockman Trust was the intended beneficiary of these proceedings. The commencement and continuation of these proceedings was approved and adopted, on behalf of the Brockman Trust, by Order of 19 December 2019 made in the Trust Proceedings. The Court in the Trust Proceedings approved that the Brockman Trust should indemnify Mr. Gilbert and SJTC in respect of all liability relating to costs of these proceedings. The Court has held that the *ex parte* Order obtained to protect the interests

of the Brockman Trust was wrongly obtained and the parties adversely affected by that Order, including SJTC, are entitled, in principle, to consequential relief. Documents of the Brockman Trust of which SJTC had knowledge are, SJTC contends, relevant to the present application for consequential relief. In relation to those documents, the Brockman Trust (asserting its rights to LPP through its successor trustee, Medland), is, in the Court's view, in the analogous position to that of the company in *Derby v Weldon (No. 10).* In the circumstances, SJTC is entitled to take the position that the current trustee of the Brockman Trust is unable to invoke LPP in relation to documents which SJTC had knowledge and which are relevant to the present application for sequential relief.

154. During the period 25 October 2019 and 6 November 2019, Mr Gilbert acted as a *de facto* sole director of SJTC and during the period 6 November 2019 to 26 March 2020, he acted as a sole director of SJTC under the authority granted to him by paragraph 3 of the Order of 6 November 2020. Mr Gilbert was the only person who instructed Conyers on behalf of SJTC and swore all affidavits on its behalf in these proceedings and in the Trust Proceedings. Mr Gilbert instructed Conyers to make the application for the removal of SJTC and the appointment of Medlands as a successor trustee. Mr Gilbert was, on any basis, during this period the directing mind and will of SJTC and as such his knowledge of the relevant documents and other information is properly to be attributed to SJTC. In this regard I was referred by Mr Malek to the judgment of Millett J in *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717. I found the judgment of Hoffmann LJ in the Court of Appeal in the same case at [1994] 2 All ER 685, to be of particular relevance to this issue.

155. During the period between 25 October 2019 and 26 March 2020 Conyers purported to act as an agent for SJTC and in particular for the purposes of corresponding on behalf of SJTC with other professional advisers and third parties. Conyers also purported to act as an agent for the purposes of representing SJTC in these proceedings and in the Trust Administration Proceedings. The knowledge of Conyers in purporting to act as an agent for SJTC is attributable to SJTC.

156. The documents and information referred to in paragraphs 123 to 125 (subject to the limitations in paragraph 130) and paragraph 134 (subject to the limitations in paragraph 146) are relevant to the application for consequential relief as the material will show what actions were taken on behalf of SJTC by Mr Gilbert and Conyers during the relevant period. This information is necessary for the Court to consider what consequential relief, if any, should be granted to SJTC. Accordingly, by analogy with *Derby v Weldon (No. 10),* SJTC is entitled to take the position that any claim for LPP is to be considered as waived and SJTC is entitled to disclosure of the documents and information.

(D) Applications for costs of these proceedings

157. Cabarita seeks an order that Mr Gilbert and Conyers should be jointly and severally liable to pay Cabarita's costs of the proceedings on the indemnity basis. SJTC, Mr Watlington and Mr Ferguson make the same application seeking an order that Mr Gilbert and Conyers should be jointly and severally liable to pay their costs of the proceedings on the indemnity basis.

Applications for costs against Mr Gilbert

158. Following the appointment of Mr Watlington and Mr Ferguson as directors of SJTC on 25 October 2019, Mr Gilbert instructed Conyers to commence these proceedings seeking a declaration that they were not directors and had no authority to act on behalf of SJTC. Mr Gilbert also instructed Conyers to apply for an order restraining Mr Watlington and Mr Ferguson from acting as directors of SJTC. By the March 2020 Judgment this Court has held that Mr Gilbert, acting alone, had no authority to instruct Conyers to commence these proceedings on behalf of SJTC. Given that Mr Gilbert had no authority to instruct Conyers to institute these proceedings, it is said that he should be liable to pay the costs of SJTC, Mr Watlington, Mr Ferguson and Cabarita.

159. In support of this application reliance is placed on judgment of William Trower QC (as he then was) in *Zoya Ltd v Ahmed* [2016] 4 WLR 174. In that case, Mr Haastrup claimed

to be the sole director of the company named Zoya Ltd and instructed solicitors to commence proceedings in the name of the company on that basis. It was subsequently determined that Mr Haastrup had never been appointed as a director of the company so that the proceedings had been commenced without authority. A costs order was made against Mr Haastrup on the indemnity basis and William Trower QC explained (at paragraph 5) that:

> *"I also gave further directions for the payment of monies out of court to Mr Ahmed and made a third party costs order against John Haastrup, such costs to be paid on the indemnity basis. The grounds on which I did so were that John Haastrup was responsible for procuring the proceedings to be issued and continued in Zoya's name without authority to do so, and thereafter was the individual who controlled the proceedings, which would have been for his own benefit if they had been successful. The interests of justice plainly demanded that the proceedings so procured be struck out as an abuse of process. I was satisfied that the proceedings were "exceptional" in the sense used in the authorities and that it was just for an order that John Haastrup, being the person who procured their commencement and continuation as an abuse of process, should be responsible for the costs of doing so."*

160. The jurisdiction to make a costs order against a person who authorises the commencement of proceedings without authority arises independently from the English third party costs order regime (see paragraph 66 of *Zoya Ltd v Ahmed*).

161. Reliance is also placed on the judgment of Arden LJ (as she then was) in *Smith v Butler* [2012] Bus LR 1836, where at paragraph 26 this "*well established*" practice is confirmed:

> *"More fundamentally, however, if I am right in my conclusion on the primary issue that Mr Butler had no authority to cause the Company actively to defend Mr Smith's applications, then it followed that Mr Butler was liable to pay the Company's costs*

on an indemnity basis under the well-established practice applying where proceedings are brought in a company's name without authority (see generally, Buckley on the Companies Acts, paragraph 127.10)."

162. In considering whether to make an order for costs against Mr Gilbert the Court has taken into account the following facts and circumstances:

(1) Mr Gilbert was warned that he had no authority to instruct Conyers to institute these proceedings and if he proceeded nevertheless there would be an application for indemnity costs in relation to those un-authorised proceedings. By letter dated 31 October 2019 Conyers stated that: *"our client [SJTC] will commence proceedings in the Supreme Court to seek resolution of this question of your clients' authority to have any role in the business of the Company and will further seek urgent injunctive relief to prevent harm to the Company from the actions resolved to be taken by your clients."* In response, by letter dated 5 November 2019, MDM, attorneys for Mr Watlington and Mr Ferguson, made clear that neither Mr Gilbert nor Conyers had any authority to commence these proceedings and both risked orders for indemnity costs being made against them: *"Mr Gilbert cannot institute proceedings in the name of the Company and our clients do not approve any such action… If Mr Gilbert wishes to commence and pay for the proceedings in his capacity as a Director, then that is his decision but any such proceedings will of course be contested and our clients will be seeking indemnity costs against Mr Gilbert. Given the above, it is self-evident that Conyers cannot represent the Company in any new proceedings."*

(2) The March 2020 Judgment has held that Mr Gilbert was responsible for procuring the proceedings to be issued in SJTC's name without authority to do so.

(3) Mr Gilbert was the individual who controlled the proceedings.

(4) Mr Gilbert instructed Conyers to obtain an *ex parte* injunction restraining Mr Watlington and Mr Ferguson from acting as a directors and allowing him to continue to act on behalf of the Company as sole director for the purposes of "*holding the ring*". Having obtained the *ex parte* order on the basis of this representation to the Court, Mr Gilbert instructed Conyers to make an application in the Trust Proceedings to remove SJTC as a trustee of the Brockman Trust and appoint Medlands as a successor trustee. The application to change the trustee was clearly in breach of the representation made to the Court that the purpose of the *ex parte* injunction was merely to "*hold the ring*."

(5) Having instructed Conyers to make the application to change the trustee of the Brockman Trust on 3 December 2019, Mr Gilbert failed to disclose that material fact to the Court at that time or at the directions hearing on 12 December 2019. Mr Gilbert failed to advise the Court of this momentous development until after the hearing in the Trust Proceedings on 19 December 2019 which resulted in the appointment of Medlands as a successor trustee. This was a serious breach of his duty to make full and frank disclosure of all material facts and developments to the Court.

(6) The commercial effect of the Order of 19 December 2019 made in the Trust Proceedings was, that whilst SJTC was removed as the trustee of the Brockman Trust, another company, Medlands, of which Mr Gilbert was the sole member and sole director became the successor trustee. The Order of 19 December 2019 ensured that Mr Gilbert could maintain his business relationship with the Brockman Trust and eliminated any potential threat posed by the appointment of Mr Watlington and Mr Ferguson as the majority directors of SJTC.

(7) Mr Gilbert, in his affidavit evidence, raised the issue that Mr Watlington and Mr Ferguson were acting in collusion with Mr Tamine and unreasonably, when requested, his attorneys would not withdraw that allegation with the result that

cross examination became necessary and thus extended the length of the hearing. In the end Mr Hagen (then appearing as counsel in the name of SJTC) did not suggest to either Mr Watlington or Mr Ferguson that they were acting in collusion with Mr Tamine.

163. Mr Chivers, in his address to the Court, took the position that no allegation of collusion was put to either Mr Watlington or Mr Ferguson because there was no allegation of collusion. The Court is unable to accept that no allegation of collusion was made in the evidence.

(1) At the close of the hearing on 6 November 2019, Mr Diel sought an order that Mr Gilbert attend the *inter partes* hearing for cross examination. Mr Adamson responded by saying "*I think all the deponents should in that case… If it is good for one director it is good for both, so we would like to cross examine directors as to the funding and why they are involved and who instructed them.*"

(2) At the directions hearing on 12 December 2019, the issue of cross examination was revisited and the Court directed that the cross examination would be limited to the issue whether Mr Watlington and Mr Ferguson were acting in collusion with Mr Tamine.

(3) On 3 January 2020 Mr Gilbert swore his Third Affidavit and made serious allegations against Mr Watlington and Mr Ferguson, MDM, attorneys for Mr Watlington and Mr Ferguson, and Canterbury Law, attorneys for Cabarita. In paragraph 21 and 23 he stated:

> "*21.I do not believe that Mr Watlington has been entirely frank about the funding arrangements he has agreed with Mr Tamine/Cabarita. At paragraph 19 of Watlington 1, he informed the Court that the remuneration which he had been promised was an annual fee of $125,000 plus expenses. However, I believe, for the reasons set out in paragraph 22 below that, in*

fact, in addition to the annual fee he has been promised his professional time which I assume means his hourly rate for all hours worked. For a practising attorney, acting as a director but charging his hourly rate, in a company requiring a great deal of time and effort, potentially it is a very large sum. Mr Watlington did not make any mention of this aspect of his promised package in Watlington 1. On the contrary, it appears to have been actively concealed.

23. My concern extends not just to the fact that Mr Watlington has not revealed the true extent of his remuneration promised by Mr Tamine but also that MDM have chosen to alter and cover-up a document from Canterbury Law. It seems likely that Canterbury Law would have been aware of, and have approved the decision to conceal part of the email exchange from the Court and from St John's. In the circumstances, I am concerned that both firms, and each of their respective clients, may have approved or were at least content with the text being covered up in the way it was and with Mr Watlington concealing the true extent of his remuneration. There may be a good reason for the decision to conceal the text which may be revealed by Mr Tamine or Mr Watlington during the course of this litigation. However, it certainly increases my concern about Mr Watlington (and, by extension, Mr Ferguson) and the extent of the understanding and apparent collusion with Mr Tamine." (emphasis added)

(4) On 4 February 2020, Conyers raised the issue of cross examination at the *inter partes* hearing stating: *"There are four witnesses for cross examination on the issue of collusion. It was the Purported Directors' wish to have cross examination. Given the growing number of issues at large and the limited time available there needs to be a focus on the priorities for this hearing. It does not appear to be a productive use of time for there to be cross examination, though we stand ready to conduct such cross examination of all respondent witnesses if any respondent insists on any cross examination."*

(5) MDM, attorneys for Mr Watlington and Mr Ferguson, responded by their letter of 6 February 2020 stating: *"As you will recall, it was ordered by the Court on 12 December 2019 that the parties' deponents attend the hearing for cross examination which would be limited to the issue of whether or not there is or has been collusion between our clients and Cabarita and/or Mr Tamine. These are very serious unsubstantiated allegations that your client has made against our clients and we do not believe that the Court can decide the issue of alleged collusion and the accusations that Mr Gilbert has made about both of our clients without cross examination of the deponents. If your client is prepared to withdraw all of its allegations of collusion made against our clients, then our clients will agree that there is no need for the deponents to be cross examined and the issue at the substantive hearing in relation to your client's injunction application can be confined to the validity our clients' appointment as Directors of St John's in accordance with the Bye-Laws and Bermuda law."* (emphasis added)

(6) Conyers responded by their letter of 10 February 2020 stating: *"It seems that what you really want our client to do is, now, to make a positive and irrevocable concession that there definitely has been no collusion between your clients and Mr Tamine; if so, that is plainly an unreasonable demand prior to discovery and fuller evidence. No party can be expected to make a concession of fact on such footing. However, since your clients have protested strongly that there was no collusion and are insisting on cross-examination, their evidence will need to be tested, albeit without prejudice to our client's ability to test further at trial after full discovery has been made."* (emphasis added)

(7) This aspect of the correspondence ended with a letter from MDM dated 11 February 2020 stating: "*We note and agree there are no allegations of fraud, collusion or breach of fiduciary duty made in the Statement of Claim. Doubtless this is because you have no evidence to support such allegations. That has not*

prevented your client from making repeatedly these (unsupported) allegations in his affidavit… Respectfully, it is you who should reconsider your approach when it comes to accusing individuals of impropriety without foundation. You should unequivocally withdraw these offensive and scandalous portions of the affidavits without prejudice to your right to assert them if you come into possession of material properly enabling you to do so."

(8) At the commencement of the hearing on 19 February 2020 the Court stated that the cross examination should be confined to "*the very narrow issue of collusion*". Mr Hagen, appearing in the name of SJTC, replied stating: *"That is correct, and that has been prepared accordingly. And I'm sure that counsel to my right will jump up and stop me if I stray from the righteous path in that connection."*

(9) Mr Watlington and Mr Ferguson were indeed cross-examined at the *inter partes* hearing in February 2020. Mr Ferguson had travelled from Australia to attend the hearing so that he could comply with the order for his cross examination on the issue of collusion. However, when they were cross-examined by Mr Hagen, it was never suggested to either of them that they were acting in collusion with Mr Tamine.

164. In the judgment of the Court, this review of the affidavit evidence of Mr Gilbert, inter partes correspondence and the cross examination of Mr Watlington and Mr Ferguson at the February 2020 hearing shows that Mr Gilbert and his legal advisers acted unreasonably. An allegation of "*apparent collusion*" between Mr Watlington, Mr Ferguson and Mr Tamine was expressly made by Mr Gilbert in his Third Affidavit. At the request of the parties the Court made the unusual order for cross examination in interlocutory proceedings but limited it to the narrow issue of collusion. Mr Gilbert and his legal advisers refused to withdraw the allegation of collusion made in his affidavit, even with the concession that SJTC would have the right to assert this allegation if it came into possession of material properly enabling it to do so. This necessitated Mr Ferguson

travelling from Australia to Bermuda so that he could be cross examined for a period of approximately one hour. Despite the fact that the sole purpose of the cross examination was limited to the issue of collusion, it was never put to either Mr Watlington or Mr Ferguson that they had colluded with Mr Tamine in any way. This, in the Court's view, constitutes unreasonable conduct on the part of Mr Gilbert and his legal advisers.

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.

166. The Court has not made any order in relation to the claim for costs on behalf of SJTC as the Court understands that Conyers, who acted in the name of SJTC in these proceedings to the date of the March 2020 Judgment, has already been paid directly by the Brockman Trust. In the circumstances there is no further liability on the part of SJTC to pay any legal costs to Conyers. In the circumstances it is sufficient that the Court makes an order that Conyers has no further entitlement to recover any legal costs and expenses relating to these proceedings from SJTC and it is so ordered.

167. Turning to the points made by Mr Chivers as to why Mr Gilbert should not be ordered to pay the costs of Mr Watlington, Mr Ferguson and Cabarita, Mr Chivers submits that the Court should observe the ordinary rule that costs follow the event. In this case the proceedings were commenced by SJTC as the Plaintiff. The Court, in its March 2020 Judgment, has struck out these proceedings (purportedly) commenced by SJTC and observing the ordinary rule in relation to the payment of costs, the Court should order that SJTC should pay the costs of Mr Watlington, Mr Ferguson and Cabarita. Mr Chivers points out that the Order of 19 December 2019, made in the Trust Proceedings, expressly provides that Medlands, the successor trustee of the Brockman Trust, may raise and pay from the Trust, SJTC's reasonable costs and expenses of and incidental to, and any other

liabilities arising in, these proceedings. As a result of the Order of 19 December 2019, Mr Chivers points out, SJTC is indemnified by the Brockman Trust in relation to any order this Court may make against SJTC and he invites the Court that any order in favour of Mr Watlington, Mr Ferguson and Cabarita should be made against SJTC.

168. The Court is of the view that making a costs order against SJTC is wrong in principle. In the March 2020 Judgment, this Court has held that these proceedings in the name of SJTC were commenced without any proper authority by Conyers on the instructions of Mr Gilbert. It follows that SJTC was never a proper party. SJTC is neither the winner nor the loser in these proceedings. As a matter of legal analysis it did not participate in the proceedings. Accordingly, there can be no proper basis for making an order that SJTC should pay the costs of the successful parties.

169. The fact that SJTC may be indemnified by the Brockman Trust in respect of any costs it is ordered to pay, and thus may have the ability to pay the costs, does not justify this Court making order against it. If it were otherwise, as Mr Brownbill correctly observes, then the wealthiest party to the proceedings would always be ordered to pay the costs of the other parties. This is not the practice of this Court.

170. Further and in any event, Mr Gilbert is in the same position as SJTC in relation to being indemnified by the Brockman Trust. It would appear that Mr Gilbert, just as SJTC, is also indemnified by the Brockman Trust in relation to any liability he may incur as a result of any adverse costs order in these proceedings. The Court was advised by Walkers (Bermuda) Limited, Mr Gilbert's attorneys, in a letter dated 10 November 2020, that:

> "*on 5 June 2020 a Deed of Indemnification was executed as between Medlands and Mr Gilbert. Under the terms of the Deed, Mr Gilbert is indemnified from and against any and all liabilities including for his own costs and the costs of others, that he may incur in relation to these proceedings, the appeal of the ruling of this court dated 26 March 2020, any appeals from the orders for consequential relief*

and the Cayman proceedings. Payments under the Deed are intended to be drawn on the assets of the A Eugene Brockman Charitable Trust."

171. Second, Mr Chivers submits that SJTC has ratified the commencement of these proceedings and, as a result, Mr Gilbert cannot be liable for having incurred costs without authority. He says that this result follows notwithstanding the March 2020 Judgment holding that Mr Gilbert and Conyers acted without authority of SJTC in commencing these proceedings.

172. Mr Chivers relies upon the conduct of SJTC following the March 2020 Judgment in support of his submission that SJTC has ratified the commencement of these proceedings in the name of SJTC. He relies upon the fact that SJTC is presently pursuing an application for its costs, and orders for the production information, documents and property. Mr Chivers maintains that the effect of these actions is that SJTC has ratified the proceedings. He argues that either SJTC is a party to the proceedings or it is not. As it has not applied to be joined, any application by SJTC *qua* party can only be based upon the original instruction from Mr Gilbert to commence proceedings on its behalf. MDM has entered a Memorandum of Appearance in these proceedings and seeks substantive orders on SJTC's behalf in these proceedings. Accordingly, Mr Chivers submits, it is unarguable that SJTC has ratified the commencement of the proceedings.

173. The Court is unable to accept this submission. By the March 2020 Judgment the Court struck out the Amended Writ of Summons and discharged the *ex parte* Order dated 6 November 2019 and this was confirmed by an Order of the same date. As a consequence of the March 2020 Judgment and Order of 26 March 2020 these proceedings came to an end and could no longer be revived. The effect of the March 2020 Judgment is that these proceedings were effectively a nullity and, as Mr Cumming correctly submits, it is not possible to ratify a nullity. However, the Court retained its residual inherent jurisdiction to provide consequential relief in respect of orders wrongly made by the Court. The 26 March 2020 Order specifically dealt with giving directions in relation to consequential relief. It provided that Mr Gilbert be joined as a defendant for the purposes of dealing with

consequential matters arising from the March 2020 Judgment. It also provided that any party seeking consequential relief shall file brief written submissions by 2 April 2020, setting out any consequential relief sought by that party and a brief summary of the basis on which any such relief is sought. The Court further directed that unless directions can be agreed in relation to outstanding consequential matters, the Court shall determine the directions on the papers.

174. It follows, therefore, that the Memorandum of Appearance was filed after these proceedings had come to an end and was filed in the context of seeking consequential relief flowing from the March 2020 Judgment holding that these proceedings had been commenced on behalf of SJTC without authority. The Memorandum of Appearance was filed after the 26 March 2020 Order setting out the brief directions in relation to consequential relief. In the circumstances the filing of the Memorandum on behalf of SJTC and seeking consequential relief cannot reasonably be construed as ratifying the initial commencement of the proceedings on behalf of SJTC, which by this stage had been struck out by an Order of this Court.

175. It is said by Mr Chivers that the conduct of SJTC in filing the Memorandum of Appearance following the March 2020 Judgment and seeking consequential relief flowing from the wrongful *ex parte* order of 6 November 2019 amounts to implied ratification of the initial commencement of these proceedings by Mr Gilbert and Conyers, without authority of SJTC, on 1 November 2019. For ratification to be implied from conduct, the conduct must be unequivocal: the conduct must not be such that it could be accounted for by other interpretations (see paragraph 2-077 *Bowstead & Reynolds on Agency 21st Ed*.).

176. In *Harrisons & Crossfield Ltd v L.N.W. Railway* [1917] 2 KB 755 at p 758 Rowlatt J held that:

> *"Ratification is a unilateral act of the will, namely, the approval after the event of the assumption of an authority which did not exist at the time. It may be expressed in words or implied from or involved in acts. It is implied from or involved in acts*

when you cannot logically analyse the act without imputing such approval to the party, whether his mind in fact approved or disapproved are wholly disregarded the question".

177. In considering whether the conduct is unequivocal in the sense that could not be accounted for by other interpretations, the Court will consider the background or matrix as it then existed (see *Shell Co. Australia Ltd v NAT Shipping Bagging Services Ltd* [1988] 2 Lloyd's Rep 1).

178. Applying these principles it is, in the Court's judgment, impossible to conclude that the conduct of SJTC in filing the Memorandum of Appearance following the March 2020 Judgment and seeking consequential relief is only consistent with the interpretation that SJTC was adopting the proceedings initially commenced by Conyers, without its requisite authority. Indeed, the application for consequential relief by SJTC is premised on the basis that the *ex parte* injunction was wrongly granted as a result of, *inter-alia*, lack of authority to commence proceedings in the name of SJTC. Furthermore, as noted above, the Memorandum of Appearance was filed after the Court had already made an Order striking out the underlying proceedings.

179. Mr Chivers also argues that Cabarita has ratified the commencement of these proceedings in the name of SJTC by Conyers. In this regard he relies on the letter written by Canterbury Law dated 8 November 2019 and addressed to Conyers and stating:

> "*Please confirm urgently… that you will apply forthwith to join our client [Cabarita] as a party to the proceeding and that you will serve on our client all documents relating to the proceedings*."

180. Mr Chivers argues that by inviting Conyers to add Cabarita as a party to the proceedings commenced in the name of SJTC, Cabarita must be considered as adopting the proceedings which have been commenced without authority. When the letter is considered

in context it is clear to the Court that Cabarita cannot reasonably be considered to be taking that position. The letter expressly states:

> *"We have been informed SJTC, acting (without authority) through Mr James Gilbert, has obtained on an ex parte basis an injunction restraining Mr James Watlington and Mr Glenn Ferguson… from holding themselves out as, or acting as, the directors of SJTC… We disagree strongly with the steps taken by SJTC in relation to that issue and we set out our client's position below… The appointment of [Mr Watlington and Mr Ferguson] was entirely lawful, valid, and effective… There is therefore no arguable legal basis for challenging the appointment of [Mr Watlington and Mr Ferguson]."*

181. In the letter dated 22 November 2019 to Conyers, Canterbury Law expressly states that *"Cabarita's position is that, on any view, Mr Gilbert had no authority to instruct your firm to commence proceedings in the name of SJTC."*

182. The Court does not consider that Mr Chivers' reliance on *Re Fletcher Hunt (Bristol) Ltd* [1988] BCC 703 assists in the circumstances of this case. The case holds that if the petitioner in the winding up of a company serves the petition on a firm of solicitors, which could only have authority to accept service if they had been clothed with that authority to accept it on behalf of the Company by persons of whom the petitioner was one, the petitioner did something through the agency of the solicitors which confirmed necessary authority. But here the correspondence made it clear that Mr Gilbert and Conyers had no such authority and Cabarita wished to join the proceedings so that it could apply to strike out the proceedings on the ground of lack of authority on the part of Mr Gilbert and Conyers to commence these proceedings on behalf of SJTC.

183. In the circumstances the Court concludes that by writing the letter of 8 November 2019, Cabarita has not ratified or adopted the proceedings commenced by Conyers in the name of SJTC. It is to be noted that no such argument was advanced by Mr Hagen, appearing in

the name of SJTC, at the hearing of the strike out application for lack of authority in February 2020.

184. Third, Mr Chivers submits that Mr Gilbert derived no personal benefit from commencing these proceedings and obtaining the *ex parte* injunction on 6 November 2019. He says that the fact of whether the director is deriving personal benefit from the proceedings is a significant consideration and he points out that in paragraph 5 of *Zoya*, William Trower QC specifically mentions the fact that the proceedings *"would have been for [Mr Haastrup's] own benefit if they had been successful."*

185. It is not clear to the Court that personal benefit to the director, who is responsible for the commencement of unauthorised proceedings on behalf of the company, is an essential requirement to the making of a costs order against that director under the jurisdiction identified in *Zoya* and *Smith v Butler*. In any event, it is reasonably clear, that there was an indirect benefit to Mr Gilbert as a result of instituting these proceedings and as a result of obtaining an *ex parte* injunction on 6 November 2019.

186. In paragraph 4 of his Fourth Affidavit Mr Gilbert confirms that whilst he is not directly remunerated by SJTC, he does receive a salary of $300,000 from St Helier's Bay, where he is employed as a Trust Manager, which provides services to SJTC, including accounting, administrative, trustee and ancillary services to the Brockman Trust. The annual fees charged by St Helier's Bay to the Brockman Trust are not disclosed. On any basis, the Brockman Trust, with assets exceeding $3 billion, is a substantial client of St Helier's Bay.

187. As noted at paragraph 46 above the obtaining of the *ex parte* injunction on 6 November 2019 allowed Mr Gilbert to make an application in the Trust Proceedings, without any interference from the majority directors of SJTC, to remove SJTC as trustee and appoint Medlands as successor trustee to the Brockman Trust. This was at a time when Mr Gilbert was the sole director and sole member of Medlands. The effect of the Order made on 19 December 2019 in the Trust Proceedings was that Mr Gilbert would retain control of the

trustee company (Medlands), irrespective of the outcome in these proceedings and as a result the financial arrangements between the Brockman Trust and St Helier's Bay would remain in place. In the circumstances, it is, in the Court's view, unrealistic to say that Mr Gilbert derived no personal benefit from these proceedings.

188. Fourth, Mr Chivers argues that as between Mr Gilbert and SJTC an order that Mr Gilbert pay SJTC's costs would be circular in effect because Mr Gilbert has a right to an indemnity under Bye-law 62(1) of SJTC's Bye-laws. He further argues that an order that Mr Gilbert pay the costs of Mr Watlington, Mr Ferguson and Cabarita would be subject to the same indemnity from SJTC.

189. Under Bye-law 62(1) Mr Gilbert, as a director of SJTC, it is entitled to be indemnified out of the assets of SJTC *"PROVIDED THAT this indemnity shall not extend to any matter arising from any willful negligence, willful default, fraud or dishonesty which may attach to any of the said persons".*

190. As noted earlier, SJTC is not pursuing a positive claim for costs in these proceedings. Accordingly, no issue of circularity arises. As far as the claim for costs by the other applicants is concerned, in the Court's view, any right Mr Gilbert may have to an indemnity under the Bye-law provision is a separate matter. There may well be an issue as to his entitlement under the relevant provision given that the indemnity is excluded for acts or omissions which may amount to *"willful negligence".* Any entitlement to indemnity under the Bye-law provision should to be pursued in separate proceedings.

191. Having considered the submissions made by Mr Chivers, the Court is satisfied that the appropriate order in this case is that Mr Gilbert be liable to Mr Watlington, Mr Ferguson and Cabarita for the costs of these proceedings on the indemnity basis. The Court also orders that Mr Gilbert make payments, within the next 28 days of 50% of the amount claimed, on account of his liability to pay costs to Mr Watlington, Mr Ferguson and Cabarita. If it was necessary, the Court would make the same order under the jurisdiction

identified in *Dymocks Franchise Systems (NSW) v Todd* [2004] UKPC 39, relying upon the factors outlined above.

Applications for costs against Conyers

192. Mr Watlington, Mr Ferguson and Cabarita contend that Conyers should pay the costs of these proceedings on the indemnity basis. The claim for costs is advanced on two grounds.

193. First, it is said that Conyers is liable for breach of its warranty of authority viz. that it had authority to act for SJTC.

194. Second, Conyers should be made liable to pay the costs under the inherent jurisdiction of the Court to require its officers to compensate third parties for wasted costs as identified in *Myers v Elman* [1940] AC 282.

Breach of warranty

195. In this case, the issue of Mr Gilbert's authority to instruct Conyers to commence these proceedings was in fact raised in the pre-action correspondence by MDM, acting for Mr Watlington and Mr Ferguson. In its letter of 5 November 2019, MDM took the position that Mr Gilbert cannot institute proceedings in the name of SJTC because the proceedings have not been authorised by the board of the company and the majority of the directors did not approve the proposed action.

196. The issue of Mr Gilbert's authority to instruct Conyers to commence these proceedings depended upon whether Mr Watlington and Mr Ferguson had been validly appointed by the written resolution of the sole shareholder of SJTC, Cabarita, on 25 October 2019. That very issue was expressly raised in the Writ of Summons filed by Conyers on 1 November 2019 which sought a declaration that Mr Watlington and Mr Ferguson had not been validly appointed.

197. The issue of Mr Gilbert's authority was known to be controversial and, as noted above, was expressly raised by Mr Watlington and Mr Ferguson in pre-action correspondence. The same issue was raised by Cabarita in correspondence from Canterbury Law on 8 and 22 November 2019. It was also the very issue that was determined by the Court in these proceedings.

198. In the circumstances, it is necessary to consider the basis of this jurisdiction and in particular whether reliance by the defendant is an essential requirement for a claim for breach of warranty of authority by a barrister and attorney.

199. The case frequently cited for settling the requirement for a claim for breach of warranty of authority by a solicitor is the Court of Appeal's decision in *Yonge v Toynbee* [1910] 1 KB 215. In that case, the issue of want of authority arose because the defendant was of unsound mind, the solicitors nonetheless entered an appearance on his behalf. The proceedings were then struck out and an issue arose as to whether the solicitors should pay the plaintiff's costs. The argument before the court was whether there was any distinction in principle between the case in which the agent never had any authority but believed that he had and the case in which the agent originally had authority but it had come to an end without his knowledge. The Court of Appeal held that there was no relevant distinction and as the liability was strict, it was not necessary to prove that the agent knew or should have known of the want of authority.

200. The importance of *Yonge v Toynbee* lies in the fact that whilst the court was exercising its inherent jurisdiction to supervise and control the officers of court, in the case of a solicitor acting without authority, it analysed the issue of liability of the solicitor by employing traditional agency principles. Buckley LJ explained the basis of liability at pages 225-226:

> *"I can see no distinction in principle between the case where the agent never had authority and the case where the agent originally had authority, but that authority has ceased without his knowledge or means of knowledge. In the latter case as*

much as in the former the proposition, I think, is true that without any mala fides he has at the moment of acting represented that he had an authority which in fact he had not. In my opinion he is then liable on an implied contract that he had authority, whether there was fraud or not… His liability arises from an implied undertaking or promise made by him that the authority which he professes to have does in point of fact exist."

201. Buckley LJ expressly noted at page 227 that liability may be excluded by the solicitor in a particular case:

> *"This implied contract may, of course, be excluded by the facts of the particular case. If, for instance, the agent proved that at the relevant time he told the party with whom he was contracting that he did not know whether the warrant of attorney under which he was acting was genuine or not, and would not warrant its validity, or that his principal was abroad and he did not know whether he was still living, there will have been no representation upon which the implied contract will arise."*

202. Swinfen Eady J. also employed the agency analysis but emphasised that in these cases the court is exercising its inherent jurisdiction over the officers of the court:

> *"Where an agent represents that he has authority to do a particular act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have. It would seem to follow from this, in principle, that, where the authority upon which an agent is professing to act is a continuing authority, there is a continuing representation by him that he has authority to do the series of acts, and an implied contract or warranty that he possesses such authority."* (Page 231)
>
> "*I wish to add that in the conduct of litigation the Court places much reliance upon solicitors, who are its officers; it issues writs at their instance, and accepts*

> *appearances for defendants which they enter, as a matter of course, and without questioning their authority; the other parties to the litigation also act upon the same footing, without questioning or investigating the authority of the solicitor on the opposite side; and much confusion and uncertainty would be introduced if a solicitor were not to be under any liability to the opposite party for continuing to act without authority in cases where he originally possessed one.*" (page 233)

203. Mr Cumming, for Mr Watlington and Mr Ferguson, submits that to analyse the jurisdiction that the court is exercising by reference to contractual analysis is incorrect and invites the Court not to follow *Yonge v Toynbee*. Second, to the extent that some of the English cases state that reliance upon the representation is an essential requirement in breach of warranty cases, that requirement should be rejected. Third, he invites the court to not follow recent English cases such as *The Sherlock Holmes International Society Ltd* [2016] EWHC 1076 (Ch) and *Zoya Ltd v Sheikh Nasir Ahmed* [2016] EWHC 2249 (Ch).

204. Mr Cumming relies upon *Newbiggin-By-The-Sea Gas Company v Armstrong* (1879) 13 Ch 310 as setting out the correct approach where the court imposed costs liability on the solicitor without recourse to the contractual analysis. However, it should be noted that *Newbiggin* was in fact cited in the judgment of Swinfen Eady J in *Yonge v Toynbee* at page 231.

205. *Yonge v Toynbee* was referred to in the speech of Lord Porter in *Myers v Elman* [1940] AC 282 which again emphasises that the court is exercising its inherent jurisdiction over the officers of the court. At page 336 Lord Porter said:

> "*I think the principle is more accurately stated by Swinfen Eady J. (as he then was) in* Yonge v. Toynbee*: "Whatever the legal liability may be, the Court, in exercising the authority which it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority." In other words, the Court is not enforcing a civil right, but exercising its authority over the conduct of its officer.*"

206. *Yonge v Toynbee* was referred to with approval in the judgment of Steyn J in *Babury Limited v London* Industrial PLC [1989] Lexis Citation 1514:

> *"In view of the fact that the jurisdiction has been called in question in the present case, it is right that I should play in the rationale of this principles. For that explanation I turn to Yonge v Toynbee [1910] 1 KB 215."*

207. Steyn J also appears to consider that reliance on the representation may be an important issue:

> *"On the other hand, the general rule may sometimes have to yield to special circumstances, for example in a case where the opposing party's solicitor is informed that there was a doubt about the solicitors authority, in which case there is no unequivocal representation of authority."*

208. In *Nelson v Nelson* [1997] 1 WLR 233, the Court of Appeal confirmed the limited nature of the representation made by the solicitor, namely, that he had a client, that the client bore the name of the party to the proceedings and that the client had authorised the proceedings, but not that his client had a good cause of action or was solvent. *Myers v Elman* was cited in this case and was considered by the Court. The Court of Appeal noted that *Yonge v Toynbee* had been cited in *Myers v Elman* and that *"none of their Lordships questioned the correctness of Yonge v Toynbee, in which the solicitor had totally innocently continued to act for a person of unsound mind, and was found liable for the costs of the other party"*.

209. *Yonge v Toynbee* was again considered by the Court of Appeal in *SEB Trygg Liv AB v Manches and others* [2006] 1 WLR 2276. *Newbiggin* was cited to the Court in argument. At paragraph 60 Buxton LJ stated:

> *"The legal basis for making a solicitor liable was settled by this court in Yonge v Toynbee [1910] 1 KB 215….This contractual theory had been developed in earlier cases involving agents other than solicitors, notably Collen v Wright [1857] 8 E & B 647 where at 656 Willes J. said:*

The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for a another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise.

In other words he was describing what we would now call a collateral contract. Although this contractual theory presents some conceptual problems in the case of a solicitor conducting litigation, this is nevertheless the established basis for the liability."

210. In *Skylight Maritime SA v Ascot Underwriting Ltd* [2005] EWHC 15, Colman J confirmed the jurisdiction and procedure established by *Yonge v Toynbee*:

> *"It is clear from the authorities that if a solicitor commences or pursues proceedings without the authority of his apparent client, the court has a jurisdiction to make a summary order against that solicitor for costs incurred by the opposite party caused by the solicitor's unauthorised conduct. In Yonge v. Toynbee [1910] 1 KB 215 the Court of Appeal approved such summary procedure and identified the conceptual basis for such summary orders as breach of an implied contract or warranty given by the solicitor that he was authorised so to act by his client: see Buckley LJ. at p229 and Swinfen Eady LJ. at p231. The nature of the remedy was confirmed to be a claim for damages and the measure of damages the costs thrown away by the opposite party.*
>
> *The exercise of this summary jurisdiction, without the need for the opposite party to start new proceedings against the solicitor, emanates from the solicitor being an*

officer of the court with a duty to act in the proceedings before it only with appropriate authority."

211. Recent English authorities appear to hold that there must be reliance upon the representation. If there is a dispute about the authority of a director to give instructions on behalf of a company and that very issue is before the court, it is unlikely that the court will hold that there was a relevant warranty as to authority. Part of the reasoning is that a solicitor does not warrant what he says and does on behalf of his client. This very issue arose in *Re The Sherlock Holmes International Society Ltd* [2016] 4 WLR 173, where the director's authority to give instructions on behalf the company was the issue to be determined by the Court. Mark Anderson QC, deputy High Court judge held at [29]-[30]:

> *"29. Moreover the rationale of inferring a warranty of authority, identified in paragraph 20 above, does not arise where the very issue in the litigation is the authority alleged to have been warranted. It is not the case that Mr Aidiniantz was unable to make his own inquiries about Mr Riley's status as a director. After 16 October he was exactly as well placed as Pinder Reaux to inquire whether or not Mr Riley's appointment had expired. A person equally well placed as the agent to know whether the agent's authority has come to an end does not have the benefit of an implied warranty of authority: Smout v Ilbery (1842) 10 M and W 1 as explained in Yonge v Toynbee by Buckley LJ at 227-228. And in Babury Ltd **v** London Industrial plc (1989) NLJ 1596, Steyn J observed that the general rule (that a warranty is given) "may sometimes have to yield to special circumstances, for example in a case where the opposing party's solicitor is informed that there was a doubt about the solicitor's authority."*
>
> *30. Pinder Reaux did not need to inform Mr Aidiniantz that there was a doubt about their authority. He knew that he could not, in the words of Buckley LJ, safely assume it. In asserting that they did have authority, Pinder Reaux were advancing Mr Riley's case, not warranting it. A solicitor does not warrant his authority where that issue is known to be controversial and the parties are engaged in litigation to*

find the answer."

212. The same issue as in *Sherlock Holmes* was before the court in *Zoya Ltd v Sheikh Nasir Ahmed* [2016] 4 WLR 174 and William Trower QC (as he then was) expressly followed the reasoning in *Sherlock Holmes* and at paragraphs [60]-[63] held that there must be reliance in the sense that he was induced thereby act to his prejudice:

> *"60… In my judgment it is necessary for Mr Ahmed to establish that he relied on the warranty in the sense that he was induced by it to act to his prejudice. This reflects the approach adopted by both Buckley LJ and Swinfen Eady J in* Yonge *v* Toynbee *and seems to me to be a logical consequence of the fact that the jurisdiction results from an implied contract of the form described by Sholl J in the passage in the* Schlieske *cited with approval by Hilary Heilbron QC in* Padhiar *v* Patel.
>
> *61. In my judgment, Mr Ahmed is not able to satisfy this requirement. I agree with Ms Stayning's submission that the reason for this is that he cannot establish either that he relied on the warranty which was given by the Solicitors, or that the breach of warranty committed by them was causative of any loss.*
>
> *62. More particularly Mr Ahmed cannot establish that he was* misled *(the word used by Swinfen Eady J in* Yonge *v* Toynbee*) in any way by the Solicitors' warranty of authority, nor can he say that he incurred any costs on what Buckley LJ called* the faith *of the Solicitors' representation that they were authorised by Zoya to commence and proceed with the action. This is because:*
>
> *62.1 it is clear that, before the proceedings were even issued, Mr Ahmed knew that the identity of the person or persons entitled to act for Zoya and to give instructions on its behalf was at the core of the family dispute, which I have described in greater detail in the July Judgment; and*

> *62.2 Mr Ahmed must have determined by no later than the time at which any material recoverable costs were incurred (i.e. the preparation and service of his defence) that he would challenge the authority of John Haastrup to give instructions on behalf of Zoya and therefore the authority of the Solicitors to act on its behalf.*
>
> *63. Both of these factors mean that, although the warranty of authority was given at the beginning of the proceedings, and continued for some time thereafter, it had no relevant effect on the position of Mr Ahmed."*

213. The reasoning in *Sherlock Holmes* and *Zoya* was followed in *Bronze Monkey LLC v Simmons & Simmons* [2017] EWHC 3097 (Comm), where Andrew Henshaw QC (as he then was) stated the current approach at [56] as follows:

> *"These two authorities indicate that at least once authority becomes the "very issue" at stake in the proceedings, any implied warranty of authority ceases, if only because the other party can no longer claim thereby to have be induced. Further, the passage quoted above from In re Sherlock Holmes International Society Ltd:*
>
> > *"Pinder Reaux and counsel chose to express their position as acting for the Company because that was consistent with the case which they were instructed to advance, but it was obvious to all that that begged the very question in dispute. It was merely incidental to Mr Riley's position to assert that the Company shared it. Applying ordinary objective principles, a reasonable person in the position of Mr Aidiniantz would not have concluded that in making (and causing counsel to make) submissions to that effect, Pinder Reaux were warranting that Mr Riley was still a director. Legal representatives do not warrant the arguments they make on behalf of their clients"* (my emphasis)

though expressed in terms of warranty, may also have some bearing on the question of what representation the solicitor could reasonably be regarded as making. The passage is directed not so much to the question of actual reliance, but rather to the question of what, applying ordinary objective principles, a reasonable person would understand the solicitor to be saying."

214. *Zoya* was cited in approving terms in the judgment of Patten LJ in *P&P Property Limited v Owen White & Catlin LLP* [2018] EWCA Civ 1082 and Gloster LJ (now Justice of Appeal in the Court of Appeal for Bermuda) agreed with Patten LJ in that regard. Patten LJ said [59]:

"This assumes that reliance is a necessary condition of liability but P&P challenge that. The traditional view is that liability depends upon the representee being induced to act in reliance on the warranty because (as with any other unilateral contract) that constitutes the acceptance and consideration for the guarantee which the agent gives. This appears in the statement of principle in the passage from Collen v Wright quoted earlier. For there to be inducement by the warranty it must be relied upon. Mr Blaker referred us to the judgment of Tuckey LJ in Donsland Ltd v Hoogstraten [2002] EWCA Civ 253 where he says (at [14]) that the issue might not be settled law but the trend in all the more recent cases has been to regard reliance as an essential feature or condition of the cause of action for the reasons I have given and Mr Blaker has provided no reason in principle for us not to adopt that as the correct view: see the discussion in Zoya Ltd v Sheikh Nasir Ahmed (trading as Property Mart) (No 2) [2016] EWHC 2249 (Ch) at [36]."

215. The above review of English authorities establishes that, as a matter of English law, basic principles relating to liability of solicitors acting without authority were indeed settled in *Yonge v Toynbee*. Whilst the court is exercising its inherent jurisdiction over its officers, the liability of solicitors is analysed in contractual terms. Recent cases make it clear that reliance by a party on the representation of authority is an essential ingredient of the claim based upon breach of warranty by a solicitor. When authority becomes the very issue at

stake in proceedings, any implied warranty of authority ceases if only because the other party can no longer claim thereby to have been induced by any representation as to authority.

216. Mr Cumming invites the Court not to follow *Yonge v Toynbee* line of cases and in particular, the recent English cases which hold that when authority becomes the very issue at stake in the proceedings, any implied warranty of authority ceases. He referred the Court to case law in Hong Kong and Australia and urged that the Court should consider following those cases.

217. Mr Cumming referred to the Hong Kong decision in *Grand Field Group Holdings Limited v Tsang Wai Lun Wayland & Ors* [2010] HKCU 1673, a decision of Poon J. The case concerned a Bermuda registered company which was listed on the Hong Kong Stock Exchange. At all material times, two camps of protagonists were embroiled in the fight over the control of the Company's board. At a board meeting held on 27 November 2008, the 6 current directors of the Board purported to appoint 5 more directors. At a special general meeting held in December 2008, the shareholders elected 8 directors.

218. These elections resulted in two derivative actions commenced by shareholders in which the validity of the appointments of both the 5 directors and the 8 directors was challenged. Kennedys accepted instructions on behalf of the Company at the instruction of the 5 directors. At trial in August 2009 it was held that the 5 directors had not been validly appointed. Following the trial Kennedys applied for leave and obtained leave to cease acting for the Company. In due course, the successful party applied for costs of the proceedings against Kennedys.

219. In considering the applicable principles, Poon J stated that the applicable principles are well settled and relied upon *Yonge v Yonbee* and *Babury Limited v London Industrial PLC:*

> *"When a solicitor purported to act for a client in an action, he impliedly warranted that he had the authority to represent the client. When it later transpired that in fact*

he did not have such authority, he had acted in breach of the implied warranty. The court would normally order him to personally pay the costs needlessly incurred by the opposing party. It matters not whether the solicitor had acted bona fide and in reasonable reliance of the instructions; or that he had been deceived into believing that he had the authority to act for the client; or that quite innocently he did not know that there was no authority or the authority once existed had ceased to exist. See Yonge v Toynbee [1910] 1 KB 215, per Buckley LJ at pp.224-225, Swinfen Eady J at 233-234; Babury Limited v London Industrial PLC & Another, The Times, 20 October 1989".

220. It seems clear that Poon J was applying the contractual analysis referred to in *Yonge v Toynbee* and accepted that this was not an inflexible rule and if the other side is informed that there is doubt as to the solicitor's authority then there may be no unequivocal representation of authority. At [14] Poon J stated:

> "*This is, however, not an inflexible rule. It may sometimes have to yield to special circumstances. For example, in a case where the opposing party's solicitor is informed that there is doubt about the solicitor's authority, there may be no unequivocal representation of authority. Or the facts of the case are such that it may be right to leave the aggrieved party to the remedy in an action in damages for breach of warranty of authority against the solicitor. That said, when a solicitor who clearly acted without authority, causing by his representation of authority the opposing party to incur wasted costs, must usually expect to be ordered to pay his costs. See Babury Limited v London Industrial PLC & Another, supra, per Steyn J.*"

221. It appears that Poon J was seeking to apply English law as it existed in 2010. However, it is also clear that Poon J has taken the view that a solicitor is liable for breach of warranty even in circumstances where the very issue of authority is raised in the proceedings. This appears from [33]-[34] of the judgment:

"[33] Mr Lee then submitted that if Kennedys were held to be liable, then whenever there is a battle for boardroom control in a listed company, the solicitors for the company, with absolutely no exception be at risk on costs, subject to any separate recovery on indemnity from those instructing them. He said that is most unattractive from a public policy standpoint.

[34] For my part, I can see no particular hardship against the solicitors as envisaged by counsel. It is up to the solicitors to decide if they wish to represent the company embroiled in a board from battle. Before accepting instructions to act for the company, the solicitors must obtain all necessary instructions from those instructing them on the matter pertaining to authority. They should then exercise their professional judgment to decide if, based on the instructions, they have the requisite authority to act for the company. When they do decide to act for the company, they must be taken to have been satisfied that they had the authority to do so. If it later turns out that they do not have the authority, I can see no reason why they should not be held responsible for all the consequences flowing from their error of judgment."

222. Poon J's decision in *Grand Field* was followed by the decision of Harris J in *Ho Chor Ming v Hong Kong Chiu Chow Po Hing Buddhism Association Limited* [2013] HKCU 2221. This was another case of the dispute relating to boardroom control and the issue of authority to act for the company was raised in the proceedings. The defendant issued a summons to set aside or strike out the writ and statement of claim on the basis that the proceedings were issued without the valid authority of the company.

223. Harris J stated, as was common ground between the parties, that the law dealing with liability of solicitors where there is an issue as to their authority is set out in the decision of Poon J in *Grand Field.* Harris J was referred to the judgment of Deputy High Court Judge Pow SC in *Kim Lung Transportation v Ip Man Fai* (unreported HCA 271/2012, 6 June 2012), where the learned judge had expressed the view that reliance on the

representation was an essential ingredient of the claim for breach of warranty. Harris J disagreed with that view at [26]-[27]:

> *"[26] However, the Deputy High Court Judge goes on in paragraphs 35-37 to consider one particular aspect of the principle, namely, that it arises from an implied warranty of the authority. The Deputy High Court Judge finds that in order for it to operate, it is necessary that the other party has relied on the warranty. The Deputy High Court Judge goes on in paragraph 37 apparently to find that where an application is made to strike out a High Court action by Defendants on the grounds of want of authority, it necessarily follows that there cannot have been any reliance by the Defendants on the warranty, the principles described in Grand Field Group Holdings Ltd are not applicable, and, therefore, the solicitors for the Plaintiffs cannot be made personally liable for costs. With respect I disagree.*
>
> *[27] It seems to me to be clear that where solicitors purportedly act for a company which instigates legal proceedings, if those solicitors are not properly instructed, then absent special circumstances they will prima facie be liable to pay the costs incurred by the Defendant of a successful application to strike out the proceedings based on an absence of authority. The fact that by making the application to strike out, the Defendants are necessarily indicating that they do not accept that the solicitors have authority in my view cannot be a reason for a solicitor avoiding responsibility for having commenced proceedings without proper authority. Such an approach would in most cases render the principle inapplicable."*

224. The Court was also referred to the Australian case of *Zimmerman Holdings & Ors* [2002] NSWSC 447, a decision of Bryson J. The relevance of this authority is diminished by the fact that the court was relying upon a statutory provision which allowed the court to make costs orders *"against a person who purports without authority to conduct proceedings in the name of another person*". It is to be noted that Bryson J is clearly of the view that the English law in relation to claims against solicitors for acting without authority is to be found in the Court of Appeal's decision in *Yonge v Toynbee.*

225. The two authorities from Hong Kong show that Poon J in 2010 and Harris J in 2012 were seeking to apply English law in relation to claims for breach of warranty of authority against solicitors. In particular they were seeking to apply the contractual agency analysis referred to in *Yonge v Toynbee.* At the time of these decisions there was no clear English authority as to whether reliance was an essential ingredient of a claim for breach of warranty of authority against a solicitor. However, recent English decisions in *The Sherlock Holmes International Society Ltd* [2016]; *Zoya Ltd v Sheikh Nasir Ahmed* [2016]; and *Bronze Monkey LLC v Simmons & Simmons* [2017] all speak with one voice. Reliance upon the representation is an essential ingredient of a claim for breach of warranty of authority against solicitors. In particular, if the very issue of authority is raised in the proceedings then any warranty ceases on the basis that there can have been no reliance upon any such warranty. The decision in *Zoya*, as noted at paragraph 214 above, was referred to in approving terms by Patten LJ in *P&P Property Limited v Owen White & Catlin LLP* [2018] EWCA Civ 1082 at [59].

226. Having reviewed the authorities, the Court prefers the reasoning in the recent English cases relating to the issue of reliance and in particular the reasoning expressed in paragraphs [28-36] and [50-63] in the judgment of William Trower QC (as he then was) in *Zoya.* It follows, therefore, that the Court holds that, as a matter of Bermuda law, reliance upon the representation is an essential ingredient of a claim for breach of warranty of authority against a barrister and attorney. Furthermore, if the very issue of authority is raised in the proceedings, there can be no relevant warranty of authority, as there could not have been any reliance upon any such warranty. As noted earlier the issue of authority of Mr Gilbert to institute these proceedings was challenged in the pre-action correspondence and in particular in the letter from MDM to Conyers of 5 November 2019 and the letter from Canterbury Law to Conyers of 8 November 2019. The very issue of the authority of Mr Gilbert is raised in the proceedings in that the proceedings seek a declaration that Mr Watlington and Mr Ferguson have not been validly appointed. The authority of Mr Gilbert is directly dependent upon the issue of whether Mr Watlington and Mr Ferguson have been validly appointed. In the circumstances, the Court holds that any

claim for costs of these proceedings based upon breach of warranty of authority by Conyers must necessarily fail.

Inherent jurisdiction of the Court

227. The alternative basis for seeking costs against Conyers, as submitted by Mr Brownbill, is under the inherent jurisdiction of the Court founded on a breach of duty owed by a barrister and attorney to the Court. The jurisdiction was clearly established by the House of Lords in *Myers v Elman* [1940] AC 282 and, despite statutory provisions for wasted costs orders, continues to exist (see *Kimathi v The Attorney- General for Bermuda* (Civil Appeal No. 9 of 2017) at [10]).

228. In *Ridehalgh v Horsefield* [1994] Ch, 205, Sir Thomas Bingham M.R. (as he then was) held that *Myers v Elman* is authority for the following five fundamental propositions:

> *"(1) The court's jurisdiction to make a wasted costs order against a solicitor is quite distinct from the disciplinary jurisdiction exercised over solicitors. (2) Whereas a disciplinary order against a solicitor requires a finding that he has been personally guilty of serious professional misconduct the making of a wasted costs order does not. (3) The court's jurisdiction to make a wasted costs order against a solicitor is founded on breach of the duty owed by the solicitor to the court to perform his duty as an officer of the court in promoting within his own sphere the cause of justice. (4) To show a breach of that duty it is not necessary to establish dishonesty, criminal conduct, personal obliquity or behaviour such as would warrant striking a solicitor off the roll. While mere mistake or error of judgment would not justify an order, misconduct, default or even negligence is enough if the negligence is serious or gross. (5) The jurisdiction is compensatory and not merely punitive."*

229. Mr Chapman, for Conyers, emphasizes that the breach of duty to the Court must result from "*serious negligence*" and not merely a mistake or error of judgment.

230. A further issue emphasized by Mr Chapman is that lawyers are constrained by the duty of confidentiality and privilege to their clients from telling the whole story to the Court and the Court must not draw an adverse inference from their failure to provide a full and complete explanation. Sir Thomas Bingham also referred to this aspect in *Ridehalgh v Horsefield* at 237B and stated:

> *"The respondent lawyers are in a different position. The privilege is not theirs to waive. In the usual case where a waiver would not benefit their client they will be slow to advise the client to waive his privilege, and they may well feel bound to advise that the client should take independent advice before doing so. The client may be unwilling to do that, and may be unwilling to waive if he does. So the respondent lawyers may find themselves at a grave disadvantage in defending their conduct of proceedings, unable to reveal what advice and warnings they gave, what instructions they received. In some cases this potential source of injustice may be mitigated by reference to the taxing master, where different rules apply, but only in a small minority of cases can this procedure be appropriate. Judges who are invited to make or contemplate making a wasted costs order must make full allowance for the inability of respondent lawyers to tell the whole story. Where there is room for doubt, the respondent lawyers are entitled to the benefit of it. It is again only when, with all allowances made, a lawyer's conduct of proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order."*

231. In *Medcalf v Mardell* [2003] 1 AC 120 (House of Lords), Lord Bingham considered, at 135-136, that the above passage should be strengthened as follows:

> *"First, in a situation in which the practitioner is of necessity precluded (in the absence of a waiver by the client) from giving his account of the instructions he received and the material before him at the time of settling the impugned document, the court must be very slow to conclude that a practitioner could have had no sufficient material. Speculation is one thing, the drawing of inferences sufficiently*

strong to support orders potentially very damaging to the practitioner concerned is another.

…

Only rarely will the court be able to make "full allowance" for the inability of the practitioner to tell the whole story or to conclude that there is no room for doubt in a situation in which, of necessity, the court is deprived of access to the full facts on which, in the ordinary way, any sound judicial decision must be based. The second qualification is no less important. The court should not make an order against a practitioner precluded by legal professional privilege from advancing his full answer to the complaint made against him without satisfying itself that it is in all the circumstances fair to do so. This reflects the old rule, applicable in civil and criminal proceedings alike, that a party should not be condemned without an adequate opportunity to be heard. Even if the court were able properly to be sure that the practitioner could have no answer to the substantive complaint, it could not fairly make an order unless satisfied that nothing could be said to influence the exercise of its discretion. Only exceptionally could these exacting conditions be satisfied. Where a wasted costs order is sought against a practitioner precluded by legal professional privilege from giving his full answer to the application, the court should not make an order unless, proceeding with extreme care, it is (a) satisfied that there is nothing the practitioner could say, if unconstrained, to resist the order and (b) that it is in all the circumstances fair to make the order."

232. Lord Hobhouse addressed the issue of the relevance of legal professional privilege in relation to this jurisdiction at page 146 C and held:

"The contrary submission of the appellants on this appeal treats the existence of privileged material as a kind of trump card which will always preclude the making of a wasted costs order on the application of an opposite party. They ask how can a court evaluate whether privileged material which, ex hypothesi, it has not seen would affect its decision without first seeing that material. But this argument does not reflect what was said in Ridehalgh. Once the lawyer is given the benefit of any

doubt, any element of unfairness is removed. It must depend upon the circumstances of each particular case. For example, a lawyer who has to ask for an extension of time or an adjournment because, say, he has forgotten about a time-limit or has accidentally left his papers at home, would not be able to say that any privileged material could possibly excuse his incompetent mistake. To make a wasted costs order against him would not (absent some additional factor) be inappropriate or unfair. In other situations privileged material may have a possible relevance and therefore require assumptions favourable to the lawyer to be made."

233. For purposes of considering the costs claim against Conyers the Court refers to Section B above (paragraphs 7 to 80) and in particular paragraphs 52 to 80 dealing with the duty of full and frank disclosure to the Court.

234. The duty of full and frank disclosure to the Court, as submitted by Mr Brownbill, imposes a personal duty upon the barrister and attorney to ensure that the client complies with this obligation. As the editors of *Gee on Commercial Injunctions* (6th ed.) explain at 9-015:

> *"On an ex parte application, those acting for the applicant have a personal responsibility to take reasonable steps to ensure that there is a full and frank disclosure to the Court on the application. If a solicitor subsequently finds that that disclosure was not made, as soon as he is aware of this, he must advise his client to correct the position and that he cannot continue to act unless the position is disclosed to the other party. If the Court accepts a worthless cross-undertaking in damages, the defendant may in consequence be left uncompensated for losses caused by an injunction. If the worthless cross-undertaking was accepted by reason of non-disclosure or misrepresentation, and the solicitor was responsible for this in breach of his duties to the Court, this may be dealt with by the court, under its inherent jurisdiction to order solicitors to pay compensation to the other party."*

235. In addition, as noted above at paragraph 80, Rule 39 of the *Barristers Code of Professional Conduct 1981* imposes a duty upon a barrister and attorney to inform the

court of any developments which may affect the information already provided to the court. This again is a personal duty imposed upon a barrister and attorney arising out of a Bermuda statutory provision made under the authority of the Bermuda Bar Act of 1974.

236. Whilst the presentation at the hearing for the *ex parte* injunction on 5 and 6 November 2019 was deficient in the respects identified at paragraphs 56 to 57 above, the Court accepts Mr Chapman's submission that any such breach does not rise to the level of "serious negligence."

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.

240. The Court has paid close attention to the observations by Lord Bingham in relation to the need for extreme caution given that a barrister and attorney owes a duty of confidentiality and LPP to the client and as such may not be in a position to give a complete explanation to the Court. However, as set out in paragraph 79 above, in this case it is important to bear in mind that Mr Gilbert had no choice but to comply with his legal obligation to provide full and frank disclosure the Court. This was his legal duty and it was Conyers' obligation to advise him accordingly. In the event Mr Gilbert chose not to follow the advice and discharge his duty to the Court, it was the duty of Conyers to cease acting for Mr Gilbert and SJTC. In the circumstances, the Court is satisfied that any privileged material will not be relevant to this application. Furthermore, as noted at paragraph 67 above, Mr Gilbert and Conyers have in fact provided an explanation as to why this development was not disclosed to the Court prior to the 19 December 2019 Order in the Trust Proceedings. The explanation given is that Conyers took the view that the obligation to give full and frank disclosure to the Court ceased when the proceedings became fully *inter partes*.

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.[3]

242. In relation to applications for wasted costs orders under the statutory provisions, Mr Chapman emphasised that the conduct complained of must cause a waste of costs. In this regard he referred to the judgment of Sir Thomas Bingham M.R. in *Ridehalgh v Horsefield* at 237 E:

> *"As emphasised in Re a Barrister (Wasted Costs Order) (No 1 of 1991) , above, the court has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential. Where the conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body or the Legal Aid authorities, but it is not one for exercise of the wasted costs jurisdiction."*

243. Mr Brownbill denies that the inherent jurisdiction is limited to costs being increased as such but argues that this is in fact the case as if all the information had been provided to the Court the injunction would have been discharged.

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[3] Following the circulation of the draft Judgment to Counsel on 4 December 2020, for purposes of correcting typographical errors, the Court received a Note from Mr Chapman dated 8 December 2020, inviting the Court to reconsider its findings against Conyers on the basis that the decision to change the trustee was made on the advice of Leading Counsel given at a Conference held in London on the 2nd and 3rd December 2019. Mr. Chapman referred to a letter from Conyers to Medlands dated 8 December 2020 which stated *"Leading (and Junior) Counsel, who had been instructed for over a year on what was now long-running litigation, advised in relation to strategy and approved all decisions. The duty to return to the Chief Justice was not identified. Conyers believes that leading counsel did not think it was necessary… The decision not to go back to the Chief Justice was not deliberate"* (emphasis added). It appears that Conyers'obligation to advise the Court of the momentous decision to change the trustee either under the general law relating to full and frank disclosure to the Court (paragraphs 68-80 above) or under Rule 39 of the Barristers Code of Professional Conduct 1981, was not raised, discussed or decided upon at the Conference with Leading Counsel. Having considered the submissions made by Conyers, Cabarita, SJTC, Mr Watlington and Mr Ferguson, and having reviewed the authorities in relation to the appropriate approach for the Court to take when invited to reconsider the Court's findings set out in a considered draft Judgment, the Court has concluded that this is not an appropriate case where the Court should revisit its findings. Had the Court reconsidered its findings against Conyers, the court would have made the same findings for the reasons set out in paragraphs 11-15 of the written submissions dated 10 December 2020 made on behalf of Cabarita; paragraphs (a)-(g) of the letter from MDM dated 9 December 2020, submitted on behalf of SJTC, Mr Watlington and Mr Ferguson; and the letter from MDM dated 10 December 2020.

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

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.

(E) Application for Leave to Appeal

248. By Notice of Motion dated 9 April 2020, Mr Gilbert seeks leave to appeal the March 2020 Judgment to the Court of Appeal.

249. The underlying proceedings are, on any basis, highly unusual. In the underlying proceedings SJTC ("**Company**"), as a separate legal entity, seeks to set aside the appointment of two directors made by its sole shareholder. The appointment (i) complies with the procedural requirements of the Company's Bye-laws; (ii) is within the powers granted to the sole shareholder by the Company's constitution; (iii) does not purport to affect the interests of the Company's creditors; (iv) and by definition, is incapable of constituting minority oppression. The Company accepts that the two newly appointed directors are proper persons to be appointed as directors and expressly disavows any improper collusion between the sole shareholder (or Mr Tamine) and the newly appointed directors.

250. During the hearing, the Court asked Mr Chivers, who has unrivalled expertise in company law, as to whether he was aware of any case in the common law world where a company, as a separate legal entity, had challenged the appointment of a director by its sole shareholder on the basis that the company had "concerns" as to the motivation of its sole shareholder. Mr Chivers was not aware of any such case. The Court also asked Mr Chivers whether he was aware of any case in the common law world where a director of a company, acting in that capacity, had sought to challenge the appointment of another director by the company's sole shareholder. Again, he was not.

251. When these proceedings were commenced in November 2019, Mr Gilbert was a director of SJTC and as such, had a legitimate interest in the ongoing commercial affairs of the Company. However, as a result of the Annual General Meeting ("**AGM**") of SJTC which took place on 9 April 2020, Mr Gilbert was not re-elected as a director and is no longer a director of SJTC. Mr Gilbert accepts that he is no longer a director and indeed, positively seeks to rely on his status as a former director of SJTC in correspondence in order to narrow the scope of his fiduciary obligations to SJTC.

252. In the circumstances, it is difficult to see what continuing interest Mr Gilbert has in prosecuting this appeal. It is noted that he is not on risk for his own costs or any adverse costs orders in relation to this appeal. As noted at paragraph 170 above, Medlands, as trustee of the Brockman Trust, has agreed to indemnify Mr Gilbert against all liability including for his own costs that he may incur in relation to this appeal.

253. At the previous hearings it appeared to the Court that the underlying proceedings lacked substance and appeared to be contrived. Now that Mr Gilbert is no longer a director of SJTC and has no other connection with SJTC, the proposed prosecution of this appeal by him makes no practical sense.

254. The Court has considered the written and oral presentation of counsel in relation to the leave to appeal application. I propose to dismiss that application on the grounds that (i)

given that Mr Gilbert is no longer a director of SJTC, the proposed appeal is now academic; and (ii) the proposed appeal has no real prospect of success. I propose to deal briefly with these two grounds.

The appeal is academic

255. As noted above, at the AGM of SJTC which took place on 9 April 2020, Mr Watlington and Mr Ferguson were elected as directors of SJTC. However, Mr Gilbert was not re-elected as a director of the Company.

256. Mr Gilbert accepts that he is no longer a director of SJTC. At paragraph 22 of his Fifth Affidavit he asserts that; "*I am also keenly aware of my obligations as (then) a Director of St John's <u>and as a former director from 9 April 2020".</u>*

257. Mr Gilbert has taken the position that now he is a *former* director of SJTC and as a result his duties and obligations to SJTC are narrower and different. In Walkers', his Bermuda attorneys, letter of 15 April 2020 it was stated on Mr Gilbert's behalf that:

> *"Matters have, however, been overtaken by the decision of the shareholder of the Company to remove our client as a director at the AGM. You will appreciate that as a former director our client's duties and obligations are different to those which he owed during the currency of his directorship of the Company: see e.g. <u>Eurasian Natural Resources Corporation Ltd v Judge</u> [2014] EWHC 3556 (QB). Our client is mindful of his ongoing duties as a former director of the Company and will, of course, comply with them."*

258. As Mr Brownbill rightly contends, even if the Amended Writ of Summons is restored by the Court of Appeal, Mr Gilbert is not in a position to take the matter any further. The newly elected Board of Directors of SJTC will simply not pursue this action. In the circumstances, the appeal is entirely academic.

259. Furthermore, the newly elected directors are in a position to convene an extraordinary general meeting of its sole shareholder, Cabarita, and Cabarita is in a position to ratify the actions of the member in relation to the appointment of directors on 25 October 2019. It follows, that it is possible today to ratify the appointment of Mr Watlington and Mr Ferguson as directors on 25 October 2019, effected by the written resolution of the sole member. The effect of that ratification would be that it would relate back to 25 October 2019 with the result that the appointments of Mr Watlington and Mr Ferguson would be valid between the period 25 October 2019 and the AGM on 9 April 2020. Accordingly, it can be seen that this appeal is academic not only for the future but also in relation to the past commencing with the appointment the directors on 25 October 2019.

260. In *Hutcheson v Popdog* [2012] 1 WLR 782, Lord Neuberger MR stated at [15] the conditions which had to be complied with before the Court of Appeal will entertain an appeal which is academic:

> *"Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."*

261. In *Gawler v Raettig* [2007] EWCA Civ 1560, Sir Anthony Clarke MR stated at [36] that such appeals are likely to be "*very rare*":

> *"the court will not entertain an appeal between private parties in private litigation unless it is in the public interest to do so. Moreover, this is likely to be a very rare event, especially with the rights and duties to be considered are private and not public."*

262. The proposed appeal arises solely from a private law dispute between private parties and there is no public interest in the proposed appeal being heard. Indeed, in my view, none of the conditions referred to by Lord Neuberger in *Hutcheson v Popdog* are satisfied. Accordingly, I refuse leave to appeal on the basis that the proposed appeal is entirely academic.

No real prospect of success

263. The test for granting leave is well established and for this purpose and content to rely upon the English Practice Direction (Court of Appeal Civil Division) [1999] 1 WLR 1027:

> *"The relevant test for granting leave to appeal are set out in the Practice Direction (Court of Appeal Civil Division) [1999] 1 WLR 1027. The general test, and the test on points of law, are as follows:''*
>
> *"2.8.1 The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. . . . 2.9.1 Permission should not be granted [on a point of law] unless the judge considers that there is a realistic prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case. . ."*

264. The Court considers that there is no realistic prospect that the Court of Appeal is likely to come to a different decision from that set out in the March 2020 Judgment.

(1) In relation to the contention that Mr Gilbert had "*residual authority*" to commence these proceedings in the name of SJTC, cases such as *Re Union*

Accident Insurance Co Ltd [1972] 1 WLR 640 certainly hold that in the event of appointment of provisional liquidators the directors retain residual power to challenge the petition for winding up on behalf of the company. However, those cases do not support the proposition that any single director can instruct solicitors on behalf of the company and oppose the making of winding up order on behalf of the company. The limited power is given to the Board as a body and not to individual directors. There is no real prospect that the Court of Appeal will hold that (i) the residual power referred to in *Union Accident* extends beyond the appointment of provisional liquidators context; (ii) any single director (as opposed to the collective body of directors) has any such residual power to institute all manner of proceedings in the name of the company.

(2) In relation to the principles recognised in *Bowthorpe Holdings v Hills* [2003] 1 BCLC 226, the Court held that even if the appointments of Mr Watlington and Mr Ferguson could be considered as a "*transaction*", the appointment in question was a "*perfectly lawful and intra-vires transaction.*" At the strike out application all allegations of collusion and other improprieties were withdrawn against Mr Watlington and Mr Ferguson. They were to be considered as fit and proper directors and their appointment would have no adverse impact upon the creditors of the company or by definition, the minority shareholders. Against that was the submission of Mr Hagen that "*Mr Tamine thought that by rolling the dice and appointing those two gentlemen in office… he would stand a better chance… of the claim not being pursued with quite the same vigour.*" There is no real prospect that the Court of Appeal will hold that Mr Hagen's submission is capable invalidating the otherwise valid appointments of Mr Watlington and Mr Ferguson as directors of SJTC.

(3) In relation to the alleged breach of the Waterford Charitable Trust and its impact upon the validity of the appointment of Mr Watlington and Mr Ferguson, there is no real prospect that the Court of Appeal will deviate from the clearly

established legal position in the House of Lords decision in *IRC v Bibby* [1945] 1 All ER 667. As far as the application of the equitable maxim that *"equity looks as done that which ought to be done"* is concerned, there is no realistic prospect that the Court of Appeal will not apply the clearly established rules of law in *IRC v Bibby* on the basis of this equitable principle.

(4) In relation to the ground that SJTC has *locus standi* to complain about the administration of the Waterford Charitable Trust, for the reasons set out at paragraph 89-114 of the March 2020 Judgment, there is no realistic prospect that the Court of Appeal will take a different view. Specifically in relation to section 47A of the Trustee Act 1975, there is no doubt, as set out in the Explanatory Memorandum, that its purpose was to restore the law relating to flawed exercise of fiduciary powers to the position as it was thought to be under the common law before the decision of the UK Supreme Court in *Pitt v Holt* [2013] 2 AC 108. There is no real prospect that the Court of Appeal will hold that section 47A changed the law in other respects or in relation to *locus standi*. There is no prospect that the Court of Appeal will interfere with the discretionary decision to decline to give leave, in any event, under section 47A(5)(d).

(F) Orders made by the Court

265. Having regard to my rulings above, the Court makes the following orders:

(1) In relation to Cabarita's application for information from Mr Gilbert, the Court orders that Mr Gilbert swear an affidavit, by or before 24 December 2020, as set out in paragraph 92(1) above and provide the documentary evidence as set out in paragraphs 92(2), 93(1), and 93(2) above.

(2) In relation to SJTC's, Mr Watlington's and Mr Ferguson's application for information from Mr Gilbert, the Court orders that Mr Gilbert swear an affidavit, by or before 24 December

2020, as set out in paragraph 123 above, and provide copies of the documents referred to in paragraphs 124 to 125 above, subject to the limitations set out in paragraph 130 above.

(3) In relation to SJTC's application for information from Conyers, the Court orders that Conyers provide to SJTC, by or before 24 December 2020, the information and documents set out at paragraph 134 above, subject to the limitations set out in paragraph 146 above.

(4) In relation to the claim for costs on behalf of SJTC, the Court orders that Conyers has no further entitlement to recover any costs and expenses relating to these proceedings from SJTC.

(5) In relation to the claim for costs against Mr Gilbert, the Court orders that Mr Gilbert be liable to Mr Watlington, Mr Ferguson and Cabarita for the costs of these proceedings on the indemnity basis. Mr Gilbert is further ordered to make a payment, within the next 28 days of the 50% of the amount claimed, on account of his liability to pay costs to Mr Watlington, Mr Ferguson and Cabarita.

(6) In relation to the claim against Conyers, the Court orders that Conyers shall be liable to Mr Watlington, Mr Ferguson and Cabarita (i) for 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. It is further ordered that the liability of Conyers to pay the costs up to the extent above is on a joint and several basis with Mr Gilbert.

(7) In relation to the application for leave to appeal the March 2020 Judgment, the Court orders that leave is refused.

266. The Court will hear the parties in relation to the costs of these applications, if required.

Dated this 14th day of December 2020

NARINDER K HARGUN

CHIEF JUSTICE