IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 205 OF 2017

IN THE MATTER OF THE ESTATE OF ISRAEL IGO PERRY DECEASED

BETWEEN

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs

and

(1) LOPAG TRUST REG.
(2) PRIVATE EQUITY SERVICES (CURAÇAO) NV
(3) FIDUCIANA VERWALTUNGSANSTALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON
(7) RON GREENSPOON
(8) MIA GREENSPOON
(9) ADMINTRUST VERWALTUNGS ANSTALT

Defendants

Appearances:	**Mr David Brownbill QC instructed by Walkers on behalf of the Plaintiffs**
	Mr Justin Fenwick QC instructed by Campbells on behalf of the First Defendant and Admintrust (the *Trustees*)
	Mr Graham Brodie QC instructed by Carey Olsen on behalf of the Fifth Defendant
	Mr Christopher Harlowe of Mourant Ozannes on behalf of the Joint Receivers
Before:	**The Hon. Justice Segal**
Heard:	**7- 8 September 2020**
Further submissions:	**5 October, 2020**
Draft judgment circulated:	**23 November, 2020**
Judgment delivered:	**1 December, 2020**

JUDGMENT FOLLOWING CONSEQUENTIALS HEARING

Introduction

1. The Plaintiffs' claims relate to the share (the ***Share***) in Britannia Holdings (2006) Ltd, a company incorporated in the Cayman Islands (***BH06***). The Plaintiffs sought to set aside the transfer of the Share by the late Mr Israel Igo Perry (***Mr Perry***) to the First Defendant. The Plaintiffs made two claims acting in different capacities. First, the First Plaintiff (who is Mr Perry's widow) claimed that the transfer was made in breach of her proprietary rights in and to the Share arising under Israeli matrimonial property law, so that Mr Perry was not entitled to transfer the Share and to the extent he did so the transfer should be said aside as against her (the ***Israeli Matrimonial Property Claim***). Secondly, the First Plaintiff and the Second Plaintiff (who is the elder daughter of the First Plaintiff and Mr Perry) also claimed, in their capacity as the representatives of Mr Perry's estate for the purpose of these proceedings, that the transfer was made by mistake (the ***Mistake Claim***).

2. On 27 May 2020, I handed down my judgment (the ***Judgment***) after trial and dismissed the Plaintiffs' claims. The Plaintiffs have an unrestricted right of appeal and on 9 June 2020 they issued a notice of appeal (the ***Appeal***) and on 3 August 2020 filed detailed grounds of appeal (the ***Grounds of Appeal***). The First Defendant served a respondents' notice on 17 August 2020 and a three-day hearing of the Appeal before the Court of Appeal has been listed for 26-28 April 2021.

3. This is my judgment dealing with various applications for consequential relief (the ***Applications***). The Applications can be summarised as follows:

   (a). the Plaintiffs' application for the continuation of the injunction (the ***Injunction***) originally obtained by the Plaintiffs on 17 October 2017 on an *ex parte* basis but subsequently continued and amended following various *inter partes* hearings (the Injunction prohibits, *inter alia*, dealings with the Share and its proceeds) and the appointment of the receivers (the ***Receivers***) who were originally appointed in respect of the Share pursuant to my order dated 5 April 2018 (the ***Injunction Issue***). The decisions contained in the Judgment were given effect by an order dated 27 July 2020 (the ***July 2020 Order***) in which the Plaintiffs' claims were dismissed (in paragraph 2 of the July 2020 Order) and I ordered that the Injunction remain in force and the appointment of the

Receivers continue "*pending the Consequentials Hearing*" (i.e. the hearing of the Applications), which I take to mean until an order is made on the Applications.

(b). the Trustees' application that the Court impose various conditions on the continuation of the Injunction and the appointment of the Receivers (the ***Conditions Issue***).

(c). the Trustees' application for a variation of the Injunction so as to permit it to use funds derived from BH06 to pay its legal expenses and other expenses and liabilities (the ***Trustees' Application to Use Funds***).

(d). the Plaintiffs' application to continue the case management stays in relation to the remaining part of the Trustees' counterclaim and the proceedings (FSD 186 of 2017 and FSD 204 of 2017) commenced by BH06 for *Norwich Pharmacal* relief and for various orders relating to the appointment of directors of BH06 (the ***Parker Proceedings***) (the ***Continuation of the Stays Application***).

(e). the parties' various applications in relation to the costs of the trial and various interlocutory hearings (the ***Costs Issues***).

(f). the Trustees' and the Fifth Defendant's application for a payment on account of their costs prior to taxation (the ***Trustees' and the Fifth Defendant's Application for a Payment on Account***).

(g). the Trustees' and the Fifth Defendant's request for pre-judgment interest on their costs (the ***Pre-Judgment Interest Issue***).

(h). the parties' applications with respect to the timing of any taxation process (the ***Taxation Issue***).

4. I note that the Trustees did also file a summons seeking an order for security for the costs of the Appeal but this application was not addressed in their skeleton argument and I believe it was not pursued. To the extent that it was, based on the materials before me, I would dismiss the application. My conclusions on each of the other applications summarised above are set out below.

The background

5. As regards the Injunction, I summarised the position as follows in my judgment dated 28 November 2018 (the ***November Judgment***) (at [10] - [11]):

> *"10. The Injunction prohibits all the defendants (including the First Defendant and the Fifth Defendant) from disposing of or dealing with the Share, any dividend or distribution in respect of the Share (or property representing such dividend or distribution) and from exercising or purporting to exercise any rights (including voting rights) in respect of the Share.*
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> *11. Prior to the granting of the Injunction certain steps (the **Solid Dilution**) had been taken by a wholly owned Curaçao subsidiary of [Britannia Guarantee National Insurance Company – BGNIC] called Solid Holding NV (**Solid)** to dilute BGNIC's shareholding and issue new shares (giving 99% of Solid's share capital) and pay a substantial dividend to a Curaçao foundation called Solid Private Fund Foundation (**SFPF**), said by the defendants to be controlled by the Plaintiffs and their associates. After the defendant became aware of the Solid Dilution because of references to it in the evidence filed in support of the application for the Injunction, various further applications were made in the Proceedings. These sought information concerning the Solid Dilution and the assets and funds that Solid and SFPF had disposed of and now retained and orders or undertakings from the Plaintiffs to preserve the status quo, protect the position of the parties and ensure that no further assets or funds held by BGNIC, Solid or SFPF could be disposed of or dissipated pending the trial in the Proceedings. On 6 February 2018, in order to preserve (at least some of) BGNIC's rights of action in respect of the Solid Dilution, I approved a consent order giving BGNIC permission to commence protective proceedings in Curaçao against Solid (which proceedings were filed on 8 February 2018)."*

6. The final form of the Injunction is contained in the order dated 11 April 2018 (the ***April 2018 Order***). As a condition to the continuation of the Injunction, the Plaintiffs were required, and agreed, to give certain undertakings (the ***Plaintiffs' Undertakings***). These are set out in paragraphs 2, 3, and 4 of the April 2018 Order:

> *"2. Subject to the Plaintiffs providing (and complying in full with) fresh undertakings in accordance with paragraphs 3 and 4 below, and until further Order, the Defendants must not:*
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> *2.1 dispose of, encumber, or deal with any share or shares in Britannia Holdings (2006) Ltd ("BH06") (the "Shares") or any title, interest, right or power in such Shares;*
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> *2.2 dispose of, encumber, or deal with any dividend or distributions in respect of such Shares or any asset or property representing such dividend or distribution or the proceeds of sale of such asset or property; and*
>
> *2.3 exercise or purport to exercise any rights (including any voting rights) or any powers in respect of the Shares.*

3 *The Plaintiffs and each of them shall undertake to the Court (in a form approved by the Court) as follows:*

3.1 That she will not deal with, encumber, dispose of, make payments out of, or take any other steps, whether directly or indirectly, in respect of the assets of and/or the shares of and/or her interests in BH06, [BGNIC], Solid Holding NV ("Solid"), and/or SFPF, or any title, interest, right or power in such assets and/or shares thereof;

3.2 That she will not dispose of, encumber, pay away, use or otherwise deal with any dividend or distributions made by BH06, BGNIC, Solid and/or SFPF (or in the case of the Second Plaintiff the proceeds of any loan made by Solid) or any asset, funds or property representing such dividend or distribution or the proceeds of sale of such asset or property;

3.3 That she will exercise all and any of her rights and powers (held directly or indirectly) in relation to Solid and SFPF (save to the extent that the exercise of such powers would result in criminal or other liabilities to unconnected third parties) to ensure that no dividends or distribution shall be made from Solid or SFPF, and that no further payments shall be made out of the assets and funds of Solid and SFPF, in each case until the conclusion of these proceedings or further order of the Court; and

3.4 That she will exercise all and any of her rights and powers (held directly or indirectly, and save to the extent that the exercise of such powers would result in criminal or other liabilities to unconnected third parties) so that (1) the Receivers shall as soon as practicable and in any event within 14 days of the date of this Order (subject to delays beyond the Plaintiffs' control) be named (with the agreement of the bank and account holder concerned) as joint account holders or otherwise designated (in a manner agreed by the Receivers) so that the Receivers' consent is required to withdrawals from and (2) so that the Receivers are entitled to full information concerning SFPF's account ….

4. The undertakings required by paragraph 3 above:

4.1 shall be given by each Plaintiff in writing, signed by the Plaintiff personally;

4.2 shall within 5 working days of the date of this Order be filed by each Plaintiff with the Court and served on each of the other parties;

4.3 shall contain a confirmation from each of the Plaintiffs that she has submitted to the jurisdiction of the Cayman Islands and that it has been drawn to her attention and that she understands that if she breaches the undertakings or any of them she may be held in contempt of Court and may be imprisoned or fined or have her assets seized;

4.4 shall not contain any exception or derogation which would permit the Second Plaintiff to procure that SFPF makes, or to permit SFPF to make, any distributions or payments for the purpose of funding maintenance expenses of the Perry family trust structures."

7. As regards the appointment of the Receivers, the order in which their powers are set out is the order dated 5 April 2018 (the ***Receivership Order***) as amended by an order dated 16 September 2019. In the November Judgment (at [12]) I noted the following regarding the basis on which the Receivers were appointed and their powers:

> *"On 5 April 2018 I made (the Receivership Order) for the appointment of receivers (the Receivers) in respect of the Share. The purpose of this application was also to ensure that the status quo was and the assets in BH06, BGNIC, Solid and SFPF were preserved pending the trial in the Proceedings. The Receivers were given wide powers including the power to (a) exercise all and any of the rights attaching to the Share including making changes to the boards of directors of BH06 and BGNIC and requesting the directors to take or refrain from taking any action; (b) bringing proceedings in any jurisdiction and (c) applying to the Court for directions. The powers were to be exercised for the purposes set out in paragraph 3 of the Receivership Order which were (i) to preserve and protect the Share and the value of the Share until and pending the trial of the Plaintiffs' claims; (ii) ensuring that BH06 and BGNIC were managed by competent and independent directors so as to protect and preserve the value of those companies' assets and to discharge liabilities properly incurred owing and due and payable by them pending trial and (iii) to the extent that the Receivers considered it necessary or appropriate in order to ensure that the purpose in (i) was achieved, taking into account the undertakings to preserve property given by the Plaintiffs, reviewing the conduct of and actions taken by the directors of BH06 and BGNIC prior to the appointment of the Receivers and taking or procuring the taking of action (with the Court's sanction before the commencement of proceedings) to preserve and protect the position of BH06 and BGNIC until and pending the trial of the Plaintiffs' claims. In the Note of Orders to be made following the 21-23 February Hearing (the **Note of Orders**) I set out the terms of the order I would make and the reasons for structuring the Receivership Order in the manner I proposed. I explained that the Receivers were given powers so that they could ensure that the:*
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> > *"directors in conjunction with the [Receivers] [could] consider whether further action or proceedings are required to preserve and protect the rights and remedies of BH06 and BGNIC in relation to the recapitalisation of and payment of dividends by [Solid] or other transactions, payments or matters occurring prior to the appointment of the [Receivers] and to procure or assent to the taking of such action as is appropriate (provided that procuring or assenting to the commencement of new proceedings in any jurisdiction shall require the sanction of the Court)." (underlining added)*
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> *I also said that I expected the Receivers to take a considered and proportionate approach to the need for and the extent of further investigations into the Solid recapitalisation and its consequences:*
>
> > *"The [Receivers'] role is to ensure that the value of the [Share] is protected and preserved ... It will be appropriate for them to have regard to the overall position established by the [Injunction] as varied and the undertakings. If these ensure that all or a substantial part of the property and funds that were previously held by Solid are protected and cannot be and are not being dissipated or diminished or that rights of action are preserved (by tolling agreements or the commencement of proceedings which are then stayed) then spending a significant amount of time and costs on an investigation and taking further action would appear to me to be disproportionate. I would expect that if the [Receivers] are unclear as to what course to take they would apply to the Court for directions (and do so before*

embarking on any investigation or action plan that would involve incurring substantial expense.)" (underlining added)."

8. As noted in the extract from the November Judgment set out above, protective proceedings were issued in February 2018, with Court approval, by Britannia Guarantee National Insurance Company (***BGNIC***) in the Curaçao court seeking to preserve BGNIC's rights to challenge and set aside the Solid Dilution. This was done to avoid limitation issues and preserve BGNIC's position, before the Receivers were appointed. These proceedings were rapidly stayed to avoid incurring unnecessary expense.

9. The Trustees have filed a counterclaim, which is currently stayed pending the decision of the Court on the Applications. The parties agree that the stay should be continued until the conclusion of the Appeal. But it is worth noting the nature of the claims covered by the counterclaim (part of the counterclaim, the double derivative claim, was struck out but a number of direct counterclaims survive). The Trustees bring direct counterclaims against the Plaintiffs on the grounds that the Plaintiffs have caused losses to the First Defendant and the Ninth Defendant by preventing them from exercising their rights as the true shareholder in BH06 and/or by preventing the directors of BH06 from carrying out their fiduciary duties. The relief sought is set out in paragraph 121 of the counterclaim. The Trustees aver that the Plaintiffs intentionally and dishonestly combined and agreed together and with others (by giving instructions or acting in combination with others including Michael Jacob, who was at the relevant time a director of both BH06 and BGNIC) to take certain actions which were unlawful including the following: (i) they took steps to prevent the individuals whom the First Defendant appointed or sought to appoint to be new directors of BH06 and BGNIC from taking up their appointments and taking over the management of BH06 and BGNIC, (ii) they purported, improperly and without a basis in law, to change and remove the First Defendant as trustee of the Lake Cauma Trust and arrange for the replacement trustee to appoint a new protector of the trust, change the proper law of the trust to Cayman law and thereby gain control of BH06 and prevent BGNIC from taking steps to reverse the Solid Dilution, and (iii) they obtained the Injunction by misrepresenting the factual position to the Court and failing to give full and frank disclosure of the steps taken in connection with the Solid Dilution and obtained for an improper purpose confidentiality orders delaying the time at which the directors of BH06 could disclose the granting of the Injunction to the First Defendant (and others).

10. The Parker Proceedings were stayed pending the outcome of the trial and are now stayed pending the decision of the Court on the Applications. The Plaintiffs have applied to continue the stay pending the outcome of the Appeal. The Trustees (as confirmed after the hearing in the

letter dated 25 September 2020 from the Trustees' attorneys Campbells) now agree to a continued unconditional stay of the Parker Proceedings pending the outcome of the Appeal.

The Swiss bank accounts

11. The Receivership Order empowered the Receivers to take action with respect to SFPF's account with Banque Pictet & Cie SA ***(Pictet)*** in Switzerland. By the order dated 16 September 2019, the Receivers were given the same power with respect to Solid's account at Pictet. In particular, in each case, the Receivers were given the power:

> *"to apply to be and be named as and become a joint account holder of and/or a party whose consent to withdrawals is required from (and a party entitled to receive information concerning the balance credited to and details of all credits, debits and transactions on) the account of Solid Holdings NV [and SFPF] and to give or refuse consent to withdrawals and obtain and review such information and take any action considered by the Receivers to be necessary or appropriate in connection with such account and information."*

12. The directors of Solid are Michael Jacob and Neil Duggan. The board members of SFPF are Mr Jacob and Private Equity Services Curaçao (***PES***) with Mr Duggan as the protector. The monitoring beneficiaries of SFPF are the Second Plaintiff and her four children (who are the Fourth, Sixth, Seventh and Eighth Defendants). They have certain powers in that capacity with respect to the board of SFPF. For example, the monitoring beneficiaries have the power to remove directors without cause and SFPF's articles authorise the monitoring beneficiaries to create specific restrictions on the powers of the board. Furthermore, certain actions such as amendments to the articles require the prior written consent of the protector.

13. Mr. Royle, one of the Receivers, has provided in his evidence (in particular in his Eighth Affidavit) details of the steps taken by the Receivers in relation to these accounts. As regards SFPF's account, the Receivers were required to obtain recognition of the Receivership Order in Switzerland. This was done and the Receivers have been successfully added to the SFPF account mandate. There is currently in excess of US$90m held in the SFPF account. As regards the Solid account, the Receivers have encountered a number of difficulties, which Mr Royle explained as follows (underlining added):

> *"10. Following the [order of 16 September], Pictet also required the Receivers to seek yet another recognition order in Switzerland so Pictet would recognise the requirement to add the Receivers to the Solid account pursuant to the Consent Order. Recognition of the [order of 16 September] in Switzerland was ultimately obtained on 20 January 2020. Since then the Receivers have made attempts to be added to the mandate of the Solid account. <u>At the date of signing this affidavit, the</u>*

Receivers have not been added to the Solid account. There therefore remains a risk that should a Swiss asset freeze be lifted (discussed below), the current signatories on the Solid account mandate (Mr Michael Jacob and Mr Neil Duggan, both of whom are known affiliates of the Plaintiffs) could give Pictet instructions to transfer significant funds (in excess of US$130mm) out of the structure. This is a significant and fundamental area of concern to the Joint Receivers.

11. *To add the Joint Receivers to the Solid account, Pictet has required firstly the Joint Receivers to sign a mandate (wet ink originals only acceptable by Pictet), which then also has to be co-signed by one of the existing signatories of the Solid account (no counter-parts acceptable), and secondly a board resolution from Solid authorising the change of signatories on the Solid account. Attached at pages 161 to 163 is a letter from Pictet's Swiss attorneys dated 23 March 2020 which outlines Pictet's requirements to change the mandate. The date of this letter is significant as it is the day after the Cayman Islands closed its borders due to the current Covid-19 pandemic. Consequently, the Joint Receivers have been unable to send the original signed mandate to the existing signatories for co-signature. Pictet have confirmed they will not accept e-copies of documents despite the pandemic.*

12. *As stated in paragraph 10 above, Mr Michael Jacob and Mr Neil Duggan are the existing signatories of the Solid account (so have to co-sign the mandate) and the current board members of Solid (so have to sign the requisite board resolution required by Pictet). As explained further in this affidavit, the co-operation they provided to the [Receivers] at the start of the Receivership has since dwindled. The revised mandate was eventually successfully delivered to Messrs Van Campen Liem (the Dutch attorneys for Solid) on 15 June 2020 so Mr Jacob or Mr Duggan could sign it and pass the required board resolution at the Solid level to authorise the account change. Despite chasing since that date by either myself or my colleagues, the Solid account mandate has still not been changed to reflect the addition of the Joint Receivers.*

13. *The [Receivers] are extremely concerned about our inability to be added to the Solid account, especially in circumstances where Mr Jacob and Mr Duggan a) have not been cooperative in relation to the US side of the BH06 structure (discussed below) b) are not subject to the jurisdiction of this Court and c) have no obligation to comply with the undertakings given by the Plaintiffs regarding the assets of the Share of BH06.*

14. *Although it is scant comfort, Pictet has confirmed to the Joint Receivers that it will not act upon the existing signatories' instructions – but this does not detract from the fact the Joint Receivers still have not been added to the Solid account.*

15. *Finally, even if the Joint Receivers are added to the SFPF and Solid mandates, there remains the risk that Mr Jacob and Mr Duggan – both of whom are outside this Court's jurisdiction and neither of whom have given undertakings equivalent to those provided by the Plaintiffs – could arrange for the respective boards of SFPF and/or Solid to pass fresh board resolutions removing the Joint Receivers from the SFPF and Solid accounts. The [Receivers] are deeply uncomfortable with a risk that assets valued at more than US$200mm could be removed from the structure in this way. A solution that would provide more comfort would be to authorise the [Receivers] to appoint independent directors to SFPF and Solid who could then preserve the funds in the accounts pending the eventual conclusion of these proceedings.*

16. *As outlined at paragraph 13 of my fourth affidavit, the funds held in the SFPF and Solid Pictet accounts are subject to a freezing order issued by the Swiss Prosecutor, Monsieur Yves Bertossa. Our understanding is that while in place, the freezing order has the practical effect of protecting the funds in Solid's and SFPF's account from any dissipation, but as I explained in my fourth affidavit, it was unknown how long the Swiss Prosecutor would maintain the freezing order. Whilst the Swiss Prosecutor has written to the Joint Receivers confirming that he will notify us of any procedures that impact BH06's rights (or those of BGNIC, being a third party to those proceedings), including the lifting of the freezing order (page 164 to 165), the fact remains that it could be lifted at any moment. If the Swiss prosecutor did so, the Pictet funds would immediately be at risk of dissipation at the hands of those parties currently named in Solid's bank mandate as outlined in paragraphs 12-15 above."*

14. Following the hearing, and at my suggestion, the Plaintiffs approached Pictet to see whether Pictet would be prepared to agree with the Receivers only to permit withdrawals from these accounts with the Receivers' consent or whether another acceptable arrangement could be put in place which would deal with and remove the Receivers' concerns. In their letter dated 1 October 2020, Walkers (the Plaintiffs' attorneys) reported back to the Court and the other parties on the result of the discussions with Pictet (the ***Walkers' Letter***):

> *"Pictet is not willing to agree to an irrevocable mandate on the accounts of SFPF and Solid Holding NV. Although we cannot see how a contractual arrangement would not produce a sufficiently certain position for all parties, it appears that Pictet foresees complications potentially arising from an irrevocable mandate (including as a result of contrary court orders) which it is not prepared to accept.*
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> *In relation to the continuation of the Injunction, the alleged concern was that the existing signing authority of the Receivers could be varied by the boards of SFPF and Solid, who are not subject to the court's jurisdiction. The Plaintiffs' position is that this is neither a practical nor realistic risk, given their current undertakings (which have been fully performed and adhered to for over 2½ years), the Geneva Prosecutor's freezing order, and the approach of Pictet, which is such as to make any change at short notice or without all parties' agreement, quite impossible.*
>
> *Nonetheless, given Pictet's position regarding an irrevocable mandate, the simple solution is to impose restrictions at the SFPF and Solid Holdings NV levels by limiting the powers of boards of directors of each entity so that neither board has the power to vary the signing authorities on the two accounts. We enclose two resolutions, one by the SFPF and the other by Solid Holding NV which achieve this. Once implemented, the mandates on the accounts cannot be varied without the written consent of Tami Perry, one of the Monitoring Beneficiaries, who is fully subject to the jurisdiction of the Cayman court and has given her specific undertakings to the court, which would be breached if consent was given without further order of the Cayman court.*
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> *Communications with Pictet's lawyers*
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> *The communications with Pictet's lawyers have been conducted on behalf of SFPF and Solid by Schellenberg Wittmer, Zurich, acting under powers of attorney granted by the*

two entities. Schellenberg were asked to act because the SFPF's usual counsel, Mr van Campen, had limited availability in the second half of September and it was also thought that it would be more efficient and effective if the matter was dealt with between Swiss counsel. In the time available, it was not feasible to engage other Swiss counsel.

On behalf of SFPF and Solid, Pictet (acting through Lenz & Staehlin) were expressly asked, several times, whether they would accept a variation to the mandates on the accounts of the two entities which would provide that the Joint Receivers could not be removed as joint signatories over the accounts and their rights to account information could not be removed, without the Joint Receivers' agreement. Pictet's initial responses were simply that they would only act in accordance with the instructions of duly authorized representatives of the entities. This was subsequently explained as described above: that as a result of the problems they foresaw, Pictet would not accept an irrevocable mandate and would look only to the duly authorized representatives of the entities to provide instructions, including in relation to the powers of the authorised signatories. Pictet also expressed concern at the possibility of contradictory court orders being made. While the latter is, necessarily, a possibility (as the Geneva freeze shows), it is difficult to see why it should affect the terms of the mandates acceptable to the bank. Nonetheless, that is where the matter stands so far as Pictet are concerned. Following from this, we believe that the straightforward solution is to impose the restrictions on varying the mandates at the level of the SFPF and Solid Holdings NV, in a manner that addresses the expressed concern regarding the present arrangements, as proposed above."

The Injunction Issue and the Conditions Issue

15. The first question is whether the Court should grant an injunction on the same terms and conditions as set out in the Injunction (or continue the Injunction) pending the conclusion of the Appeal.

The Plaintiffs' submissions

16. The Plaintiffs submit that the Injunction should be so continued:

(a). the draft order filed by the Plaintiffs before the hearing contains under the heading "*Stay*" four draft orders, including an order that paragraph 2 of the July 2020 Order (as well as the Trustees' counterclaim and the Parker Proceedings) be stayed, and that the Injunction and the Plaintiffs' Undertakings remain in force, pending the determination of the Appeal. Nonetheless, the Plaintiffs submit that they do not require or seek a stay of the Judgment but instead apply for an injunction (if permissible, a continuation of the Injunction) in support of their appeal. They submit that the test for granting such an injunction in a case where there is a proprietary claim against an asset or fund is different from that applied where there is an application for a stay of enforcement of a judgment pending an appeal (at least an application for a stay of a judgment relating only to a

personal, non-proprietary, claim). But they also argue that to the extent that the Court considers that a stay is required, the grounds for such a stay are made out.

(b). the Plaintiffs argue that it is well-established that (especially where, as in the present case, a party has an unrestricted right of appeal) the Court has a positive duty to make orders to ensure that the appeal is effective and is not rendered nugatory as a result of any steps taken by the defendant before the conclusion of the appeal process. They submit that the leading authority in this regard is the decision of the English Court of Appeal in *Wilson v Church (No.2)* (1879) 12 Ch D 454 (***Wilson v Church 2***). In that case, the Court of Appeal granted an injunction to restrain the distribution of a fund pending the determination of an appeal to the House of Lords by the unsuccessful party. Cotton LJ held (at 458) that (underlining added):

> "*when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory; and, acting on that principle, where there was an appeal to this Court from the judgment of Mr Justice Fry dismissing the Plaintiff's action altogether, and it was urged therefore that this Court had no jurisdiction to stay the execution of the order, we were of the opinion that we ought to stay the execution of a judgment in another action made by Mr Justice Fry, ordering the fund to be dealt with – that is to say, by granting an injunction against the trustees to restrain them from parting with any portion of the fund in their hands till the appeal was disposed of. That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the appeal, if successful, from being nugatory. Acting on the same principle, I am of the opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.*
>
> *If there had been any case made by the Plaintiff that this appeal was not bona fide, that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position, but there is no affidavit or tangible fact upon which, in my opinion, we can rely for the purpose of arriving at the conclusion that such is the fact. I deal with it as being presented in the right of the Defendants, and bona fide presented for the purpose of trying this question whether the judgment of this Court is or is not right.*"

(c). the Plaintiffs say that the same principle applies to a trial judge who has dismissed a claim at first instance. Where the plaintiff has an unrestricted right of appeal, and the appeal was *bona fide*, the issue as to whether a proprietary injunction should be granted

or continued pending the determination of an appeal is to be determined on the balance of convenience. They cite *Orion Property Trust Ltd v Du Cane Court Ltd* [1962] 1 WLR 1085 where Pennycuick J applied (at 1088) the balance of convenience test in favour of restraining a proposed share issue pending the determination of an appeal in proceedings concerning the ownership of a company. They also rely on *Imbar Maritima v Republic of Gabon* [1988-89 CILR 286] at 292 to 295 per Kerr JA in which the balance of convenience test was applied in this jurisdiction (applying *Wilson v Church 2*).

(d). in order to maintain the status quo and ensure that the Plaintiffs' appeal is not rendered nugatory, the Injunction should remain in place pending the determination of the Appeal (including any appeal to the Privy Council in due course).

(e). the Plaintiffs submit that their appeal is a *bona fide* appeal. Detailed and focussed grounds of appeal have been produced which explain the basis on which the Plaintiffs seek to overturn the dismissal of their claims. They point out that the Trustees have produced an eight-page Respondents' Notice in which they also challenge certain aspects of this Court's reasoning in the Judgment, thereby demonstrating that there are legitimate points in issue arising out of the Judgment. They argue that the points of law arising on the Plaintiffs' claims are not straightforward (indeed the issues of Israeli law were described at [24] of the Judgment as "*unsettled*") and that an appellate court may well take a different view on those issues. The issues of law concern both Cayman law (as to the doctrine of equitable mistake) and Israeli and Liechtenstein law. Although technically findings of foreign law are categorised as findings of fact the approach of an appellate court to challenges to findings of foreign law was different from that taken to challenges to findings or ordinary facts. It was easier for an appellant to succeed on a challenge to a finding of foreign law. The Plaintiffs relied on the judgment of Megaw LJ in *Dalmia v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 at 286: "*a finding of fact on an issue of foreign law is a finding of fact of a very different character from the normal issue of fact…an appellate court must not by uncritical acceptance of a trial judge's conclusions of fact shirk from its function of considering the evidence afresh and forming its own view of the cogency of the rival contentions.*"

(f). the balance of convenience is overwhelmingly in favour of the continuation of the Injunction for all of the reasons which justified the original decision to grant it. In particular, the Plaintiffs' claims are proprietary claims to a unique asset (the Share) and if the Trustees are permitted to deal with the Share (or its proceeds), the Appeal will be

rendered nugatory as the Trustees (based on previous conduct) will inevitably take the opportunity to transfer all the assets of BH06 to Liechtenstein so that it will be impossible to recover the assets if the Appeal is successful. Alternatively, the Trustees could and would extract all of the assets from BH06 leaving it an empty, worthless shell. Given the Trustees' position (on their case) as trustees, there can be no suggestion that the continuation of the Injunction will result in them being kept out of the funds subject to the Injunction, as they have no beneficial interest in them. Those who do have such an interest are those who seek the continuation of the Injunction (including the Fifth Defendant).

(g). the decision of the English Court of Appeal in *Ketchum International v Group Public Relations* [1997] 1 WLR 4 (***Ketchum***), which had not been cited by counsel but to which I drew the parties' attention during the hearing, was distinguishable and was not authority for the proposition that in a case such as this, involving an application for, or the continuation of, an injunction in support of a proprietary claim to the Share, the Plaintiffs needed to show that they had a good arguable appeal. *Ketchum* dealt with an application for an injunction pending an appeal from the judge's decision to dismiss an application for a Mareva or freezing injunction. Unlike the present case, the relief sought in *Ketchum* was a Mareva injunction in support of a contractual damages claim and not a proprietary injunction in relation to property which was the subject matter of the action. Therefore, the threshold test for granting Mareva relief in support of an appeal, which was identified in *Ketchum* (i.e. that there is a good arguable appeal), did not apply in the present case. It is sufficient that the Plaintiffs' appeal is *bona fide* and that the balance of convenience favours the continuation of the Injunction.

(h). in any event, to the extent they are required to satisfy the test for a stay of the Judgment and establish "*good cause*" in accordance with section 19(3) of the Court of Appeal Law (2011 Revision), and to the extent that such test required not merely that the appeal be bona fide but also that it be arguable or had a real prospect of success, the Plaintiffs argued that the prospects of the Appeal also satisfied these requirements.

(i). the Plaintiffs deny, in response to the Trustees' argument to the contrary, that the assets of SFPF and Solid are at risk and submit that no additional conditions or protections are required. They accept that the Receivers should be added as signatories to accounts of SFPF and Solid with Pictet and argue that if that is done no payments from those accounts can be made without the approval of the Receivers and no one can deal with the assets without the Court's permission:

(i). the Plaintiffs have given and, for over two and a half years have fully performed in all respects, the Plaintiffs' Undertakings, and will continue to do so.

(ii). all of the assets are the subject of the sequestration (or freezing) order imposed by the Swiss prosecutor. The Plaintiffs rely on a letter dated 1 September 2020 from Schellenberg Wittmer (the ***Schellenberg Wittmer Letter***), a Swiss law firm advising the Second Plaintiff, which they say represents uncontroverted evidence that the sequestration order can only be lifted with proper advance notice to all parties. Even if the investigation were to be terminated, the parties would have a right of appeal which would take many months (if not years) to be concluded during which the sequestration order will be continued.

(iii). as regards the concern raised by the Trustees that the bank mandates could be changed by the directors of SFPF and Solid, none of whom is subject to the jurisdiction of the Court, so as to remove the requirement for the Receivers' signatures:

(A). for the reasons summarised above, the Plaintiffs submit that this does not present a practical or feasible risk.

(B). even if there is a real concern, it can be resolved by restricting the power of the directors of SFPF and Solid to vary the mandates, and ensuring that such power is under the control of persons who are within and subject to the jurisdiction of the Court. This can be achieved by way of a suitable direction from the monitoring beneficiaries of SFPF, together with a consequential resolution of the members of Solid. The Plaintiffs, as noted above, set out their suggested approach in the Walkers' Letter (the ***Plaintiffs' Alternative Proposal***) and provided the other parties and the Court with drafts of the proposed resolutions.

(C). pursuant to the Plaintiffs' Alternative Proposal:

First, the monitoring beneficiaries would pass resolutions giving a direction to the board of SFPF to:

"*adhere to the following restriction on the bank accounts held by [SFPF] and by [Solid] at [Pictet].*

The Board may not:

1. *amend the signatory authorities of its account at [Pictet] without specific written approval of [the Second Plaintiff]; and*

2. *[authorise] by shareholder resolution the Board of [Solid] to amend the signatory authorities of the account of [Solid] at [Pictet] without the specific approval of the [Second Plaintiff]."*

and a resolution to authorise and instruct the SFPF board to instruct Solid to accept such restrictions on the authority of the Solid board. The resolutions would also be signed by Mr Duggan in his capacity as SFPF protector and as a Solid director, by Mr Jacob in his capacity as a member of SFPF's board and as a Solid director and by PES as an SFPF board member.

Second, the Plaintiffs' Undertakings would be amended so that the Plaintiffs would also undertake (individually and collectively) to exercise all of their rights and powers (held directly or indirectly, and save to the extent that the exercise of such powers would result in criminal or other liabilities to unconnected third parties) to restrict the powers of the boards of SFPF and Solid so that they cannot remove or change the appointment of the Receivers as a party whose consent to withdrawals is required to the accounts and who are entitled to receive information concerning the accounts.

(D). the effect of these resolutions would be to prevent the boards of SFPF and Solid from varying the mandates in relation to the accounts with Pictet, Geneva without the prior written consent of the Second Plaintiff. The Second Plaintiff is fully within the jurisdiction of the Court and has given and is a party to the Plaintiffs' Undertakings.

(E). the Plaintiffs had asked Pictet (as was explained in the Walkers' Letter) to agree with the Receivers only to permit withdrawals from these accounts with the Receivers' consent but Pictet was unwilling to accept what it considered to be an irrevocable mandate. It appears that Pictet foresaw potential complications arising from such an irrevocable mandate (including as a result of contrary court orders) which it was not prepared to accept. The

Plaintiffs believed that a contractual arrangement would produce a sufficiently certain position for all parties (including Pictet) and that the making of contrary court orders should not affect the terms of the mandates agreed with the bank. Notwithstanding this, Pictet remained unwilling to accommodate the parties. It was therefore necessary for the Plaintiffs to propose the Plaintiffs' Alternative Proposal.

(F). there was no justification for the Court to require (i) the repayment of the Solid loan, or (ii) even if it was presently possible (which it is not given the Swiss sequestration order discussed below), the movement of all funds with Pictet to accounts with other banks in Cayman. Neither of these steps was a "security" measure and both were intended first, to cause immense difficulty to the Plaintiffs and to stifle the appeal, secondly, to secure the *de facto* reversal of the Solid Dilution before and without any determination of its validity (or even the pursuit of its validity) and thirdly to obtain collateral jurisdictional advantages in the dispute over the validity of the Solid Dilution.

(j). the Plaintiffs also accept that the Injunction and the Receivers' powers should be amended to permit BGNIC to pursue its existing or other proceedings in the Curaçao court for a determination, on the merits, of the validity of the Solid Dilution (which includes both the issue of the new shares and the payment of the dividend to SFPF). The Plaintiffs' draft order includes an authority for BGNIC to take whatever steps it deems fit against Solid and/or SFPF before the Courts of Curaçao for the purpose of challenging the validity of and/or to set aside and/or to reverse the Solid Dilution (and for the Receivers and BGNIC to consult with BH06 and the First and Ninth Defendants for that purpose). However, the Plaintiffs submit that Solid and SFPF should be permitted to use their assets to pay their reasonable legal costs and expenses of defending any actual or threatened proceedings. It would be unfair to permit proceedings to be brought against Solid and SFPF without also permitting them to use their own funds to defend themselves. But the Plaintiffs accepted that the defence costs of Solid and SFPF would be subject to supervision by this Court. Before incurring any such costs or expenses Solid and SFPF would be required to provide to this Court an estimate of their likely costs of defending such proceedings and the Court would be asked to determine on the papers whether to approve such estimate or require any revision to the estimate. All parties would also need to provide written confirmation to the Swiss Prosecutor and Pictet that they consent to Solid and SFPF using the funds that are presently frozen in Switzerland

for this purpose (and take all other steps as may be reasonably necessary or required by Solid and SFPF to secure a release by the Swiss Prosecutor of those funds which are approved by this Court for this purpose). The Plaintiffs object to the Trustees' application that BGNIC be given permission to bring proceedings not just in Curaçao but elsewhere and not just against Solid and SFPF but also against the Plaintiffs and those who were involved in the Solid Dilution. They argue that the proper forum for the determination of the dispute as to the lawfulness and validity of the Solid Dilution is plainly Curaçao since it involves Curaçao entities and Curaçao law governs the transactions so that there was no basis for claims in relation to that transaction to be pursued elsewhere. If the Solid Dilution was found to have been lawful and effective, then there was no possible basis on which such wider claims against the Plaintiffs and others could succeed. Permitting further proceedings against other parties would result in substantial additional expense which if the Plaintiffs were successful in the Appeal would be wasted.

The Trustees' submissions

17. The Trustees' position can be summarised as follows:

(a). the Plaintiffs must satisfy the requirements for a stay of execution of the Judgment in order to be entitled to an injunction pending the Appeal. The Court has power to impose a stay pending appeal pursuant to section 19(3) of the Court of Appeal Law (2011 Revision) which states:

> *"No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties to the action, or upon good cause shown to the Court or to the Grand Court."*

(b). absent security being provided, the Plaintiffs must prove a "*good cause*" before any stay can be granted. The approach of this Court was set out by the Court of Appeal in *Deputy Registrar and AG v Day and Bush* [2019] (1) CILR 510 where the Chief Justice stated:

> *"By s.19(3) of the Court of Appeal Law (2011 Revision), a stay may be granted for good cause. What amounts to good cause to stay an execution of a judgment has been considered in many cases, a number of which have been drawn to our attention. As the cases make plain, a successful litigant is prima facie entitled to the fruits of his success. There must be good reason for the court to prevent that. In deciding whether or not to impose a stay, the court will consider the grounds of appeal, their likelihood of success and the balance of convenience having regard*

to the interests of both parties. The overriding feature is the interests of justice in any given case, as the observations of Potter, L.J. make plain in the case of Leicester Circuits Ltd. v. Coates Brothers plc."

(c). the Trustees also cite and rely on the following passage from the judgment of Cresswell J in this Court in *Heriot African Trade Finance Fund Ltd v Deutsche Bank Ltd* [2011] (1) CILR 34 (a case involving an application for a stay of a winding up order) (***Heriot***) where the Court held that the relevant law was as follows (at paragraph 22):

> *"(a) the Court of Appeal Law (2006 Revision), s.19(3) provides so far as material: "No stay of execution . . . shall be granted upon any judgment appealed against save . . . upon good cause shown to the Court or to the Grand Court";*
>
> *(b). the critical test is whether good cause has been shown;*
>
> *(c). the onus is upon an appellant to show good cause (i.e. good reasons) for the imposition of a stay pending appeal;*
>
> *(d). in considering whether good cause has been shown, the court will have regard to all the circumstances of the case, including, without limitation:*
>
> *(i). whether the appeal would be rendered nugatory if a stay is not granted (Wilson v. Church (12 Ch. D. at 458–459));*
>
> *(ii). whether the appellant can show a good arguable case;*
>
> *(iii). whether the appeal is in exercise of a true right of appeal and not for some collateral purpose;*
>
> *(iv). the balance of convenience (see Quintin v. Phillips Petroleum Co.); and*
>
> *(v). appropriate regard should be had to the reasons given by the first instance judge for refusing a stay.*
>
> …….
>
> *(f). the question whether or not to grant a stay is entirely in the discretion of the court; and*
>
> *(g). indications in past cases do not fetter the scope of the court's discretion.*"

(d). the relevant circumstances for the Court to consider when assessing whether the Trustees should be deprived of "*the fruits of their success*" included the following: (i) the prospects of success of the Appeal, (ii) whether the Appeal would be rendered nugatory, and (iii) the balance of convenience. It was not sufficient that the Plaintiffs show a *bona fide* appeal. As was said in *Heriot*, it was necessary to show a good arguable case. This

approach was supported by *Ketchum*. The evidence advanced by the Plaintiffs did not come close to establishing the evidential basis for a stay.

(e). as regards the prospect of success of the Appeal, an examination of the Plaintiffs' Grounds of Appeal showed that the Appeal was against either findings of primary fact or findings of foreign law (which are treated as findings of fact). None of the grounds of appeal raised any issues of Cayman law about which there was a reasonable prospect of the Court of Appeal reaching a different conclusion. The Plaintiffs are seeking to run the same arguments regarding the evidence that were previously before the Court and which had been rejected (and indeed new arguments that were never raised at trial), in the hope of obtaining a different outcome before the Court of Appeal. In the circumstances, whilst there is an absolute right of appeal, the Court can safely conclude that the prospects of success are low.

(f). as regards the question of whether the Appeal would be rendered nugatory, there was no evidence at all that any appeal would be rendered nugatory if the Injunction was lifted and indeed the evidence indicated the opposite. The Second Plaintiff gave evidence that the Trustees would immediately dissipate the assets of BH06 and its subsidiaries in order to prevent the Plaintiffs from obtaining control of them in the event that the Appeal was successful. But her evidence was without foundation: there was no evidence that the Trustees would take any such steps. Because the Plaintiffs are advancing a proprietary claim, practically speaking the Trustees would be unable to use any of the funds that derive from BH06 without running the risk of a tracing claim being made against such funds (as the Plaintiffs have threatened in their statement of claim). The Second Plaintiff's evidence in her Twenty First Affidavit was based on the findings of the Delaware court (but no final determination had yet been made) and the steps taken by the Trustees to change the domicile of a Panamanian company, European Holdings Investment Incorporation, from Panama to Liechtenstein (but such steps were justified since the Trustees' claim that they own the shares of that company and believe that the Second Plaintiff had forged share certificates, an issue which is pending before the Panama Court). Furthermore, the Second Plaintiff's criticisms and challenge to the integrity of the other two trustees was without foundation. The suggestion that all three trustees and the protector will act together to remove assets from the Cayman Islands was fanciful. In any event, Dr Schierscher, the protector, had confirmed in evidence that the Trustees will take no such step.

(g). as regards the balance of convenience, this pointed against any grant of a stay. If the Injunction is lifted, the Trustees will be free to take steps to ensure that assets taken from the structure pursuant to the Solid Dilution are returned to it. If it is continued, the Trustees may be unable to take steps to recover those assets, rendering the Appeal nugatory in a very different sense by risking the Trustees being deprived of the benefit of the findings in their favour, even if those findings are not overturned on appeal. On the other hand, the Plaintiffs will suffer no prejudice if the Injunction is lifted, there being no risk of the Appeal being rendered nugatory.

(h). the Injunction should *only* be continued, or a further injunction granted, pending the outcome of the Appeal if as a condition to continuation or grant the Plaintiffs are required or agree to take steps to ensure that the assets held by Solid and SFPF are properly and fully protected (SFPF now holds substantial cash assets itself, and is the controlling shareholder of Solid, which has very substantial cash assets of its own). The Trustees submit that the Plaintiffs' Undertakings and the appointment of the Receivers currently provide insufficient protection.

(i). the Trustees' claim that the action taken to effect the Solid Dilution was wrongful and that those involved, including Mr Jacob and Mr Duggan, acted wrongfully and in breach of duty. It involved the improper diversion of trust assets. The effect of the Solid Dilution was to give control of substantial cash assets to Mr Jacob and Mr Duggan (who had assisted the Second Plaintiff in the Solid Dilution and were almost entirely controlled by the Second Plaintiff) and ultimately the Second Plaintiff. She is, as noted above, one of the monitoring beneficiaries who have almost complete control over SFPF (they have key powers such as the ability to remove directors and protectors without cause). In addition, she was one of the most influential monitoring beneficiaries since she was able to vote on behalf of her minor children (in a vote on a special resolution) and as the eldest monitoring beneficiary had control if the directors were unable to act. The beneficiaries of SFPF were not identical to the beneficiaries of the Lake Cauma Trust, although they were similar, while the trust structure was different. The purpose of the Solid Dilution was to allow the Second Plaintiff to access and use the cash resources of the subsidiaries of BH06 to fund the Plaintiffs' litigation costs and to obtain leverage by taking control of a substantial part of the value of the BH06 group. In June 2017, Mr Jacob and Mr Duggan authorised a purported loan of €15 million by Solid to the Second Plaintiff (the ***TP Loan***) and sums were paid out by 18 August 2017 (to advisers to the Second Plaintiff). The TP Loan was for a three-year term and was due to be repaid in full on 1 July 2020 but no such repayment has yet been made.

(j). the real, or at least the most important, reason why the Plaintiffs had been unable to access the funds of Solid and SFPF was the action taken by the Swiss Prosecutor to freeze them. On 15 March 2018, the Geneva Public Prosecutor had made a sequestration order in respect of the accounts of BH06, BGNIC, Solid and SFPF held with Pictet. This order had been made following an application by the Trustees, pursuant to a criminal complaint made by them against, *inter alia*, the Plaintiffs, Mr Jacob and Mr Duggan, and a request by the prosecutor in Liechtenstein. The sequestration prevents Pictet from permitting withdrawals from the accounts. However, as the evidence of Mr Böhler (a member of the Ninth Defendant's board) shows, there is no guarantee that the sequestration order will continue, or assurance as to how long it will continue, and grounds for concern that it may be terminated. The Liechtenstein prosecutor has recently confirmed that she has dismissed the Liechtenstein criminal complaints against the Plaintiffs in respect of the Solid Dilution on jurisdiction grounds and her request to the Geneva Public Prosecutor had been one of the key grounds supporting the Geneva Public Prosecutor's decision to grant the sequestration order.

(k). the conduct of Mr Jacob and Mr Duggan in relation to the Receivers' investigations into a US subsidiary of BH06, Greetnwin.com Inc. (***GNW***) demonstrated that they remained willing to obstruct the Receivers, to hide important information relating to assets and funds of BH06's subsidiaries and assist the Second Plaintiff in resisting the Receivers' efforts to ensure that these assets were properly disclosed and protected. Mr Jacob was a director of GNW until 22 August 2016. GNW owns a 49.5% equity interest in RECAP Chelsea Investment LLC (***RECAP***) and a further 49.5% equity interest is owned by Solid ISG Capital US, Inc. (***Solid ISG***). Mr Jacob had been a director of Solid ISG until 23 September 2016 when he was removed. RECAP is managed by managing members who since 31 December 2015 have been GNW and Solid ISG. The Receivers had been required to bring proceedings in New York and New Jersey (pursuant to section 1782 of Title 28 of the US Code) to require production of the documents and the information they sought. Some of these documents showed that loans of approximately US$1.1 million on uncommercial and favourable terms had been made between June and November 2017 to the Second Plaintiff on the authority of Mr Jacob from RECAP. The documents discovered in the section 1782 proceedings revealed that Mr Jacob professed to act as director of RECAP throughout 2017 and signed off a number of significant loans from RECAP in this purported capacity, despite never having been a director and having previously been removed as director of GNW and Solid ISG (the managing members of

RECAP). Between 16 November 2017 and 30 November 2018, when Mr Jacob was not a director of RECAP's managing members, he caused a total of $1,574,514 to be paid to the Second Plaintiff and in direct contravention of the instruction of the Receivers (and/or their independently appointed director), Mr Jacob continued to be active in the affairs of RECAP by, amongst other things, signing cheques in the name of RECAP.

(l). accordingly, the assets held by Solid and SFPF were at risk. As the Receivers had explained in their evidence, they were not in complete control of the funds in the Pictet accounts. They were unable to prevent Solid and SFPF, as holders of the Pictet accounts, from giving instructions to Pictet to amend the mandate given by Solid and SFPF and thereby to prevent withdrawals without the Receivers' consent. If the Swiss sequestration order was discharged, there was a risk that action would be taken to permit and effect such withdrawals. The directors of SFPF and Solid, who have the power to take action on their behalf, are Mr Jacob and Mr Duggan. Neither has given undertakings to, or submitted to the jurisdiction of, the Court. The Swiss sequestration order could be discharged and steps could be taken to change the mandates on the Pictet accounts at any time.

(m). the Plaintiffs' response to these concerns was inadequate. In her evidence, the Second Plaintiff (see her Twenty-Second Affidavit at [17] to [24]) states that she has fully complied with the Plaintiffs' Undertakings. This may be correct (as far as the Trustees are aware) but it does not address the issue that those in control of the companies have given no undertakings. Further, the Second Plaintiff appears to accept that the Swiss sequestration order could be lifted but states that this will only be on notice. If this is correct, it provides only limited comfort to the Trustees. Assuming they have sufficient time to do so, they would then be required to apply to this Court for the further relief they now seek, as a matter of urgency. The risks remain but would fall to be dealt with at a later date. Furthermore, there would be a risk that the Trustees would be unable to act in time.

(n). in order to remove the risk of dissipation and further misuse, to preserve the status quo and to provide the Trustees with the protection they needed, the assets of SFPF and Solid should be put under independent control. The Trustees had formulated various different approaches and made various submissions regarding what needed to be done and what the Court should order:

(i). in the draft order filed prior to the hearing the Trustees sought the following orders:

> *"3. [That there be] a stay of execution of the [Judgment] …. on the following conditions:*
>
> *a. The Plaintiffs transfer (or procure the transfer of) all of the shares in [Solid] held by SFPF to BGNIC;*
>
> *b. The Plaintiffs procure the resignation of the existing directors of [Solid] and SFPF and the appointment of two independent directors, nominated by BGNIC, as directors of both entities;*
>
> *c. The Plaintiffs, the Fourth, Sixth, Seventh and Eighth Defendants each provide written undertakings not to exercise any powers as Monitoring Beneficiaries of SFPF (other than to comply with paragraph 0b above), until further order of the Court;*
>
> *d. The Plaintiffs transfer (or procure the transfer of) cash or cash equivalents to a bank account in the Cayman Islands in the name of the Receivers to be held on trust for [Solid] in the sum of €99 million (plus interest);*
>
> *e. The Second Plaintiff repays the [TP Loan] of €15 million plus interest of 3.5% per annum in full to [Solid] immediately;*
>
> *……"*

(ii). in their Further Written Submissions dated 9 September 2020, the Trustees argued that there were serious problems with the approach I had floated during the hearing that an undertaking might be obtained from Pictet that the Receivers be notified at least a certain period, say 14 days, before any changes to the bank mandate were made. They doubted whether such an undertaking was enforceable and even if it was it could not in practice be enforced in Swiss proceedings before the change to the mandate became effective and the funds could be withdrawn. They submitted that the simplest way of ensuring that the funds remained untouched and of ensuring that the Receivers could not be removed from the bank mandates/accounts was either by an order of this Court to that effect (that the Receivers shall not be removed as parties holding a mandate and whose consent for withdrawals was required, without a further order of this Court) or by the opening of new accounts in the joint names of Solid/SFPF and the Receivers. They had advice from Swiss counsel that such an order was likely to be recognised by the Swiss Court (as the Swiss Court had recognised the 5 April 2018 order) and this would then prevent Solid and SFPF from removing the

Receivers from the mandate. For new accounts to be opened in the name of the Receivers, they would first have to become clients of the relevant Swiss bank and then before funds could be transferred from the existing Pictet accounts the permission of the Swiss prosecutor would be required (the Trustees argued that if the funds were to be transferred to new accounts, they should be accounts in the Cayman Islands, but failing that accounts in Switzerland). However, since obtaining the necessary approvals could take some time, the first option (relying on the proposed order of the Court) was likely to be preferable.

(iii). subsequently, in Campbells' letter dated 25 September 2020, the Trustees submitted that, in light of the position that had emerged in the correspondence since the hearing, the Trustees' position was that the continuation of the Injunction should be conditional on a request actually being made by the Plaintiffs to Pictet to make the appointment of the Receivers to the bank mandate permanent; the Plaintiffs and the Fourth, Sixth, Seventh and Eighth Defendants giving further undertakings that pending the Receivers being given control of the funds, they will not take any steps as monitoring beneficiaries of SFPF save to carry the terms of the Court's order into effect and on the Second Plaintiff being required to repay the TP Loan immediately. The Court's order should be drafted so that if the required steps were not taken by a designated date, the Injunction would automatically be discharged. Although their primary position had been that the Receivers' appointment should also fall away, they now accepted that the appointment should continue in any event (to address the concerns of the Fifth Defendant, discussed below and without any admission that there was a proper basis for such concerns or that they were justified).

(iv). on 5 October 2020, Campbells wrote again, after having seen the Walkers' Letter, to reject the Plaintiffs' Alternative Proposal (see below) and Campbells concluded that "*In all the circumstances the effective routes to protect the funds are limited to those set out in our letter to the Court of 25 September 2020.*"

(o). the Plaintiffs' Alternative Proposal did not provide adequate protection for the assets of Solid and SFPF. While the Plaintiffs acknowledge that protection should be put in place, they were still not willing to consent to the one step that would fully secure the assets by transferring the funds to an account in the name of the Receivers. The Plaintiffs' Alternative Proposals involve putting an internal restriction on the authority of the directors of SFPF and Solid (Mr Duggan and Mr Jacob) by way of resolution. But they

offered scant protection to the assets in circumstances where Mr Duggan and Mr Jacob have taken numerous actions, ultra vires the companies they have purported to represent, to dissipate assets and where they are not subject to the jurisdiction of the Cayman Court:

(i). there is nothing to stop either the monitoring beneficiaries or SFPF from passing subsequent resolutions which reverse the protection that these resolutions purport to give.

(ii). such an internal restriction on the authority of Mr Duggan and Mr Jacob will not restrict their actual ability to instruct Pictet to change the signatories on the mandate. It is to be expected that Pictet will, as they have indicated to Schellenberg Wittmer, "*act in accordance with the duly authorised representatives of the entities*" who will remain Mr Jacob and Mr Duggan.

(iii). the remedy available to BGNIC and the Trustees, should Mr Jacob and Mr Duggan act in excess of their authorisation as directors of SFPF or Solid to enable the removal of funds from either entity, would be a remedy against them personally but there was no realistic prospect that either Mr Jacob or Mr Duggan would be able to meet any such claim.

(p). given the concession by the Plaintiffs that there was a need to resolve the issues surrounding the Solid Dilution in Curaçao, there should be express permission for the Trustees, the Receivers, BH06 and BGNIC to take *any* steps they deemed fit to challenge, reverse and hold accountable those responsible for approving and effecting the Solid Dilution. This would include the commencement of new proceedings (in addition to the proceedings already commenced in Curaçao) and proceedings against other parties. The Trustees, the Receivers, BH06 and BGNIC should not be prevented from taking any action which they considered suitable and required to protect their interests.

The Fifth Defendant's submissions

18. The position of the Fifth Defendant can be summarised as follows:

(a). the Fifth Defendant submits that the Injunction should be continued or a new injunction in the same terms should be granted pending the outcome of the Appeal to hold the ring.

(b). she noted that the Trustees contended that various orders be made in order to recover assets currently held outside Cayman so that they are placed under the ultimate control of the Receivers and that the Receivers had expressed concern about the effectiveness of the Injunction and the Plaintiffs' Undertakings as a mechanism for the protection of assets outside the Cayman Islands.

(c). the Fifth Defendant recognised the limited protection afforded by the current regime insofar as it concerns the assets of Solid and SFPF and accordingly, (assuming the Court considered that it had jurisdiction to make the necessary orders) would not oppose:

(i). the Trustees' application for an order that those assets be transferred to BGNIC and to the Cayman Islands, or

(ii). the Trustees' and the Receivers' proposal that the Court should authorise the Receivers to appoint independent directors to Solid and SFPF.

(d). she remained concerned that the funds held in the Ypresto Trust, BH06 and BGNIC should be protected from the predations of the Trustees. The discharge of the Injunction would give them *control* over the assets, including (and in particular) the use of assets emanating from BH06. The Trustees have not explained whether the ability to draw down on the BH06 funds will trigger an obligation in their litigation funding agreement to pay the funder some or all the loan amount or, because assets of the Ypresto Trust appear to have been charged to the funder, whether those assets would be used to meet the Trustees' repayment obligations to the funder (prior to the completion of the appellate process) and whether the assets held by BH06 and BGNIC in accounts in Swiss banks would also be regarded as available to meet the Trustees' repayment obligation to the funder (prior to the completion of the appellate process). As a result, the Fifth Defendant was concerned that as soon as the Injunction was discharged the assets of the Ypresto Trust would be depleted (if not, indeed, exhausted) irrespective of the outcome of the Appeal (and she noted that the granting of the charge over the assets of the Ypresto Trust appeared to have breached the Injunction).

(e). the Fifth Defendant objected to the Plaintiffs' Alternative Proposal because it is aimed at keeping the Second Plaintiff as the controlling person over the SFPF and consequently the accounts of SFPF and Solid held at Pictet. Even if the Appeal was successful, and the litigation in Curaçao ended in favour of the Plaintiffs (neither of which results were conceded) there did not appear to be any basis for saying that the Second Plaintiff was or

would be entitled to be the controlling person over sums exceeding US$200 million. Indeed, the experts' opinion submitted by the Plaintiffs for the purpose of justifying the Solid Dilution clearly stated that SFPF was established in order to safeguard the legitimate interests of the beneficiaries of Lake Cauma Trust and implementing the Letter of Wishes.

(f). the Fifth Defendant submitted that the Court should adopt the following approach:

(i). all funds held by Pictet should be transferred to an account in another bank.

(ii). if it was not possible to transfer the funds to the Cayman Islands because of the Swiss sequestration order, the most appropriate course was to transfer the funds from Pictet into an account held at another bank in Switzerland. That new account should be under the joint control of the current signatories (the directors of Solid/SFPF) and the Receivers, and the Second Plaintiff should not have control of this account.

(iii). there should also be an order clarifying that it shall not be a breach of the Injunction for all cash at bank which is subject to the Injunction to be properly managed by professional investment managers (rather than being left in cash which reduced significantly the return that could be earned on the funds).

The Receivers' evidence and position

19. The Receivers, as I have noted, filed evidence and explained their position as follows:

(a). as Mr. Royle noted in his Eighth Affidavit and was confirmed in post-hearing correspondence from the Receivers' attorneys Mourant, the Receivers consider that they do not have adequate control over the assets of and funds held by SFPF and Solid and are currently unable to ensure that such assets and funds are protected from dissipation and the Receivers remain concerned that there is a risk of dissipation.

(b). as regards to the Plaintiffs' Alternative Proposal, they did not accept the Plaintiffs' argument (made in Walkers' Letter) that any action taken by Mr Duggan and or Mr Jacob as members of the boards of SFPF or Solid to remove the Receivers from the Pictet bank mandates or make withdrawals without the Receivers' consent (and which

was therefore inconsistent with the restrictions imposed by the monitoring beneficiaries' resolutions) would constitute a breach by the Second Plaintiff of the Plaintiffs' Undertakings, and contempt. On the assumption that the boards of SFPF and Solid act independently, it was unclear why any actions by either of those boards would be attributed to the Second Plaintiff. To prove contempt, it would be necessary to prove that those boards had acted on the Second Plaintiff's instructions. That would, in practice, be impossible. Neither Mr Duggan nor Mr Jacob have themselves given any undertakings to this Court and neither was subject to the jurisdiction of this Court. They remained able to pass such resolutions as they see fit. In the Walkers Letter it is stated that Pictet had confirmed that it will *"act in accordance with the duly authorised representatives of the entities"*. This impliedly confirmed that if the boards of either SFPF or Solid NV passed resolutions to change the mandates, Pictet would follow the instructions given. Rather than providing them with any comfort, this simply served to confirm the Receivers' concerns.

(c). the Receivers considered that adequate protection of the funds held by SFPF and Solid could only be achieved by, in descending order of effectiveness:

(i). the transfer back to BGNIC of the 600,000 shares issued by Solid to SFPF.

(ii). the replacement of the boards of SFPF and Solid with entirely independent and unaffiliated directors. The Receivers would be content for Mr Van Campen to be one such director provided that the other two were truly independent, and ideally chosen by the Receivers.

(iii). the transfer of the funds to an account in Cayman in the Receivers' names.

(iv). the Receivers being made the sole mandate signatories for the SFPF and Solid accounts with Pictet.

(v). a provision that Pictet be required to give the Receivers notice of any instructions received to change either the SFPF or Solid mandates coupled with a grace period before such instructions were implemented.

Discussion and decisions

20. There are two main issues to be decided. First, what is the test to be applied in deciding whether to grant the injunction sought by the Plaintiffs and is that test satisfied in this case? Secondly, if

it is, should the granting of an injunction pending the Appeal be subject to the implementation of the Plaintiffs' Alternative Proposal or the different conditions and requirements argued for by the Trustees and the Fifth Defendant (and to what extent should the additional protections argued for by the Trustees and the Fifth Defendant be regarded as relevant to and given effect by amending and extending the Receivers' powers)?

21. In my view, where an injunction is sought by an unsuccessful plaintiff to prohibit the successful defendant dealing with the subject matter of the action pending appeal, the plaintiff must show that the appeal is arguable and that on the balance of convenience (or hardship) the risks and potential hardship to the plaintiff outweigh the risks and potential hardship to the defendant. The appeal's prospects of success are relevant to the exercise of the Court's discretion as to whether to grant injunctive relief even where the plaintiff has a right of appeal without leave.

22. The basic test to be applied requires the Court to assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted (see for example *Peel Land and Property (Ports No 3) Ltd v TS Sheerness Steel Ltd* [2013] EWHC 2689 (Ch.) per Morgan J at [35] – [41]). The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other. The Court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard (and it does not follow from the fact that an interim injunction was granted before the trial that an injunction should be granted pending appeal).

23. The Court should have regard to the appeal's prospect of success since the granting of an injunction of the type I have just described is the functional equivalent of and achieves the same result as a stay of execution of a judgment and it seems to me that the same test should be applied. In order to be entitled to a stay, as the Trustees submit, a party is required to establish "*good cause*" as that term has been explained in the case law. Even if that was not right, the prospects of success of the appeal are relevant to the Court's assessment of the balance of hardship/convenience.

24. The judgment of Cotton LJ in *Wilson v Church 2*is not in my view to be taken as a fully formulated and definitive statement of the standard to be applied by the Court when considering whether the appeal justifies the grant of injunctive relief. His reference to the *bona fides* of the appeal was expressed in the negative and as a qualification to an entitlement to injunctive relief

that might have applied had the facts of the case been different ("*If there had been any case made by the Plaintiff that this appeal was not bona fide, that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position*") and he adopted a different formulation in his near contemporaneous judgment in *Polini v. Gray (1879) 12 Ch.D. 438 (**Polini**)* when he referred to a "*reasonable ground of appeal*" (see below). Furthermore, the subsequent authorities support the link between an application for an injunction pending appeal by an unsuccessful plaintiff and an application for a stay of execution of a judgment by a successful plaintiff, and that even where leave to appeal is not required injunctive relief should not be granted unless leave to appeal would have been granted, had it been required. The fact that the plaintiff has a proprietary claim rather than a personal claim does not in my view affect the test to be applied to the merits of the appeal although it will clearly be relevant to the application of the balance of hardship or convenience test.

25. The test applied on an application for a stay was most recently and authoritatively summarised by Sir John Goldring P in the Court of Appeal in *Deputy Registrar and Attorney General v Day and Bush* [2019 (1) CILR 510] at [24]) when he said that the question was whether "*the grounds [of appeal] are arguable*". It seems to me that the same test should be applied when considering whether to grant an injunction pending an appeal.

26. *Ketchum* supports this analysis. The Plaintiffs are correct to point out that *Ketchum* was a case involving a Mareva injunction in support of a contractual damages claim and that Stuart Smith L.J.'s statement that "*the question will not be "Does he have a good arguable case?" but "Does he have a good arguable appeal?"* was made with reference to an application by a plaintiff who having failed in his application for a Mareva injunction applied for (similar) injunctive relief pending an appeal. But it does not follow that the decision is of no relevance to the question of whether it is sufficient for the failed plaintiff to show that it is acting *bona fide* in bringing the appeal. Stuart Smith L.J. considered that the jurisdiction to grant injunctive relief pending the appeal applied both to proprietary and pecuniary claims and was based on a single common principle. A similar approach should be applied to injunctions pending appeal in both types of case. He also considered that the position was analogous to an application for a stay of execution. He took the view that in a case where leave to appeal was not required injunctive relief pending the appeal should not be granted unless leave to appeal would be granted, had it been required.

27. In *Ketchum* the defendant owned shares in a company. The plaintiff purchased 40 per cent of the shares under an agreement providing for a put option, under which the plaintiff could be

required to purchase the remaining shares, and providing also that the company should not pay dividends without the plaintiff's approval. The plaintiff claimed damages against the defendant for breach of the agreement. The judge (Blackburne J) dismissed the plaintiff's claim and the plaintiff applied for an injunction restraining the defendant from dealing with part of the proceeds of sale of the shares, pending the plaintiff's appeal. The judge refused the application. He considered that the trilogy of cases in 1879, namely *Wilson v. Church (1879) 11 Ch.D. 576 (**Wilson v Church 1**), Wilson v. Church 2* and *Polini*, were distinguishable on the ground that on their facts they involved competing claims to a fund and did not apply to an action for damages. The Court of Appeal allowed the plaintiff's appeal against that decision. Counsel for the defendant had argued that the judge had been right to distinguish the 1879 cases on the ground that he did. Stuart Smith L.J. referred to *Wilson v Church 1* and then said as follows (underlining added):

> *"In so far as dicta in that case suggest that it is enough that the appeal is bona fide and not brought for some improper purpose such as delay or exerting pressure on the other party, that, in my opinion, is inconsistent with what was said in [Polini]. In that case S. claimed that she was next of kin of a testator and was entitled under his will. She failed at first instance and in the Court of Appeal but intended to appeal. The Court of Appeal granted an injunction staying disposal of the fund pending appeal to the House of Lords. I think it may well be right that Jessel M.R. based his judgment on the rule of court that gave the court jurisdiction to make any order for the detention, preservation … of any property being the subject of such action." But Cotton L.J. seems to have put it on a broader basis. He said, at p. 446:*
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> > *"I see no difference in principle between staying the distribution of a fund to which the court has held the plaintiff not to be entitled, and staying the execution of an order by which the court has decided that a plaintiff is entitled to a fund. In that case, as in this case, the court, pending an appeal to the House of Lords, suspends what it has declared to be the right of one of the litigant parties. On what principle does it do so? It does so on this ground, that when there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree or the distribution of the fund would make the appeal nugatory, that is to say, would deprive the appellant, if successful, of the results of the appeal, then it is the duty of the court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights. That applies, in my opinion, just as much to the case where the action has been dismissed, as to the case where a decree has been made establishing the plaintiff's title."*
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> *In Orion Property Trust Ltd. v. Du Cane Court Ltd. [1962] 1 W.L.R. 1085 (**Orion**) Pennycuick J. followed the judgment of Cotton L.J. which I have cited and held that the court of first instance had jurisdiction to make an order restraining the issue of shares, pending an appeal, even though the action seeking such relief had failed. And, in [Erinford], Megarry J. applied the same principle to an interlocutory injunction, which he had refused, but granted it for a limited time so that application could be made to the Court of Appeal to extend it. He said, at p. 268:*

"There will, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton L.J. in [Wilson v. Church 2] where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, at p. 458, 'when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.' That was the principle which Pennycuick J. applied in [Orion]; and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted Mr Newsom the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative .... Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal."

In my judgment, this jurisdiction is not limited, as the judge thought, to cases concerned with the preservation of a fund or property the subject of the action, but is based on the wider principle enunciated by Cotton L.J. that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless by an unjustifiable disposal of assets. Moreover, I cannot see any reason in principle why the considerations which are applicable when the court is considering the grant of a Mareva injunction should not be applied in favour of a plaintiff, even if he has lost in the court below, though the question will not be "Does he have a good arguable case?" but "Does he have a good arguable appeal?" This is likely to be a more difficult test to satisfy, and, if the case turns upon questions of fact which the judge has resolved against the plaintiff, may well be insuperable. This threshold must be at least as high as that which has to be satisfied when the court considers whether or not to grant leave to appeal where that is required.

The analogy with a stay of execution is appropriate. Where an unsuccessful defendant has to obtain leave to appeal and seeks a stay of execution, for example, in a possession action, this court will normally grant a stay if it grants leave to appeal, since otherwise a successful appeal will be of no effect. Where leave is not required to appeal the substantive judgment, as in this case, injunctive relief of the type sought should not be granted unless leave to appeal would be granted, had it been required. In my opinion the judge was in error in thinking that he did not have jurisdiction to make the order sought."

28. I would also note that in *Simmonds v Williams and Another (No 1); Caines v Williams and Others; Heyliger v Williams and Others* (1999) 57 WIR 90 at 93 Singh JA in the Court of Appeal of the Eastern Caribbean States said as follows (underlining added):

"It is accepted that an appeal per se does not operate as a stay, except to the extent that the court below or the Court of Appeal otherwise directs. An application of this nature is a matter for the exercise by the court of its judicial discretion. This discretion is wide and unfettered and, in its exercise, the court should try to maintain a fair and proper balance between the needs of the parties. The court ought not to grant the stay unless there are good reasons for so doing. It is recognised that the court does not make a practice of depriving a successful litigant of the fruits of his litigation. This applies not merely to

execution but to the prosecutor of proceedings under the judgment or order appealed from, e.g. inquiries into the accounts of a company (see Shaw v Holland [1900] 2 Ch. 305). But, a court is likely to grant a stay where the appeal would otherwise be rendered nugatory (see Wilson v Church (No 2) (1879) 12 Ch. D 454) or where the appellant would suffer loss which could not be compensated in damages. If the special circumstances of the case so require, the stay should be granted. If there are prima facie no arguable grounds of appeal, the stay should be refused. It is therefore always most prudent to decide that issue first."

29. Are the Plaintiffs' Grounds of Appeal arguable? I have reviewed and carefully considered the Plaintiffs' Grounds of Appeal. While I have a good deal of sympathy for the Trustees' submissions on this issue, and consider that Plaintiffs' Grounds of Appeal with respect to the Mistake Claim are weak, at least for the purposes of the Plaintiffs' application for the continuation of the Injunction or the granting of a new injunction on the same terms, I consider that the First Plaintiff's appeal on the Israeli Matrimonial Property Claim (which is referred to in the Grounds of Appeal as the Matrimonial Claim) is to be treated as arguable and this is sufficient to satisfy the arguable appeal requirement in this case. I do not consider that it is necessary to discuss in detail the Grounds of Appeal. Suffice to say that even though I remain satisfied that my decision on the Israeli Matrimonial Property Claim was correct and that my findings as to the applicable Israeli law were correct and based on and supported by the expert evidence, I accept that, as the Plaintiffs submitted, the points of Israeli law arising on the Israeli Matrimonial Property Claim were "*not straightforward (indeed the issues of Israeli law were described at [24] of the [Judgment] as "unsettled")"* and that the Court of Appeal will wish to consider the evidence afresh and form its own view of the cogency of the rival contentions (to use the language of Megaw LJ in *Dalmia v National Bank of Pakistan*, above). In these circumstances, it is not possible to say that the appeal with respect to the Israeli Matrimonial Property Claim is unarguable and without any chance of success.

30. As regards the balance of hardship or convenience, in my view the proper course pending the outcome of the Appeal is to preserve the status quo and to retain the protections put in place pending trial for the benefit of all parties. The Injunction and the Plaintiffs' Undertakings should be continued, subject to the changes dealt with in this judgment, pending the outcome of the Appeal (including any appeal to the Privy Council). Furthermore, the appointment of the Receivers should be continued on the same basis. This is a case in which there are allegations of serious misconduct against the Plaintiffs and the Trustees (some of which are addressed in the Judgment but many of which are not), in which the Trustees and the Plaintiffs remain in the midst of open hostilities giving rise to litigation and criminal complaints in multiple jurisdictions and in which the value of the property in dispute and to be preserved for the benefit of the winning party depends at least in part on the actions of non-parties (against whom

there are also allegations of serious misconduct) with respect to assets of subsidiaries of BH06 out of the jurisdiction. These circumstances justify the need for injunctive relief and other orders to ensure that, to the extent the Court is able to do so, the value of the Share is preserved until the identity of the true owner is established following the Appeal. I reject the Trustees' submission that the granting of injunctive relief against them is unjustified. If the Injunction were not continued (or a new injunction on the same terms granted), if the Plaintiffs were released from the Plaintiffs' Undertakings and the Receivers were discharged there is a serious risk that steps would be taken by one side or the other – and perhaps one side following a perceived provocation by another side – that would prejudice or damage the value of the Share, in particular with respect to the preservation of BGNIC's claims resulting from the Solid Dilution.

31. Solid was, prior to the Solid Dilution, an indirect subsidiary of BGNIC and therefore the value of its assets indirectly affected and were material to the value of the Share. After the Solid Dilution, BGNIC retains only a small shareholding and asserts claims against Solid and SFPF to set aside the issue of the new shares and the payment of the dividend to SFPF.

32. Prior to the trial, the value of the Share was protected by (i) pursuant to the Injunction, prohibitions on dealings and action by the Trustees affecting the Share or dividends paid by BH06, (ii) pursuant to the Plaintiffs' Undertakings, restrictions on dealings and action by each of the Plaintiffs affecting the Share or dividends paid by BH06, BGNIC, Solid and SFPF and the proceeds of the TP Loan or in relation to BGNIC, Solid and SFPF, prohibiting further payments out of Solid or SFPF, fortified by requiring the Plaintiffs to exercise their rights in respect of Solid and SFPF to ensure that the Receivers had joint control of Solid's and SFPF's accounts with Pictet by being added to the bank mandates or other appropriate action and (iii) pursuant to the Receivership Order (as amended), giving control of the Share and active management powers in respect of the Share to the Receivers, including the power to exercise the voting rights as holder of the Share to ensure that BH06 and BGNIC were managed by competent and independent directors, to review the conduct of and actions taken by the directors of BH06 and BGNIC prior to the appointment of the Receivers and to take or procure the taking of action (with Court sanction) to protect the position of BH06 and BGNIC (including further action or proceedings to preserve and protect the rights and remedies of BH06 and BGNIC in relation to the Solid Dilution).

33. The appointment of the Receivers over the Share, of course, had the effect of preventing the Trustees from dealing with the Share and therefore reduced the need for and significance of the Injunction. Nonetheless, the Injunction continued to perform a useful function in so far as it

restricted dealings by the Trustees with dividends previously received by them and provided a basis for the Plaintiffs' Undertakings.

34. The Trustees and the Fifth Defendant argue that the protection provided by the pre-trial regime is inadequate and that a continuation of the Injunction (or the granting of a new injunction on the same terms) without additional protections causes them serious hardship because there is a serious risk that the funds held by Pictet could be withdrawn or dissipated pending the Appeal and leave them without or with only limited rights of recourse if the Judgment is upheld on the Appeal. The serious risks they submit are not materially ameliorated by the Plaintiffs' Alternative Proposal. They submit that the funds held by Pictet must be placed under independent control, either by the Receivers or new directors of Solid and SFPF and preferably held in Cayman. They also submit that they will suffer prejudice if the combined effect of the Injunction and the appointment of the Receivers is to prevent a determination by a competent court (or courts) of the validity of, and the existence and extent of the liability of those responsible for, the Solid Dilution. The Trustees and the Fifth Defendant argue that while the Plaintiffs now accept and all parties agree that there should be no further delay in determining the validity of the Solid Dilution via litigation, the Court should reject the Plaintiffs' argument that the only proceedings to be permitted are the existing proceedings in Curaçao and that Solid and SFPF should be allowed to access the Pictet funds to pay their legal expenses of defending those proceedings.

35. Three issues therefore arise:

(a). the proper scope of proceedings to determine the validity of the Solid Dilution.

(b). the extent to which provision should be made to permit Solid and SFPF to use the funds in the Pictet accounts to pay the legal expenses associated with their defence of such proceedings.

(c). the adequacy of the Plaintiffs' Alternative Proposal and the need for additional action to prevent the risk of payments being made out of the Pictet accounts.

36. The first issue relates to the manner in which the Receivers' powers are to be exercised (since the Receivers control the exercise of voting rights in respect of the Share and effectively act as the ultimate shareholder of the BH06 group with the right to change the directors of BH06 and are the people with whom the directors of BH06 and BGNIC must consult). The second and third issues relate to the nature, purpose and scope of the Plaintiffs' Undertakings and the

restrictions imposed thereby on the use of and dealings with the funds held by Solid and SFPF in the Pictet accounts.

37. The Receivers, as I have explained, were given the power to exercise all and any of the rights attaching to the Share including making changes to the boards of directors of BH06 and BGNIC and requesting the directors to take or refrain from taking any action. Following the Receivers' appointment various changes were made to the boards of BH06 and BGNIC:

(a). the Receivers appointed a new director to the board of BH06 and at the same time one BH06 director resigned (leaving one old director and the new director).

(b). as regards BGNIC, prior to the Receivers' appointment, the directors were Mr Jacob, Mr Nelson and Mr Oakley. After the Receivers' appointment, the Receivers appointed a new director and the directors of BH06 resolved that Mr Jacob be removed as a BGNIC director.

38. BGNIC issued, and agreed to stay, the protective proceedings in respect of the Solid Dilution before the Receivers were appointed. Following the November Judgment and the striking out of the Trustees' double derivative claim against the Plaintiffs, the Receivers reviewed the possibility of bringing further claims relating to the Solid Dilution in this Court or elsewhere. The Trustees had included in their counterclaim a double derivative claim brought on behalf of BGNIC against the Plaintiffs. This counterclaim asserted that BGNIC had claims to recover losses suffered by it as a result of the Solid Dilution, and that the Trustees were entitled to bring such claims since BH06 and BGNIC were at least partially controlled by the Plaintiffs. I held that the counterclaim should be struck out as disclosing no reasonable cause of action since it was not arguable that in light of and following the Receivers' appointment over the Share, BH06 and BGNIC were subject to wrongdoer control. In their report dated 8 February 2019 (and their report dated 14 March 2019 in which the same text appears) the Receivers noted that:

> *"In conjunction with the Receivers, BGNIC or [sic] BH06 have investigated the possibility of claims arising from the Solid Dilution in Cayman or other jurisdictions. Given the dismissal of Lopag's derivative and the fact that the Receivers hold the share registered in Lopag's name, it is difficult to see how Receivers would be in any better position to bring any claims on behalf of BH06 or BGNIC than Lopag. The final decision whether to issue any such claims must therefore rest with BH06 and BGNIC."*

39. This passage gives rise to the following points. First, the reason for the striking out of the double derivative claim was that the Receivers were in control of BH06 and BGNIC because they were able to act as the ultimate shareholder in the BH06 group and ensure that independent

directors were in office and that they acted properly. Secondly, the Receivers were expected to engage with the directors and satisfy themselves that appropriate action was taken to protect BGNIC's position. If they disagreed with the decisions of the BGNIC (and BH06) board, they were expected to inform the boards of their views and if necessary, after seeking directions if the position was unclear, exercise the rights given by the Share to ensure that the right course was pursued. As I made clear in the November Judgment (to repeat the passage quoted above, with different underlining added):

> "*the Receivers were given powers so that they could ensure that the ... directors in conjunction with the [Receivers] [could] consider whether further action or proceedings are required to preserve and protect the rights and remedies of BH06 and BGNIC in relation to the recapitalisation of and payment of dividends by [Solid] or other transactions, payments or matters occurring prior to the appointment of the [Receivers] and to procure or assent to the taking of such action as is appropriate (provided that procuring or assenting to the commencement of new proceedings in any jurisdiction shall require the sanction of the Court) ..... The [Receivers'] role is to ensure that the value of the [Share] is protected and preserved ... It will be appropriate for them to have regard to the overall position established by the [Injunction] as varied and the undertakings. If these ensure that all or a substantial part of the property and funds that were previously held by Solid are protected and cannot be and are not being dissipated or diminished or that rights of action are preserved (by tolling agreements or the commencement of proceedings which are then stayed) then spending a significant amount of time and costs on an investigation and taking further action would appear to me to be disproportionate. I would expect that if the [Receivers] are unclear as to what course to take they would apply to the Court for directions (and do so before embarking on any investigation or action plan that would involve incurring substantial expense.)*"

40. So under the Receivership Order, the Receivers had the power, if necessary, to procure the commencement of proceedings in any jurisdiction and it was contemplated that they would at least be actively engaged in the process of reviewing (and would form their own view on) what was required to ensure that the position of BGNIC was protected. The regime put in place by the Receivership Order, the Injunction and the Plaintiffs' Undertakings was designed to ensure that the status quo (at the time the relief was granted) was preserved and the position of the Trustees and the Fifth Defendant was protected by there being a review of what proceedings might need to be commenced to challenge the Solid Dilution and ensuring that there were no limitation problems (by obtaining tolling agreements or issuing and staying protective proceedings pending the trial in these proceedings, if possible). It was to be hoped that this would minimise costs and avoid the need for any litigation to challenge the Solid Dilution to be actively pursued until the outcome of these proceedings was known. Pursuant to the Receivership Order, the Receivers have engaged with the directors of BGNIC in connection with such proceedings.

41. So the pre-trial regime envisaged that further proceedings may be needed. The position now is that the Plaintiffs accept that the validity of and challenge to the Solid Dilution should be resolved in suitable proceedings and they say that the existing Curaçao proceedings (in which BGNIC claims against SFPF and Solid) are the right and only vehicle for such a determination. They wish the Injunction and the Receivers' powers to be amended to permit BGNIC to pursue these proceedings. But they argue that (i) such amendments should permit Solid and SFPF to use the funds they hold to pay their legal expenses, subject to this Court approving the amount of such expenses and that (ii) the Receivers, BGNIC and BH06 should not be permitted to commence other proceedings, against other parties including the Plaintiffs and in jurisdictions outside Curaçao.

42. The pre-trial regime did not permit Solid and SFPF to use the funds they hold to pay their legal expenses since the Plaintiffs' Undertakings required them to ensure that there were no withdrawals from the Pictet accounts or further use of the funds (although it was open to the Plaintiffs to apply for an amendment to the Plaintiffs' Undertakings to permit this and no doubt they would have done so had the stay in respect of the existing Curaçao proceedings been lifted or permission to commence other proceedings against Solid and SFPF been sought). In considering whether the Plaintiffs' Undertakings should be relaxed so that the Plaintiffs may permit Solid and SFPF to access the funds to pay their legal fees it is necessary to consider the nature and purpose of the Plaintiffs' Undertakings so as to decide what needs to be shown in order to justify the funds being used to pay legal expenses to defend claims made or for the benefit of the Trustees.

43. The restrictions imposed (and accepted by the Plaintiffs) with respect to the funds held by SFPF and Solid were ordered in connection with the dispute over ownership of the Share and were ancillary to the proprietary injunction granted to the Plaintiffs to protect their proprietary claims. They were needed to protect the Trustees' own proprietary claim in respect of the Share by ensuring that if the Trustees were successful the asserted rights of BGNIC to recover the shares in Solid transferred to SFPF and the funds paid by Solid to SFPF were not prejudiced by the restraints imposed by the Injunction. They were part of the protective ring created by the Injunction, the Plaintiffs' Undertakings and the Receivers' appointment to preserve the status quo and the position of whoever succeeded in establishing their claim to the Share. The restrictions were justified because SFPF is said and acknowledged by the Plaintiffs to be controlled by the Second Plaintiff and her family (Solid and SFPF are not parties to these proceedings but the Second Plaintiff and the Fourth, Sixth, Seventh and Eighth Defendants as monitoring beneficiaries have control over and an interest in SFPF). The Plaintiffs should not be entitled to restrain the Trustees from exercising their rights granted by the Share and from

procuring that BGNIC asserts its claimed right to recover its property transferred to an entity controlled by the Second Plaintiff if the Second Plaintiff is not prepared to preserve the assets and funds received by that entity.

44. It is true that the Trustees do not have direct proprietary claims to those assets and funds but as assets of subsidiaries of BGNIC they obviously substantially affect and contribute to the value of the Share and can be said to be indirectly assets of the Lake Cauma Trust. It is also true that as a result of the Solid Dilution the funds held by SFPF and Solid (and the shares in Solid held by SFPF) are currently not assets of BH06 and its subsidiaries. It is unclear whether BGNIC's claim (as currently formulated in the existing Curaçao proceedings or to be formulated in further proceedings) includes a claim under applicable law to an interest in or a proprietary remedy in respect of the shares and funds. There is no evidence before me on this application as to the basis of and the nature of the claims being made or available pursuant to the challenge to the Solid Dilution and as to the position under Curaçao or other applicable law. From a Cayman Islands perspective, it may well be that BGNIC could maintain a proprietary claim or a claim for proprietary relief against SFPF (assuming of course that any claims were governed by Cayman Islands law). I note that in the parts of the Trustees' derivative counterclaim on behalf of BGNIC brought against the Plaintiffs it was claimed that the Plaintiffs had dishonestly assisted Mr Jacob and Mr Duggan in breaching their fiduciary duties and that the shares and funds transferred to SFPF, and to the Second Plaintiff through SFPF, were received with knowledge of the breach of trust. But, as I say, I have not been told whether the claims against SFPF in the existing Curaçao proceedings include (or could as a matter of Curaçao law include) proprietary claims or claims giving rise to proprietary remedies. But even if the funds and shares held by SFPF are not subject to proprietary claims by BGNIC, BGNIC's rights and claims are assets of BGNIC and it is these assets that the Trustees, in reliance on their proprietary claim to the Share, seek to protect and preserve.

45. The nature of the restrictions imposed by the Plaintiffs' Undertakings and the rights claimed by the Trustees over or in respect of the funds and the shares held by SFPF are relevant when considering whether SFPF and Solid (and the Plaintiffs) should be allowed to use those funds to pay for the legal expenses of defending the proceedings against them. To the extent that the Trustees can be said to be asserting proprietary claims against, or perhaps in relation to, the funds (or that their claims should be treated as analogous to proprietary claims) then it will be more difficult to justify such use of the funds.

46. It seems to me that the different approaches taken by the Court when considering whether to permit the use of funds subject to a proprietary injunction on the one hand and a freezing (or Mareva) injunction on the other hand are helpful reference points for this purpose.

47. The Court takes a different approach to granting permission to use assets subject to an injunction depending on whether the injunction is a proprietary or freezing injunction. A defendant who seeks permission to use funds that are the subject of a proprietary claim and injunction must usually produce evidence that there are no other funds or assets available to pay the legal expenses and that their defence and claim to ownership of the funds is arguable. Then the Court must weigh the potential injustice to the claimant of permitting the funds which may turn out to be his property to be used against the potential injustice to the defendant of depriving him of having access to legal advisers in advancing what may turn out to be a successful defence, and must apply a careful and anxious judgment for this purpose (see for example, *Ostrich Farming Corporation Ltd v Ketchell and another* [1997] Lexis Citation 5078). But a defendant subject to a Mareva or freezing injunction is usually not prevented from paying his own legal expenses from the assets (his assets) subject to the injunction. The usual form of injunction contains an express provision to this effect.

48. For the reasons I have given, the restrictions imposed (and accepted by the Plaintiffs) with respect to the funds held by SFPF and Solid can be characterised as having features of both proprietary and Mareva relief. They relate to and preserve property which the Trustees' claim was improperly removed from BGNIC (and Solid) and which should be restored to BGNIC (and Solid), and through BGNIC to the Trustees and the Lake Cauma Trust. BGNIC might have proprietary claims in respect of that property in the hands of SFPF but it is at present unclear and cannot be assumed that it does. In addition, the restrictions are closely connected with the proprietary claims/rights of the Trustees and are ancillary to the proprietary injunction granted to the Plaintiffs. But the restrictions can also be seen as preserving and restricting dealings with SFPF's (and Solid's) own property to avoid unjustifiable dissipation thereof, pending the outcome of these proceedings and the proceedings brought and to be brought by BGNIC.

49. In my view, in these circumstances, the Court is required to consider and balance the hardship that will be suffered by the Trustees if SFPF/Solid (and the Plaintiffs) are permitted to use the funds in the Pictet accounts to pay their legal expenses and the hardship that will be suffered by the Plaintiffs (as controllers of and those interested in SFPF) if SFPF and Solid are prevented from using those funds to pay such costs, taking into account the fact that the funds appear to be the property of SFPF and Solid but were derived and (it is said) improperly removed from

BGNIC, a company whose value is a significant and substantial part of the property held by the Trustees, in circumstances where BGNIC might have proprietary claims or rights (including rights against the Plaintiffs) to have the shares and funds held by SFPF returned in specie to BGNIC and Solid. If it turns out that the Solid Dilution was wrongful so that BGNIC should have remained the sole shareholder in Solid and the funds held by Solid should have remained with it, the use by SFPF and Solid (together with the Plaintiffs) of the funds to pay their legal expenses will diminish the value of BGNIC's property (or the property to be returned to BGNIC). Furthermore, if it turns out that the Solid Dilution was wrongful and orchestrated by the Plaintiffs, SFPF and Solid (with the Plaintiffs) will have been allowed to use the property they have wrongfully misappropriated to pay the costs of defending the claim to reverse the effects of their wrongdoing. If, however, it turns out that the Solid Dilution was lawful and proper, SFPF and Solid (together with the Plaintiffs) will have been prevented from using their own property to pay their legal fees of a proper defence although it is unclear on the evidence before me as to whether preventing access to the funds in the Pictet accounts will itself have the effect of depriving SFPF and Solid (together with the Plaintiffs) from having access to legal advisers since it is possible that the Plaintiffs have available other funds and cash resources with which to pay such legal expenses.

50. It seems to me that, having regard to all these circumstances and balancing and taking into account the position of and risks to (and hardship that might be suffered by) the parties, the right course is to permit BGNIC (with the Receivers' approval and the consent of the BH06 board to the extent separately required but without the need for further Court approval) to lift the stay on and continue the existing Curaçao proceedings (and to make such amendments thereto and to issue further proceedings in Curaçao against Solid and SFPF as they consider appropriate and are advised to make or issue) and to permit Solid and SFPF to use a limited amount for the purpose of defending such proceedings (the existing Curaçao proceedings including any amendments and other proceedings commenced against them in Curaçao by BGNIC or BH06) but then to require that before any further funds may be used, the Plaintiffs would need to make a further application and *inter alia* provide evidence as to why those who are interested in SFPF and for whose benefit the defence of the Curaçao proceedings is being maintained are unable to fund the litigation (perhaps on the basis of an entitlement to be indemnified if the Appeal is successful). This does not involve treating the claims against SFPF and Solid as being proprietary and an application of the approach to the payment of legal expenses out of funds subject to proprietary claims. Rather I give weight to the proprietary or quasi-proprietary aspects of the Trustees' and BGNIC's claims (as described above) and the fact that there are material differences from the normal freezing injunction case where the defendant is restrained from dealing with what are clearly his assets in order to prevent their

dissipation and the frustration of the enforcement of a prospective monetary judgment. This approach also gives weight to the prejudice that would be suffered by SFPF and Solid (and the Plaintiffs) if permission is given for the Curaçao proceedings to be immediately and actively pursued without them having some immediate access to the funds that may turn out to be theirs to take the steps required in the short term to maintain what may turn out to be a proper and successful defence.

51. The limit should be fixed at a level that will allow Solid and SFPF to obtain immediate advice as to how to prepare their defence of the proceedings and to take steps after the stay has been lifted to file the equivalent of a defence, provided that the sums involved are not disproportionate or unreasonable. The Plaintiffs have obviously not yet been able to make submissions as to what such a limit should be and I do not consider that I should settle on the limit before receiving such submissions. While I have not settled on and do not wish to prejudge the appropriate amount, my preliminary view is that I would need considerable persuasion to accept a sum above US$100,000. Accordingly, I will direct, assuming that the Plaintiffs, the Trustees and the Fifth Defendant are unable promptly to reach agreement on the limit, that the Plaintiffs file submissions with evidence in support within twenty-one days of the date on which this judgment is handed down; that the Trustees and the Fifth Defendant shall have 14 days thereafter to file submissions and evidence in opposition and the Plaintiffs shall have seven days thereafter in which to file submissions in reply. I recognise that the Plaintiffs will need to avoid disclosing matters and evidence that would prejudice Solid's and SFPF's defence and that their submissions and evidence may therefore need to be circumspect with respect to certain matters.

52. I have explained above the powers given to the Receivers in the Receivership Order, and the purpose of giving them powers, to permit or procure the commencement and prosecution of proceedings to challenge and preserve BGNIC's (and BH06's) rights in respect of the Solid Dilution. The position pending the Appeal is somewhat different as the Plaintiffs have accepted that the validity of the Solid Dilution should be resolved by proceedings, at least the existing proceedings in Curaçao. Nonetheless, the reasons justifying the Receivers having such powers remain valid in the period pending the outcome of the Appeal. It seems to me that Curaçao is likely to be the most appropriate forum in which the proceedings to establish the validity/invalidity of the Solid Dilution are conducted. But it does not follow that proceedings against other parties than Solid and SFPF or in other jurisdictions are not needed. They might be needed to ensure that BGNIC's (and BH06's) rights of recourse, to obtain compensation and restitution in respect of the Solid Dilution are preserved, or possibly to determine issues relevant to, or enforce and give effect to a determination relating to, the validity of the Solid

Dilution. Since the Plaintiffs have made it clear that if they are unsuccessful before the Court of Appeal they will seek permission to appeal to the Privy Council so that the conclusion of the Appeal may take some considerable time, there will be time for other proceedings to be commenced and possibly well advanced or even concluded before the outcome of the Appeal is known. Therefore, it is not unrealistic to contemplate that other proceedings may need to be commenced and prosecuted. It is to be hoped that any such other proceedings would only need to be issued to avoid limitation problems and their disposition could await the outcome of the main proceedings in Curaçao before becoming active, thereby minimising costs and avoiding unnecessary expense. But, as I say, whether that is possible will depend on the claims to be made and the circumstances. I consider that the right order to make on the present application is to permit BGNIC (and if required BH06) to commence proceedings in Curaçao against parties other than Solid and SFPF, or to commence proceedings in other jurisdictions against Solid, SFPF and other parties (including the Plaintiffs) with the consent of the Receivers, which consent shall only be given after the Receivers have obtained the approval of the Court (and with the consent of the BH06 board to the extent separately required). Any such application for approval would be made by the Receivers and the usual arrangements on an application of this type for redacting and preserving the confidentiality of sensitive evidence and, if necessary, for permitting the Receivers to apply ex parte will be needed.

53. As regards the manner in which the funds in the Pictet accounts are to be held pending the Appeal and the need for additional protections, it seems to me that the Trustees and the Fifth Defendant are right that further protections are required to avoid real risks and ensure that the funds of SFPF and Solid held by Pictet are fully protected during what is likely to be the long period pending the outcome of the Appeal. I regard the Plaintiffs' Alternative Proposal as being of material assistance in reducing the risks but of itself insufficient. I consider that the Plaintiffs should be required to implement the Plaintiffs' Alternative Proposal but that two further steps are taken. First, as submitted by the Trustees, I shall order that the Receivers shall not, without a further order of the Court, be removed as parties to the mandate and holding a mandate in relation to, and that the Receivers' consent shall be required to all and any withdrawals from or dealings with the funds in, the Pictet accounts. Secondly, the funds should be moved to accounts in which the Receivers are joint-account holders so that they have direct rights against the account bank. This will ensure that, as originally required, the funds are held in accounts which are clearly controlled by the Receivers, in the sense that the Receivers' consent to withdrawals is a legal requirement binding on the bank with whom the funds are deposited. It is in my view sufficient that such accounts are in Switzerland provided that the accounts are in the name of the Receivers and SFPF and the Receivers and Solid respectively. I

propose to direct that the Plaintiffs' Alternative Proposal be implemented and that the Plaintiffs take steps to procure that SFPF and Solid open new accounts in Switzerland with Pictet or another bank in the joint names of the Receivers and each of them and that SFPF and Solid transfer all the funds currently in the Pictet accounts to such new accounts. The requirement to transfer the funds is subject to the consent of the Swiss prosecutor but the Plaintiffs must seek, and procure that SFPF and Solid seek, such consent as soon as practicable. I propose to direct that the Receivers have discussions with the parties and with suitable Swiss banks (including Pictet if appropriate) within 14 days after the date on which this Judgment is handed down in order to identify where the new accounts will be opened and held and that within 14 days thereafter they shall decide and inform the parties in which bank the new accounts are to be opened, whereupon the Plaintiffs shall within 14 days procure and direct (as monitoring beneficiaries or otherwise in the exercise of their rights and powers) that SFPF and Solid seek the consent of the Swiss prosecutor to (to the extent that such consent has not already been obtained) the opening of and the transfer of the funds to such accounts and that within 7 days of such consent being obtained, that SFPF and Solid execute and deliver to the new bank the papers required to open the new accounts and give instructions to Pictet for the immediate transfer of the funds to the new accounts. The form of special resolutions of the monitoring beneficiaries of SFPF and the written resolutions of the shareholders in Solid provided by the Plaintiffs appear to me to be satisfactory and should be executed within seven days of the date on which the order giving effect to this judgment is sealed (it is not clear whether further resolutions of the monitoring beneficiaries and Solid's shareholders will be needed to approve and give instructions for the transfer of the funds to the new accounts but they should be given if required).

54. I have carefully considered the submissions and proposals made by the Trustees and the Fifth Defendant but have concluded that the arrangements I have just described provide them with sufficient protection without unduly prejudicing the Plaintiffs and without involving the expense, delay and difficulties that would be involved in finding acceptable and appointing new directors to Solid and SFPF. I accept that relying on the Plaintiffs' Alternative Proposal alone would involve an unacceptable level of risk – leaving the Trustees and the Fifth Defendant with the need to enforce or bring proceedings for sanctions resulting from a breach of the Plaintiffs' Undertakings involves some risk and gives much less protection than having the funds under the control of the Receivers. I have given particular weight to the concerns expressed by the Receivers, which I believe will be removed by the approach I have directed be followed. I do not consider that it would justifiable or fair to change the jurisdiction in which the funds are held by transferring them to accounts in Cayman (this could change and weaken the position of the Plaintiffs and SFPF/Solid in litigation both before and after the outcome of the Appeal) and

there is no need for them to be transferred to BGNIC if they are under the control of the Receivers, who are better placed to hold them as officers of the Court and as neutral parties.

55. It seems to be sensible and in the interests of all parties that the funds currently held in the Pictet accounts be invested in a manner that will generate a proper return. The Fifth Defendant has proposed that the funds be managed by professional investment managers. In my view, the proper approach is to leave the decision as to how best to generate a proper return on and to protect the value of the funds to the Receivers. They should be given the power to consent to a suitable arrangement with which the other parties agree. I will direct that the Receivers consult with the parties and make a proposal to them within 28 days of the date on which the order giving effect to this judgment is sealed and I shall give the Receivers and the parties liberty to apply if agreement cannot be reached within that timeframe (or such further time as the parties and the Receivers may agree). I can see that this could give rise to issues and disputes particularly if the proposed arrangements require the funds to be transferred to new accounts, into investments or instruments or to new banks or financial institutions. There is a further and related issue. The Fifth Defendant wishes the permission for funds to be managed by professional investment managers to extend not only to the funds currently held in the Pictet accounts but also to the assets within the Ypresto Trust, which are subject to the Injunction as continued since they emanated from BH06. But the Fifth Defendant submitted that since the assets in the Ypresto Trust are not under the control of the Receivers and are outside the BH06 group it would be inappropriate to impose a requirement that the Receivers' approval be required. That seems right to me, since the Receivers currently only have standing with respect to the Share and the assets of BH06 and its subsidiaries, which relate to and directly affect the value of the Share (although, since the assets in the Ypresto Trust are derived from and therefore relate to the Share, there is a link with the Share). However, I do not regard it as acceptable to give an unqualified permission for the assets in the Ypresto Trust to be managed by investment managers or for such managers to be permitted to operate without suitable oversight or supervision. In my view, the proper approach is to give permission for the Ypresto Trust assets to be managed by professional investment managers (and for the payment of the investment managers' fees out of those assets) subject to the terms on which the investment managers are to be appointed and act being agreed by all parties or approved by the Court. I will direct that the parties discuss and seek to agree suitable arrangements within 28 days of the date on which the order giving effect to this judgment is sealed and give them liberty to apply if agreement cannot be reached within that timeframe.

56. I do not consider that the Second Plaintiff should be required to repay the TP Loan at this stage. While there remains a dispute as to whether the TP Loan was properly made and as to the time at which the Second Plaintiff should repay the TP Loan, this is not a matter which requires the intervention of this Court or that immediate repayment be made a further condition of the continuation of the Injunction (or the granting of a further injunction) in order prevent undue hardship to the Trustees. It was not previously a condition and I do not consider that circumstances have changed to such an extent as to require the Court to adopt a different approach. The Second Plaintiff will remain liable to Solid and subject to the Plaintiffs' Undertakings which require that she not "*dispose of, encumber, pay away, use or otherwise deal with .... the proceeds of [the TP Loan]*." However, I do consider that this undertaking should be supplemented to prevent the Second Plaintiff from agreeing to any amendment to the terms of the TP Loan and to procure that Solid does not make or agree to any such amendment or waives or gives up its rights in respect of the TP Loan.

The Trustees' Application to Use Funds

57. The Trustees seek permission to make payments pending the outcome of the Appeal out of the assets of BH06 to fund certain trust expenses. This permission is sought either as a condition for the granting of the Plaintiffs' application for a stay (so that there would be a variation of the Injunction to account for it) or as a permitted use of the Share and its related assets pending the outcome of the Appeal. The relevant expenses are as follows:

(a). any tax liability of the Trustees including:

(i). the annual tax on enveloped dwelling (***ATED***) payable by a BVI company called Mallett Ford Inc. (***Mallett Ford***) which owns and in respect of the property at 39-41 South Street (the ***South Street Property***).

(ii). any inheritance tax charges which the Trustees consider to be payable in respect of the South Street Property. According to the Trustees, the Heritage Trust must pay inheritance tax in respect of the value of the South Street Property arising on the 10-year anniversary of the settlement of the Heritage Trust.

(b). an insurance premium payable in respect of the art collection.

(c). the Trustees' reasonable legal and professional costs of and associated with the Appeal.

58. The Trustees also sought an order to protect the Trustees and recipients of such payments by confirming that any payment made to a third party pursuant to the Court's permission would not be deemed to be a breach of trust (so that no tracing claim could be brought) in the event that the Plaintiffs succeeded on the Appeal.

59. The Trustees rely on Mr Böhler's evidence in his Third Affidavit in which he explained that due to the restrictions imposed by the Injunction, the Trustees have been unable to pay for the administrative expenses of the upkeep and maintenance of the trust structure by recourse to trust assets. In order to meet these costs and their legal costs, the Trustees had to enter into a litigation financing agreement (the ***LFA***). The terms of the LFA are confidential and privileged so that the details of the arrangement have not been disclosed. But Mr Böhler points out that using the funding available under the LFA is much more expensive for the Trustees and imposes a greater burden on the trust assets than would be the case if the Trustees were permitted to use the trust assets to pay their legal (and other) expenses.

60. If the Court grants permission to pay these expenses, the Trustees also seek a direction that the Receivers write to the Swiss Prosecutor to suggest that the sequestration order be lifted over the BH06's account with Pictet (for the purpose of permitting these payments to be made).

61. The Plaintiffs' position is as follows:

(a). they consent to the payment of the ATED provided that this is done in a way which respects the parties' positions (i.e. without prejudice to the parties' positions as to the true ownership of BH06 and Mallett Ford). This can only be done by way of a dividend from BH06 which could be paid directly to HMRC with the consent of all parties. They do not want, for example, a payment to be made to the Trustees by way of repayment of a loan advanced by the Trustees (since I assume they wish to reserve the right, in the event that they succeed in the Appeal, to review the basis and terms on which the loan was made and if appropriate to challenge BH06's obligations to the Trustees thereunder).

(b). the Plaintiffs accept that if it is ultimately determined that Mallett Ford is held on the terms of the Heritage Trust then there will be an inheritance tax liability. However, they maintain and have brought proceedings in the BVI to establish that they own Mallett Ford and argue that if successful Mallett Ford will not be an asset of the Heritage Trust so that there will be no such tax liability. The Plaintiffs object to the payment now of any inheritance tax as it may be difficult for them to recover the payment if and when their claim to ownership of Mallett Ford succeeds. Furthermore, they assert, but the Trustees

say that there is no evidence to support their assertion, that HMRC will not require payment of tax until the ownership dispute is settled.

(c). once again, the Plaintiffs have no objection to the payment of the insurance premium but make the same point regarding the manner in which funds are made available to the Trustees for the purpose of making the payment as they do in relation to the ATED liability. They once again propose the declaration and payment of a dividend from BH06 to the Trustees for this purpose. They note that the Court has already given approval of the payment of the insurance premium but that, despite this, payment had not been made because the parties and BH06 had been unable to reach agreement as to an acceptable mechanism and method for making the payment from BH06.

(d). the Trustees have access to and should use the funding available under the LFA. It is well-established (as I have noted above) that where (as in the present case) an asset is the subject of a proprietary injunction, the respondent will not be permitted to use that asset to fund his legal expenses unless, *inter alia*, he first establishes that he has no other funds available to him for that purpose and even then the Court will exercise a "*careful and anxious*" discretion before permitting such payments (the Plaintiffs relied on *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch.) at [22(4)] per Nugee J and *Gee on Commercial Injunctions* (6th ed.) at 21-053). Therefore, the threshold conditions for even engaging the Court's discretion to permit payment of the Trustees' legal expenses from assets derived from BH06 are not satisfied and the Trustees' application must therefore be dismissed.

(e). the Plaintiffs resist any order being made that would protect the Trustees from a liability to the trust or the beneficiaries in respect of the use of trust assets to pay their legal expenses in the event that the Appeal is successful although they do not object to third party payees being protected and being relieved of any obligation to disgorge the sums they receive.

62. The Fifth Defendant submitted that the Court should be astute to ensure that any decision on expenditure should be made by the Receivers (if they were prepared to accept that responsibility) or the Court itself on application and that no order should be made before the outcome of the Appeal that would trigger an entitlement on the part of the funder under the LFA to receive repayment.

63. BH06 also made brief submissions in writing (but did not attend the hearing):

(a). BH06 pointed out that the question whether the Trustees should be allowed to use or have access to assets of (or assets derived from) BH06 was separate from the question whether BH06 could or should make any such assets available to the Trustees in the current circumstances. BH06 did not address the first question but invited the Court, as regards the second question, to bear in mind that the Trustees will be seeking to have BH06's assets applied for purposes that benefit not BH06 itself but its shareholder (acting in its capacity as trustee). Ordinarily the BH06 board would require a shareholder making such a request to provide clear written assent to the payment (so as to engage the principle in *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd* [1983] Ch. 258, as explained in the recent Privy Council decision *Ciban Management Corporation v Citco* [2020] UKPC 2). The question therefore arose as to who could give such assent pending the outcome of the Appeal (during which period the identity of BH06's shareholder remained in issue) and how BH06's directors could be protected. For so long as the Receivers were appointed, they would be able and need to give such assent (although if the Receivers ceased to be in office alternative arrangements would need to be made). In addition, the BH06 board would need to be satisfied that any upstreaming of funds to its shareholder was permissible as a matter of law. The BH06 board would need to be satisfied not only that shareholder assent had been given to the payment, but also that having regard to BH06's position (including its liabilities to creditors and future cash flow needs), it would be appropriate to make such a payment for the benefit of a shareholder at the time it came to be made. BH06 submitted that any order of the Court to authorise payments to be made by BH06 to the Trustees ought to make it clear that BH06 would only be required to make a payment if its board was satisfied that it was lawful and proper to do so.

(b). BH06's attorneys, Appleby, by letter to the Court dated 7 September 2020 also drew to my attention the earlier approval given by the Court and the problems that had arisen in connection with upstreaming funds to the Trustees to facilitate the payment of the insurance premium relating to an earlier period of cover. They pointed out, after having read Mr Böhler's Third Affidavit (in particular [69] - [70]) that it was not the case that the insurance premium could easily be paid by way of a dividend declared by BH06. On 9 September 2018, Appleby had written to the Court stating that the BH06 board would be willing to declare a dividend to facilitate the payment of the art insurance premium if it were in a position to do so, however it was not in such a position. This was because the board only had the power to declare a dividend if there were sufficient distributable

profits or money in the share premium account to cover the dividend, which at that time there was not. Consequently, on 11 September 2018, Appleby had written to the Court stating that a solution "*might be a payment in form of an interest free loan of USD62,539.98 to the Heritage Trust by way of direct payment of the insurance premium (the Loan*)" subject to certain listed conditions. At the hearing on 12 September 2018, the Trustees had sought a variation of the Injunction to permit USD62,539.98 from the assets of BH06 to be allocated to pay the insurance premium and the order had been granted, subject to the parties agreeing an appropriate method of payment. But the parties had been unable to agree a payment method, and as a result, the premium was not paid and the policy lapsed.

64. Considering and taking into account the parties' submissions I have concluded that:

(a). the Receivers shall have permission and the power to pay the insurance premium and the ATED payment to the insurer and HMRC (to discharge the liability of the Trustees in respect of both items) out of funds paid to them (as Receivers of the Share) by BH06 either by way of a dividend or other method approved by the BH06 board and the Receivers. If BH06 is currently unable to declare and pay a dividend, it may (if the BH06 board on advice so approves) make the payment as a loan which will be repayable by the Trustees (if the Appeal is dismissed) or the Plaintiffs (if the Appeal succeeds in whole or part) but only by way of deduction from future dividends which are declared by BH06 and payable to the Trustees or the Plaintiffs (as appropriate). If on reviewing the manner in which payment may be made the parties still find that there are problems, they should explain their proposals and make further submissions in writing and I shall issue a further ruling on the papers.

(b). as regards the potential liability to pay inheritance tax, the Trustees and the Plaintiffs shall jointly and as soon as practicable approach HMRC and seek HMRC's agreement that the inheritance tax liability shall not be payable pending the conclusion of the Plaintiffs' proceedings in the BVI (or if relevant the Appeal) but that if such an agreement (on terms satisfactory to the Trustees and the Plaintiffs) is not agreed within 42 days of the date on which the Trustees and the Plaintiffs first write to HMRC then the Receivers shall have permission and the power to pay the inheritance tax on the same basis as the payment of the insurance premium and the ATED payment.

(c). I accept the Plaintiffs' submissions with respect to the Trustees' costs of the Appeal. The Trustees' application should be dismissed.

The Costs Issues

65. There are various issues to be decided in relation to the costs to be awarded following the handing down of the Judgment:

(a). the Plaintiffs have accepted that in principle they should pay the Trustees' and the Fifth Defendant's costs on the standard basis (subject to the outcome of the Appeal). However, they seek various costs orders in their favour and in some instances no order as to costs in relation to certain applications.

(b). the position as between the Plaintiffs and the Fifth Defendant is generally agreed save for one issue. This concerns the costs of the Plaintiffs' application to strike out paragraphs [30] to [33] of the Fifth Defendant's defence. The Plaintiffs argue that this application was partially successful since the Court determined that these paragraphs should be struck out subject to the Fifth Defendant being given an opportunity to amend her defence (which she subsequently did). Given the partial success of the application, the Plaintiffs argue that the appropriate order as to the costs of the strike out application is that there should be no order as to costs as between the Plaintiffs and the Fifth Defendant.

(c). the Plaintiffs also accept that (once again subject to the Appeal) they must pay BH06's costs which were reserved under the orders dated 1 November 2017, 21 November 2017, and 10 April 2018 concerning the Plaintiffs' application for the Injunction.

(d). as regards the costs of the hearing on 9-10 January 2020 (the ***New Evidence Hearing***), convened to hear the Trustees' new evidence (***Trustees' New Evidence***) from the Panamanian witnesses adduced to support the Trustees' case that the Second Plaintiff could not be relied on as a witness of fact and the Plaintiffs' further evidence from the Second Plaintiff and others adduced to support the Plaintiffs' case that the Trustees had knowingly advanced a false case on the EHI share issue (see paragraphs [7]-[9] of the Judgment), the Plaintiffs seek an order that the Trustees pay their costs on the indemnity basis:

(i). they refer to GCR O.62, r.4(11) which is in the following terms: "*The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

(ii). they rely on Williams J's summary of the proper approach to the determination of whether to make an order for indemnity costs in *Ritter v Butterfield Bank* [2018 (2) CILR 638] (***Ritter***) at 651 (underlining added by me):

> "*In considering awards for indemnity costs, the court's focus should be primarily on the conduct of the losing party, not on the substantive merits of the case. Such an award should be made only in exceptional circumstances, such as where the losing party had behaved improperly, negligently or unreasonably. Advancing a claim which was unlikely to succeed, or which did in fact fail, was not by itself sufficient for the award of indemnity costs; to justify such an award, there should normally be an element in the losing party's conduct which deserved a mark of disapproval. That conduct would need to be unreasonable to a high degree, though may fall short of deserving moral condemnation*."

(iii). the Plaintiffs argue that this standard was satisfied in the present case. The Trustees' conduct in relying on the evidence of Mr Pitti and Mrs de Arauz (the key witnesses in support of the forgery allegation, without whom there was no evidential basis for alleging that the EHI share certificates had been forged in March/April 2018) in order to advance very serious allegations of forgery against the Second Plaintiff was "*unreasonable to a high degree*". This conclusion was supported by the findings made in the Judgment. The Plaintiffs say that I comprehensively rejected the evidence of Mr Pitti and Mrs de Arauz. They rely in particular on [42] of the Judgment (where I conclude that the evidence of Mr Pitti was not reliable and that his explanation for a photograph he produced shortly before the hearing was "*deeply implausible*"); [43] of the Judgment (where I conclude that Mrs de Arauz was "*wholly unreliable*" and that she "*gave the impression of having no understanding of her evidence and of following a pre-prepared script that reflected what she had been told to do and say by her husband*") and [46] of the Judgment (where I said that "*it was surprising to me that the interviews and discussions with Ms de Arauz had not been more thorough and had failed to identify the serious inconsistencies and confusions in her evidence*"). The Plaintiffs submitted that if the Trustees had applied even a rudimentary degree of scrutiny to the evidence of Mr Pitti and Mrs de Arauz

before making wild and entirely false allegations of forgery against the Plaintiffs, they ought never to have pursued those allegations. Their approach was especially unreasonable because it involved the pursuit of a very serious allegation of fraud. The extreme unreasonableness of the Trustees' conduct was compounded by the Trustees' baseless attack on the honesty of Mr Zuzovsky (an independent professional) by accusing him of fabricating his documentary records of having notarised the EHI documents in December 2017 (there had been no evidence to support such allegations). The resumption of the trial in January 2020 was entirely at the Trustees' behest and had they not sought to introduce this new evidence the Plaintiffs would not have been required to lead evidence to meet the new allegations, the hearing would not have been necessary, and the matter would have proceeded to judgment long before it in fact did.

(e). as regards the costs of Plaintiffs' application (the ***Adjournment Application***) to adjourn the trial and for various orders to preserve documents and to ensure that an independent review of those documents was undertaken (see the Plaintiffs' summons dated 14 February 2019 and [48] of the Judgment), the Plaintiffs resist the Trustees' application for costs on the indemnity basis and argue that they should only be liable to pay costs of the on the standard basis (they accept that this liability should extend both to the Adjournment Application and the independent review process which the Court directed as a result). Although the Court had ultimately determined that there was no further evidence of suppression by the Trustees, the Plaintiffs had acted entirely reasonably in making the Adjournment Application in the light of the information that Dr Gisler had provided (as corroborated by the very serious findings made by the Delaware Court against the First Defendant's officers shortly before the trial). The reasonableness of the Plaintiffs' conduct in making the Adjournment Application could (and should) not be assessed with the benefit of hindsight (see Henderson J in *Bennett v AG* [2010 (1) CILR 478] at [9] where he said that "*[t]he assessment of unreasonableness must avoid the wisdom of hindsight*"). In particular, by definition the Plaintiffs could not have known in advance that the limited review process directed by the Court would not ultimately uncover any further evidence that the First Defendant had deliberately suppressed documents in the course of its discovery process as that was the very purpose of the review which was conducted. On the contrary, the Plaintiffs could hardly be expected to ignore the information volunteered by Dr Gisler as to the serious misconduct of Lopag and the Plaintiffs acted entirely reasonably in pursuing those matters in the adjournment application. Furthermore, in ordering the limited review, the Court accepted that Dr

Gisler's evidence was such as to justify further investigation of the position. That in itself militated against any finding that the Plaintiffs had acted unreasonably.

(f). as regards the costs of the Plaintiffs' strike out application (made pursuant to their summons dated 1 October 2018), the Plaintiffs were successful in striking out the First Defendant's derivative counterclaim in its entirety. Accordingly, costs should follow the event and the First Defendant should be ordered to pay the Plaintiffs' costs of that derivative counterclaim (including the application to strike it out), to be taxed on the standard basis (including the costs of pleading a defence to that derivative counterclaim and applying to strike it out).

(g). as regards the Trustees' summonses seeking orders regulating the discovery process and for specific discovery (dated 22 November 2018 and 3 January 2019, the ***Discovery Summonses***), in view of the mixed success of the parties on the wide range of issues raised, the appropriate order was that there should be no order as to costs. The Plaintiffs accept that the Trustees were partially successful in that the Plaintiffs were ordered to conduct some additional keyword searches and an issue as to whether the documents held by a law firm (Asserson) were discoverable was resolved in the Trustees' favour. But the Trustees were not successful in respect of a substantial part of the Discovery Summonses, in particular, the Plaintiffs were only ordered to carry out 7 additional keyword searches from the very extensive list originally proposed. The Trustees had constantly changed their position as to the additional keywords they sought to impose on the Plaintiffs. Originally, they sought 62 additional keywords but during the course of the first hearing, the Court directed the Trustees to identify 6 keywords from its list. The Trustees responded by identifying 14 search terms (many of which had not even been included in its original list), of which the Plaintiffs were ultimately ordered to carry out further searches against 7 of those keywords.

66. The Trustees assert that they have incurred potentially recoverable costs of almost US$4 million and seek orders that the Plaintiffs generally pay their costs on the standard basis (to be taxed if not agreed) but that as regards the Adjournment Application, and as already noted, the Trustees seek an order that the Plaintiffs pay costs on the indemnity basis (to be taxed if not agreed):

(a). the Adjournment Application was pursued by the Plaintiffs unreasonably, with a wholly inadequate documentary basis to support allegations of dishonesty made against the

Trustees on the eve of trial (and they rely on the history and account given in Mr Böhler's Second Affidavit).

(b). the timing of the Adjournment Application had plainly been tactical and had caused severe disruption to the Trustees' preparation for trial. It had put the Trustees to significant and otherwise avoidable expense.

(c). the Plaintiffs conduct had been "*unreasonable to a high degree*". The Plaintiffs had made serious and unfounded allegations about the Trustees' conduct which were unsupported by contemporaneous documents, incorrect and found to be unsubstantiated. They had decided to proceed even after my ex tempore judgment of 14 February and after the letter from the Trustees' attorneys dated 16 February 2019. In the ex tempore judgment, I had made it plain that Dr Gisler's evidence was insufficient and an unsound basis on which to proceed with the Adjournment Summons, and had indicated that if the Plaintiffs intended to pursue their application, they would need to consider what, if any, additional evidence could be produced to deal with the issues which I had identified. In the letter dated 16 February 2019, the Trustees' attorneys had put the Plaintiffs' attorneys on notice that Dr Gisler's evidence contained information confidential to the Trustees, included information which was legally privileged, contained information provided to him in the course of his employment, included information which was provided to him subject to (at least) an implied duty of confidence to the First Defendant as his employer, was subject to the Confidential Information Disclosure Law 2016 and that the Trustees' rights relating to the issue of costs were strictly reserved. Despite this correspondence, the Plaintiffs decided to pursue their misguided application to adjourn the trial on 18 February 2019, which would otherwise have been the first day of the trial. In my judgment of 19 February 2019, I had held that the Plaintiffs had failed to show how any of the allegedly withheld documents related to the issues in dispute or were needed to allow the claims to be fairly adjudicated, and reiterated my concerns about Dr Gisler's evidence, specifically that he had failed to provide particulars as to the subject matter of the documents which were allegedly withheld, despite being given a chance to supplement his evidence.

(d). as regards the New Evidence Hearing, the Trustees say that it was and is to be treated as part and an extension of the trial, and not a separate hearing of a discrete application so that costs should follow the order to be made with respect to the trial itself. The Trustees succeeded at trial and therefore they should be paid their costs of the New Evidence

Hearing on the standard basis (to be taxed if not agreed). Had the new evidence been available to the Trustees at an earlier stage, the Court would have been invited to hear it and make the same factual determinations as part of the original trial days between 20 February 2018 and 5 March 2018 (the Trustees considered that they were compelled to place the new evidence before the Court pursuant to the duties of disclosure). The fact that the evidence was only obtained at a later stage was not sufficient to suggest that the issues raised in the evidence should or could be treated as anything other than part of the trial. Furthermore, the Plaintiffs were not entitled to say now that the further hearing was unnecessary or unjustified. They had invited the Court to order and wanted to have the further hearing and the Court had given great weight to their wishes when deciding to permit the further hearing to proceed (I had said that I would allow a hearing on the basis that the "*Trustees and the Plaintiffs consider this to be necessary and appropriate*"). Even if the New Evidence Hearing was not to be treated as part of the trial and the issue of costs was considered separately, the Plaintiffs cannot be described as the successful party and so were not entitled to their costs at all. While the Court concluded that the Trustees' new evidence was insufficient to support a finding of wrongdoing by the Second Plaintiff, the Court also concluded that the Plaintiffs' evidence was not made out. In circumstances where the Court declined to accept either the Trustees' or the Plaintiffs' position on this issue the threshold required for an adverse costs order is not met. The Plaintiffs' application for a costs order on the indemnity basis was plainly unfounded where both parties agreed that further evidence should be heard and then both parties evidence was essentially rejected by the Court. The costs should therefore be costs in the cause or, failing that, there should be no order as to costs.

(e). as regards the costs of the Plaintiffs' strike out application, the Trustees say that the outcome of the hearing was not an unqualified success for the Plaintiffs. The decision was balanced with both sides winning important issues and losing other important issues. There was no overall winner and, in the circumstances, there should be no order as to costs.

(f). as regards the Discovery Summonses, they were decided substantially in the Trustees' favour with certain aspects being limited to take account of the impending trial date. The Court had ordered the Plaintiffs to make good their deficient discovery review and the Trustees were successful on substantive issues which were resisted by the Plaintiffs, such as the Trustees' claim that the retainer with Asserson, the solicitors, was a joint retainer. One of the reasons why the Court concluded that it should not accept the Trustees'

application for orders requiring a search by the Plaintiffs of a large number of additional keyword search terms was the need for expedition due to the impending trial. As the Court noted in its ruling of 18 January 2019, *"The fact that the trial is now very near has meant that it has been necessary to limit significantly the further discovery that can be ordered."* In addition, the Court should take account of the fact that if the Plaintiffs had adequately complied with their discovery obligations in November 2018 and engaged with the Trustees' numerous requests to provide further and better discovery thereafter, the costs of the Discovery Summonses and the hearing on the 8 January 2019 could have been avoided. Costs should follow the event and the Plaintiffs should be ordered to pay the Trustees' costs of the Discovery Summonses on the standard basis (to be taxed if not agreed).

67. The Fifth Defendant says that paragraph [30] of the Fifth Defendant's defence was not struck out and neither were paragraphs [31]-[33] (which were simply inserted elsewhere in the amended defence). In the circumstances there was no basis upon which the Plaintiffs could sensibly oppose an order that they should pay the costs of their summons and application to strike out paragraphs [30] to [33] of the Fifth Defendant's defence.

68. After carefully considering and taking into account the various submissions made, and in the exercise of the discretion given to the Court, I have concluded as follows:

(a). that the Plaintiffs' application for an order that the Trustees pay their costs of the New Evidence Hearing on the indemnity basis should be dismissed but that the Trustees should pay eighty per cent (80%) of the Plaintiffs' costs of the hearing on the standard basis, to be taxed if not agreed:

(i). the basis on which an order for costs on the indemnity basis may be awarded was not in dispute. GCR O.62, r.4(11) requires the Court to be satisfied "*that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*" The approach to be adopted by the Court was clearly and succinctly summarised by Mr Justice Parker in *Re BDO Cayman* [2018 (1) CILR 187] (***BDO***). As he pointed out (at [17], echoing Williams J in *Ritter*), "*Conduct is a more important factor on this issue than the substantive merits of a party's case*" and as was noted in *Ritter* "*That conduct would need to be unreasonable to a high degree, though may fall short of deserving moral condemnation*." As was also noted in *Ritter* "*Advancing a*

claim which was unlikely to succeed, or which did in fact fail, was not by itself sufficient for the award of indemnity costs; to justify such an award, there should normally be an element in the losing party's conduct which deserved a mark of disapproval."

(ii). in my view, the Trustees' conduct in relying on the Trustees' New Evidence does not reach the necessary threshold to justify the award of indemnity costs. While there were serious weaknesses in the Trustees' New Evidence, the allegations made by the Panamanian witnesses and the evidence they gave were in my view serious and troubling and on balance sufficient, but only just sufficient, to justify being brought before the, and tested in, Court. The findings I made in the Judgment, in particular the findings quoted and underlined below, do not show that the Trustees' conduct was so unreasonable as to require or justify censure or to take the case out of the norm of highly contested litigation. As I noted in the Judgment (underlining added):

> "*42. The First Defendant's evidence of the bribery of Mr Pitti and Ms de Arauz is at best inconclusive..... But I do not find Mr Pitti's account of what was discussed and of Ms Gonzales' bribery to be reliable…….*
>
> *43. I also found Ms de Arauz to be wholly unreliable ……*
>
> *45. In these circumstances, it seems to me that the Court is unable to conclude, and should not conclude, that the evidence of Mr Pitti and Ms de Arauz is reliable. In my view, it is certainly not strong enough to displace the evidence given by the Plaintiffs' witnesses as to the Second Plaintiff's Documents being in existence before April 2018. This is not to say that the allegations surrounding the activities of Ms Gonzales are not serious and troubling. They are. But the evidence presented to this Court is not in my view sufficient to prove to the requisite standard (the balance of probabilities) that she bribed Mr Pitti and Ms de Arauz, and on the instructions of the Second Plaintiff procured the production of false documents.*
>
> *46. But I do not accept the Plaintiffs' submission that the only possible explanation for Mr Pitti's and Ms de Arauz's evidence was that the First Defendant or its agents had persuaded Mr Pitti and Ms de Arauz to produce false evidence in support of the First Defendant's case. That is not a conclusion, involving a very serious finding of dishonest and criminal conduct, which I can properly reach, based on the evidence presently before me. It is possible, indeed reasonably likely, that the First Defendant in vigorously pursuing its case relating to the ownership of EHI and relying on the other evidence it believes demonstrates that the EHI shares have always been trust property, had discussions with Mr Pitti and were told his story. There is no evidence to show that the First Defendant knew or must have*

known that the Mr Pitti's and Ms de Arauz's account and evidence, even if limited, was untrue and that Mr Pitti's and Ms de Arauz were lying (although it was surprising to me that the interviews and discussions with Ms de Arauz had not been more thorough and had failed to identify the serious inconsistencies and confusions in her evidence)."

(iii). while the Plaintiffs consented to the listing of a further hearing and did not object to the Trustees' characterisation of the further hearing as being "*an extension of the trial that took place in February and March 2019*" (see the Trustees' opening submissions dated 6 January 2020 at [5]), nonetheless I consider that the question whether the Second Plaintiff's integrity, honesty and credibility were undermined by the New Evidence and whether the Trustees' integrity, honesty and credibility were undermined by the Plaintiffs' further evidence relating to how the New Evidence had been obtained and relied on by the Trustees, should be treated, for costs purposes, as giving rise to a separate issue justifying a separate costs order having regard to the decision of the Court on that question (rather than an order that followed the outcome of the trial as a whole). The Plaintiffs were largely the successful party although they failed in their attempt to show that the Trustees had knowingly advanced a false case. The Plaintiffs did not just deploy this argument by way of a rebuttal of the allegations made against the Second Plaintiff but went further and positively asserted dishonesty on the part of the Trustees. In my view, the Plaintiffs should have eighty per cent (80%) of their costs of the New Evidence Hearing on the standard basis (to be taxed if not agreed).

(b). that the Trustees' application that the Plaintiffs pay their costs of the Adjournment Application relating to the Plaintiffs' application for an adjournment of the trial on the indemnity basis be granted:

(i). I accept the Trustees' submissions on this issue. In my view, it was unreasonable to a high degree justifying censure for the Plaintiffs to press their application for an adjournment of the trial, in a manner that would obviously disrupt the start and conduct of and the Trustees' preparation for the trial after the delivery of my *ex tempore* judgment of 14 February in the absence of further evidence that would deal with the serious problems and deficiencies in the Plaintiffs' evidence identified in that judgment.

(ii). in my *ex tempore* judgment of 14 February 2020, I made it clear that I did not "*find Mr Gisler's evidence to be satisfactory*" and that in my view were "*serious deficiencies such that his evidence [was] not sufficiently credible or reliable to justify the relief being sought by the Plaintiffs today*". I recognised the seriousness of the allegations made and the importance of ensuring that there could be a fair trial, but concluded that "*in order for the Court to be able to grant any relief there must be a sufficiently credible and reliable evidential base [and that] Mr Gisler's affidavit and signed statement [were] in important respects incomplete, evasive and unsubstantiated and I [had] serious concerns as to his independence and reliability.*" In light of the Court's serious concerns, it was unreasonable for the Plaintiffs to continue with the Adjournment Application in the absence of being able to adduce additional evidence that would address in a substantial and substantive way the deficiencies identified by the Court. As my ruling of 19 February 2020 (set out in the transcript of day 2 of the hearing) made clear, the Plaintiffs failed to do so. I said that:

> *"But, despite being given the chance to supplement his evidence, [Dr Gisler] has failed, in my view, to identify how the withheld or hidden documents relate to issues in the case and how, without them, there is a serious risk of an unfair trial. While I do not downplay the seriousness of the allegations, or of the findings of Vice Chancellor Laster, it seems to me that the Plaintiffs have failed to establish that the problems identified in the evidence filed in support of their application relate to factual or legal issues to be dealt with at trial in such a way that, in the absence of such documents or categories of document, the trial cannot safely proceed."*

(iii). I do not consider that the order I made for the appointment of an independent Liechtenstein lawyer "*to undertake some high-level testing of the first defendant's electronic records and to provide a report to the court within seven days… [to] ensure that [would be] some additional, albeit limited, testing of the First Defendant's electronic records to see whether or not there is any evidence of withheld documents being within those records that are relevant to the issues in trial"* undermines the reasons justifying, or precludes the making of, an order for indemnity costs. This order was made out of an abundance of caution and despite the fact that the Plaintiffs' evidence had failed to deal with the issues raised in the *ex tempore* judgment.

(iv). the Plaintiffs were successful in their application for an order for the preservation of electronic and hard copy documents, and for the production and verification of a

further list of documents. They are entitled to an order for the costs associated with those applications. If it is difficult separately to identify those costs, I shall make an order that 10% of the Plaintiffs' costs of the Adjournment Application be treated as costs related and to be allocated to their application for an order for the preservation of electronic and hard copy documents, and for the production and verification of a further list of documents.

(c). that there be no order as to costs in relation to the Plaintiffs' application to strike out paragraphs [30] to [33] of the Fifth Defendant's defence. I decided in favour of the Fifth Defendant on the paragraph [30] point (holding that if the Plaintiffs failed to amend the prayer and retained the application for an order transferring the Share to themselves, I would dismiss their strike out application) and in favour of the Plaintiffs on the paragraphs [31]-[33] point. I agree with the Plaintiffs that the proper result is that there be no order as to costs as between the Plaintiffs and the Fifth Defendant.

(d). as regards the costs of the Plaintiffs' strike out application (made pursuant to their summons dated 1 October 2018), I accept the submissions of the Trustees. There shall be no order as to costs. While the Plaintiffs were successful in their application to strike out the derivative counterclaim, they failed in their applications to strike out the direct claims and for a stay of the direct claims on *forum non conveniens* grounds. The fair and appropriate order is that there be no order as to costs.

(e). as regards the Discovery Summonses, I consider that the Plaintiffs should be ordered to pay eighty per cent (80%) of the Trustees' costs on the standard basis (to be taxed if not agreed). I largely accept the Trustees' submissions. They were substantially but not completely successful since the Plaintiffs were only ordered to carry out a limited number of additional keyword searches from the very extensive list originally proposed. In my view, therefore the Trustees should not be entitled to all of their costs and an 80/20 split seems to me to be fair and appropriate.

The Trustees' and the Fifth Defendant's Application for a Payment on Account

69. The Trustees seek an order that the Plaintiffs make an interim payment on account of the Trustees' costs in the sum of US$2.4 million within 14 days:

(a). the jurisdiction to order a payment on account is based on GCR O.62, r.4(7)(h) which states: "*where the Court orders the paying party to pay costs subject to taxation, a*

reasonable sum on account of costs, such sum to be assessed summarily". As confirmed by Mr Justice Parker in *BDO* [2018 (1) CILR 187] the provisions of the GCR give the Court a discretion (without any presumption) to order that litigants make payments on account in order to do justice on a principled basis.

(b). In *Mars UK v Teknowledge Ltd* [1999] 1 Costs L.R. 44 (***Mars UK***), Jacob J said at pp. 46 - 47:

> *"Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible.* ***It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice****. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount." (Emphasis added)"*

(c). if the Court decides to exercise its discretion to order a payment on account of costs, it must order a *"reasonable sum"*. Necessarily, this involves the Court arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the taxation or as a result of a compromise of those proceedings. In *Excalibur Venturers LLC v Texas Keyston Inc* [2015] EWHC 566 (***Excalibur***) Clarke LCJ ordered that the paying party make a payment on account on 80% of the total costs (where the award was made on the indemnity basis) and in *Mars UK* Jacob J proceeded in the basis of a two-thirds estimate where costs were being ordered on the standard basis. In Excalibur Clarke LCJ had said that:

> *"What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, to the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.*
>
> *In determining whether to order any payment and its amount, account needs to be taken of all relevant factors, including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser amount and if so what proportion of them; the difficulty, if any, that may be faced in*

recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulties in recovery in the case of an overpayment."

(d). in the present case the Court should order that the Plaintiffs make a substantial payment on account of costs as the power to award payment on account of costs is not limited to rare and exceptional circumstances. In fact, as a matter of principle, payment on account of costs should be the default position and the Trustees were entitled to their costs as at the date of the costs order and should not be kept out of the money due to them, especially since the Trustees have been obliged (ordered by the Liechtenstein court) to defend the claims and the assets of the Trust structure have been frozen as a result of the Injunction. Interest payable on costs (2.375%) in this jurisdiction is low and below commercially available rates so that the Trustees will suffer yet further prejudice if payment is delayed until after assessment.

(e). the sum of US$2.4 million represented approximately 60% of their potentially recoverable costs of their proceedings (including 80% of their potentially recoverable costs of the Adjournment Summons, which costs are sought on the indemnity basis). These figures were evidenced in the Trustees' summary of costs, exhibited to Mr Böhler's Second Affidavit, which provided a breakdown of the Trustees' potentially recoverable costs. It only included the costs of attorneys admitted in Cayman (as the costs of foreign attorneys are not recoverable on the standard basis) save in respect of the Adjournment Application which includes foreign lawyer costs since the Trustees seek the costs of the application on the indemnity basis. The summary provides for each month (from November 2017 to July 2020) an outline of the type of work undertaken, an aggregate figure for total hours charged by the attorneys from Campbells and counsel, the total sums charged by Campbells and counsel and total disbursements. The total for the fees is US$3,172,998.90 and for disbursements is US$527,652.58, giving an aggregate of US$3,700,651.48 (60% of which is US$2,220,390.89). The amount of fees charged in respect of the Adjournment Application were US$208,299.11 (80% of which is US$166,639.29). This resulted in a claim for a payment on account in the sum of US$2,387,030.18.

70. The Plaintiffs accept that the Fifth Defendant is entitled to an order for standard costs. The Fifth Defendant also seeks an order that the Plaintiffs make an interim payment on account of such costs in the sum of US$1,206,568.60, or some other sum as the Court deems just, within 14

days. The sum of US$1,206,568.60 is 60% of the total sums claimed (which is US$2,010,947.80 which includes fees and disbursements, including sums owed to the Fifth Defendant's foreign counsel). The Fifth Defendant submits that the Court is empowered to make such an order in accordance with GCR Order 62, rule 4(7)(h) (as enacted under the Grand Court (Amendment No 1) Rules 2016) and an order for a reasonable sum should be made absent good reason to the contrary. She argues that she was "*pulled into*" these proceedings in 2017 and has had to pay the substantial costs of her legal advisers during the lengthy period in which the proceedings have taken place. The inevitable result of the parties' agreement that taxation will be stayed pending the conclusion of the Appeal will be a further delay of possibly a year during which the final amount owed to her will not be determined. She is an individual, not a corporate entity, and the total cost she has incurred is material. An interim payment of costs in her favour would be particularly appropriate given that, of all the litigants in these proceedings, she is alone in having funded her representation: all other litigants have had access (regularly or otherwise) to trust assets or litigation funding. As regards the quantum of the interim costs her Seventh Affidavit provided, at paragraph [7], a table summary of the invoices that the she has received and paid up to the date on which that affidavit was sworn. She reserved the right to provide updating information on costs subsequently incurred which was done in the skeleton argument filed on her behalf for the purpose of the hearing. The breakdown of the total sum claimed was US$1,680,521.15 in respect of legal fees of her counsel and her Cayman attorneys and approximately US$330,426.65 in respect of disbursements. The disbursements included the sum of US$181,742.44 in respect of her Liechtenstein legal advisers. She submits that she is entitled to include their fees as disbursements and cites Practice Direction 1/2001 which provides that "*Legal fees paid to foreign lawyers cannot be claimed as disbursements unless the foreign lawyer is engaged to give an opinion on a point of foreign law which is in issue in the proceeding*". While Walch & Schurti, a Liechtenstein law firm, did not ultimately give expert evidence, they were nonetheless engaged to give opinions on foreign law, as issues of Liechtenstein law were at issue in the proceedings.

71. The Plaintiffs submit that the burden is on the receiving party to demonstrate that it would be appropriate to order a payment on account taking into account all of the circumstances of the case (*BDO* at [34]). No payment on account of costs should be ordered in the circumstances of the present case and even if any payment on account were to be ordered, there was no justification for making an order for a payment anywhere near the excessive sum sought by the Trustees.

(a). as regards the Trustees' application, the Plaintiffs submit that there are various matters which strongly militate against an order for a payment on account being made. They say that an order for the payment of a large sum on account may have the effect of stifling the Appeal and therefore be unjust. The Trustees are not at risk and as trustees, if the Appeal fails, will be able to recover their costs directly out of the Plaintiffs' entitlements as beneficiaries under the trusts (and the Trustees' costs of the Appeal could be paid pursuant to the LFA). Furthermore, the Trustees have not provided sufficient information for the Court to be in a position to make a fair assessment of the quantum of any costs which they might recover following taxation, even on an approximate basis. There are likely to be substantial (and as yet unquantified) costs orders in favour of the Plaintiffs and the costs claimed by the Trustees in relation to those issues would have to be deducted from their overall claim and an allowance would also have to be made for a set-off of any costs ordered in favour or the Plaintiffs. Without having considerably more information, the Court is not in a position to make a fair quantum assessment in relation to those issues. In addition, the evidence showed that any payment on account to the Trustees could not be recovered if the Appeal is successful. Neither the First Defendant nor the Ninth Defendant has any material assets of their own and are just shell companies. The payment on account would rapidly be paid away - Mr Böhler had indicated that the First Defendant intended to deploy over US$1million of any interim payment on funding its participation in the Appeal. The difficulties in recovering any payment on accounts and the risks to the Plaintiffs were exacerbated by the fact that any costs order made by this Court would not be enforceable in Liechtenstein.

(b). the Plaintiffs submitted that the Trustees method for assessing the quantum of any payment on account (80% of the sums claimed on an indemnity basis and 60% of the sums claimed on the standard basis) was without foundation and at odds with the usual practice of the Court which was that the amount of any payment on account should be assessed very conservatively so as to ensure that any payment did not exceed the amount which is finally determined to be due at the conclusion of the taxation process. The preferable approach was to apply the analogy between the quantum of an interim costs certificate and the quantum of a payment on account. This had as been approved by the English Court of Appeal in *Blakemore v Cummings* [2010] 1 WLR 983 at [23] (with the Court of Appeal nonetheless emphasising that there was no presumption in favour of a payment on account and that the Court must take into account all of the circumstances of the case). The relevant passage was cited with approval by Kawaley J in *Al Sadik v Investcorp* (unreported, 6 August 2019) (***Al Sadik***) at [22]. Were the matter proceeding to

taxation at this stage, any interim costs certificate would be limited to the sum not in dispute between the parties. It would be unfortunate (and indeed extraordinary) if the Trustees (or the Fifth Defendant) was able to secure a more advantageous interim payment on the basis of limited evidence simply because the Judgment in their favour was subject to appeal, all the more so given that there remains a material possibility that any interim payment will fall to be repaid in due course. A party who obtains a payment on account should not, in principle, be able to obtain a higher interim payment than would be awarded through the taxation process.

(c). the Plaintiffs argue that in principle a payment on account for costs to be assessed on the indemnity basis should be no more than 40% and no more than 20% for costs to be assessed on the standard basis. They rely on the approach taken by Kawaley J in *Al Sadik* as a reference point. In that case the losing party was ordered to pay costs on the indemnity basis and Kawaley J ordered a payment on account based on 40% of the costs claimed after obviously irrecoverable costs had been deducted. The difference between the appropriate percentage for indemnity costs and standard costs of 20% was the same difference as that proposed by the Trustees. In addition, where there was any doubt in relation to any of the costs claimed it should be resolved in favour of the Plaintiffs as the paying parties. This approach reflected the rules relating to taxation of costs on the standard basis as set out at GCR O.62, r.13 in the following terms:

> "*On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the taxing officer may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these rules the term "the standard basis" in relation to the taxation of costs shall be construed accordingly.*"

(d). the Plaintiffs set out detailed objections to the Trustees' claimed costs which can be summarised as follows:

(i). in view of the substantial involvement of the Trustees' foreign lawyers (whose fees were irrecoverable, including the cost of communications between Cayman lawyers and foreign lawyers) and taking into account the overriding principle that a paying party should not be required to pay more because the successful party has engaged a foreign lawyer than he would have been required to pay if the successful party had employed only local attorneys, it was difficult to see that Campbells could justify having incurred fees of US$2,004,407.89. Given the heavy involvement of foreign lawyers, this sum appeared to be susceptible to

significant reduction in the course of the taxation process. Furthermore, given the limited nature of the role played by Campbells because of the heavy involvement of foreign lawyers, it was not reasonable or proportionate for senior lawyers at Campbells to have any substantial involvement in the matter. It ought to have been possible for the vast majority of the work to have been done by more junior lawyers at lower cost.

(ii). it would be necessary to review the basis on which the fees of Mr Fenwick Q.C. had been calculated. It appeared likely that a substantial amount was payable pursuant to irrecoverable brief fees. The Court should assume that Mr Fenwick Q.C. was paid for the trial on the basis of a brief fee which was incurred in the course of the period between 1 January 2019 and 13 February 2019, rather than on the basis of an hourly rate, so that the amount claimed for his trial fees was vulnerable to being disallowed in due course. Even if the Court took the view that it was possible that Mr Fenwick Q.C. was engaged on the basis of an hourly rate during this period, the amount claimed was clearly unreasonably high and a substantial proportion was likely to be disallowed.

(iii). assuming that the Court made an order for costs in the Plaintiffs' favour with respect to the New Evidence Hearing, it would be necessary to reduce the Trustees' costs award (the Trustees would not be entitled to recover their costs of the New Evidence Hearing). While the Trustees had not produced a detailed breakdown of the work done in relation to the New Evidence Hearing it was reasonable to assume that substantially all of the fees claimed between November 2019 and 31 January 2020 concerned that hearing because the narrative for that period did not identify any other substantial task (and there was no other active issue in the litigation at that time). The total fees claimed for that period amounted to a total of US$490,588.68 and disbursements of US$14,903.67 were also claimed in relation to the expenses of the Trustees' Panamanian witnesses. The total amount arising with respect to the New Evidence Hearing was therefore approximately US$500,000 which should be deducted from the Trustees' total costs claim before any other deductions were applied. In addition, since the Plaintiffs anticipated that their recoverable costs and disbursements in relation to the New Evidence Hearing would be similar to the amounts claimed by the Trustees, a further deduction of approximately US$500,000 should be made from the Trustees' claimed costs to reflect the impact of any costs order in favour of the Plaintiffs.

(iv). for these reasons it was clear that the Plaintiffs would in due course object to a very substantial proportion (potentially more than 80%) of the costs claimed by the Trustees as well as seeking to set-off their own costs claims. This should inform Court's approach to the summary assessment of the quantum of any payment on account.

(v). assuming that the Court also made an order for costs in the Plaintiffs' favour with respect to the Trustees' derivative counterclaim (which the Plaintiffs successfully applied to strike out) there will also need to be an adjustment to the quantum of any payment on account to reflect the fact that the Trustees cannot recover their costs in relation to that and that it would be liable to pay the Plaintiffs' costs of that issue. The Trustees had once again not produced a detailed breakdown of the work done in relation to its derivative counterclaim but it was reasonable to assume that this accounted for a substantial proportion of the sums claimed for the period between 1 September 2018 and 31 October 2018 (US$281,640.98) as well as some costs in November 2018 when the strike out application was heard.

(vi). the result of these adjustments was as follows:

Total costs claimed by Trustees	-	US$3,700,651.48
Less Leading Counsel's irrecoverable brief fee for trial	-	US$571,384.66
Less Leading Counsel's irrecoverable brief fee for the return date on the injunction	-	US$132,490.56
Less deduction for EHI issue	-	US$1,000,000
Less deduction for	-	US$650,000

derivative counterclaim	
Less deduction for specific discovery applications	- US$150,000
Less deduction for Campbells' unspecified disbursements	- US$99,823.42
Trustees' claimed costs minus apparently wholly irrecoverable elements	- US$1,096,952.84

(e). as regards to the Fifth Defendant's application, there was also a serious risk that a payment on account in the large amount claimed would not be recoverable. In addition, the Fifth Defendant had also not provided sufficient information for the Court to be in a position to make a fair assessment of the quantum of any costs which she might recover following taxation, even on an approximate basis. She had only provided in her evidence global figures for her Cayman attorneys, Carey Olsen (US$789,335), Mr Brodie Q.C.'s fees (US$798,205.04), the fees of her foreign lawyers Walch & Schurti (US$181,742.44), her personal expenses for attending the trial (estimated at US$80,000), and other largely unspecified disbursements (US$67,633.73). The total sum claimed was US$1,916,916.21 (this sum was increased, as I have noted, in the skeleton argument filed on her behalf to US$2,010,947.80).

(f). the Fifth Defendant was not permitted to claim US$80,000 for personal costs in relation to the trial. Paragraph 9 of Practice Direction No.1/2001 only permitted the recovery of reasonable travelling expenses of a witness travelling to Cayman and accommodation expenses for witnesses were limited to US$250 per day. Since the Fifth Defendant was only present in Court for her own evidence, she was only entitled to recover the cost of an economy class return flight to Cayman and perhaps 2-3 nights in a hotel capped at US$250 per night. She was also not permitted to recover the costs of foreign lawyers. She did not adduce any expert evidence at trial and therefore there was no justification for claiming any part of Walch & Schurti's fees (which were in any event remarkably high). Since no breakdown of disbursements had been provided save for some allowance

for the costs of the Opus 2 system (excluding the costs of logins for foreign lawyers such as English junior counsel who attended trial) no payment on account should be made in respect of any disbursements. As regards to the fees of Mr Brodie Q.C., they were unreasonably high given the very limited role that Mr Brodie had played in the proceedings both at trial and in the various interlocutory hearings. The Fifth Defendant was entitled to recover Mr Brodie's fees of attending those hearings on an hourly rate not exceeding US$900 but it seemed to be extremely unlikely that it was reasonable for Mr Brodie to spend anything like 886 hours of work (or 88 working days of 10 hours each) on this case in the circumstances. It was also unclear as to whether Mr Brodie had been paid a brief fee. Since there was a doubt on this issue, and that doubt was to be resolved in favour of the Plaintiffs, Mr Brodie's fees should be discounted entirely for the purpose of determining the quantum of any payment on account. Carey Olsen's fees also appeared to be unreasonably high. In the absence of any explanation of what it is that Carey Olsen actually did in these proceedings so as reasonably to incur this level of fees (the burden of proof being on the Fifth Defendant to establish that any fees were reasonably incurred) the Court should proceed on the basis that the Fifth Defendant was unlikely to recover more than a very small proportion (no more than 10%) of Carey Olsen's fees.

72. Having considered the parties' submissions and the evidence they have filed, and taking into account all relevant factors and circumstances, I have concluded that the Plaintiffs must pay as an interim payment in respect of costs within 21 days of the date on which the order giving effect to this judgment is drawn up and sealed (i) US$300,000 to the Trustees and (ii) US$350,000 to the Fifth Defendant.

(a). as Parker J held in *BDO*, GCR O.62, r.4(7)(h) gives the Court a discretion (without any presumption) to order that litigants make payments on account and in the exercise of that discretion the Court is entitled to do justice on a principled basis. There is no reversal of the burden of proof, as there is in England and Wales.

(b). the Court may order the payment of "*a reasonable sum*."

(c). the Court should have regard to all relevant factors in deciding whether to order such an interim payment and if a payment is to be made, the quantum of the payment. Lord Clarke's discussion of the proper approach in *Excalibur*, quoted above, is a helpful summary of the position. I note that in a case where there is an appeal against the

judgment in respect of which an interim costs order is sought, as in this case, the likelihood of a successful appeal is one of the factors to be taken into account.

(d). the Trustees seek an order that the Plaintiffs make an interim payment in the sum of US$2.4 million. This sum represents approximately 60% of their potentially recoverable costs claimed on the standard basis (the total costs and disbursements being US$3,700,651.48 of which 60% is US$2,220,390.89) plus 80% of their potentially recoverable costs claimed on the indemnity basis (in respect of the Adjournment Application, where the total sum claimed is US$208,299.11, 80% of which is US$166,639.29). As regards the necessary adjustments in light of the costs orders I have made as explained above:

(i). I held against the Trustees in respect of, and ordered them to pay 80% of the Plaintiffs' costs of, the New Evidence Hearing, so they must deduct the amount of their costs included in the above total and also 80% of the Plaintiffs' costs from the amount claimed. The Plaintiffs claimed that the deduction in respect of the Trustees' costs claimed in relation to the New Evidence Hearing should be US$1,000,000.

(ii). I have ordered that there be no order for costs with respect to the Plaintiffs' strike out application. Any sum included in the Trustees' fees for their costs of this application would need to be deducted. The Plaintiffs have estimated this sum to be US$650,000.

(iii). I have held in favour of Trustees with respect to their application that the Plaintiffs pay their costs of the Adjournment Application on the indemnity basis (subject to a deduction in respect of the Plaintiffs' costs relating to their application for an order for the preservation of electronic and hard copy documents, and for the production and verification of a further list of documents, which I have said may be 10% of the Plaintiffs' costs of the Adjournment Application). The total claimed by the Trustees as I have noted is US$208,299.11.

(iv). I have also held that the Plaintiffs should be ordered to pay eighty per cent (80%) of the Trustees' costs on the standard basis (to be taxed if not agreed) in respect of the Discovery Summonses. The Plaintiffs have estimated that the amount claimed by the Trustees for this application were US$150,000.

(e). I have taken into account all the relevant factors, weighing in particular on the one hand the fact that the Trustees' success after a long and complex trial entitles them to an award of substantial costs and that the costs awards I have made in respect of the interlocutory applications will result in them also being entitled to further substantial costs orders, subject to deductions for the costs orders against them, against on the other hand the fact that the Plaintiffs have raised serious challenges to the amounts claimed by the Trustees and the difficulty at this stage of forming a reliable view on the issues raised, the risk that the Plaintiffs will have difficulties in recovering any overpayment, the possibility of a successful appeal, the position of the parties and the risk that a substantial interim payment could materially interfere with the Plaintiffs' ability to prosecute the Appeal. It seems to me that in this case the fair and proper order is that the Plaintiffs must make an interim payment but in an amount calculated on the basis of a cautious and low percentage of the sum claimed by the Trustees. I have concluded that this should be 20% of the sums claimed, without adopting a different percentage for the sums payable by the Plaintiffs on the indemnity basis. For this purpose, I consider that the total sum claimed should be assumed to be US$1.5 million. This sum results from an assessment of the adjustments I consider to be appropriate to the US$3.7 million total figure claimed by the Trustees to take account of the costs orders I have made, the Plaintiffs' objections, and the other uncertainties that exist regarding quantification of the Trustees' costs claims. Accordingly, I shall order that the Plaintiffs pay the Trustees US$300,000 as an interim payment in respect of costs and that they must do so within 21 days of the date on which the order giving effect to this judgment is drawn up and sealed. I am satisfied that in the event that the Appeal is successful, the Trustees will be able to repay this sum. I also do not consider that the Plaintiffs have provided evidence to demonstrate that the payment of such a sum (with the sum payable to the Fifth Defendant) will stifle or materially affect their ability to prosecute the Appeal. The Plaintiffs appear to have access to substantial resources which has enabled them to continue the multi-jurisdictional litigation in which they and the Trustees are engaged.

(f). the total sum claimed by the Fifth Defendant is US$2,010,947.80. It seems to me that the Plaintiffs are wrong to argue that the sums claimed in respect of Walch & Schurti's fees should be disallowed. Taking into account the Plaintiffs' challenges to the legitimacy and level of and lack of a breakdown with respect to the Fifth Defendant's claims relating to personal costs and disbursements and as to the level of Carey Olsen's fees and the level of Mr Brodie Q.C.'s fees and the basis on which they were charged, I have concluded that fair and appropriate base level of fees for calculating the amount of the interim payment should be US$1.4 million. In my view the Fifth Defendant is entitled to an interim payment of 25% of that sum, being US$350,000 (once again payable within 21 days of the date on which the order giving effect to this judgment is drawn up and sealed). I have once again taken into account the factors set out

above but have concluded that the Fifth Defendant's position as an individual not acting in a professional capacity justifies a higher percentage than the professional Trustees. In am satisfied that in view of her rights and position as a beneficiary of the Ypresto Trust she will be able to repay this sum in the event that the Appeal is successful.

The Pre-Judgment Interest Issue

73. The Trustees seek an order that the Plaintiffs pay to the Trustees' interest on their costs at a rate of 2.375% per annum from the date of payment of each amount by the Trustees until the date of the order and thereafter at the judgment rate of interest of 2.375% until the date of payment, in accordance with the Judgment Debts (Rates of Interest) Rules 2012, the prescribed and applicable rate of interest in United States Dollars is 2⅜% or 2.375%.

74. The Trustees submit that they are entitled to interest on their costs pursuant to GCR O.62, r.4(7)(g) and the Judgment Debts (Rates of Interest) Rules 1995 (the ***1995 Rules***). GCR O.62, r.4(7)(g) states that the orders the Court may make include "*interest on costs (at the prescribed rate for Cayman Islands Dollars) from or until a certain date, including a date before judgment*." This was consistent with CPR.44.2(6)(g) in England and Wales which enables the court to award "*interest on costs from or until a certain date, including a date before judgment*". In *Amoco (UK) Exploration Co v British American Offshore Ltd (No 2)* [2002] BLR 135 QBD (Comm Ct), the court ordered that interest on costs should run from a date prior to the judgment to recognise the reality of when the costs were actually incurred. Mr Justice Langley stated:

> "*For my part, I think it may well be appropriate for at least in substantial proceedings involving commercial interests of significant both in balance sheet and reputational terms, that the Court should award interest on costs under [CPR Part 44.3(6)(g) now 44.2(6)(g)] where substantial sums have inevitably been expended perhaps a year or more before the award of costs is made and interest begins to run on it under the general rule…. I have no difficulty in accepting that [the costs claimed] have had to be financed and paid over a substantial period of time."*

75. The Trustees also relied on the following statement of the position in *Cook on Costs* (2018 edition) at [32.5]:

> *"What these authorities show is that the Court has a broad discretion. While the incipitur rule [that interest runs from the date of judgment] may be appropriate in the majority of cases, there is nothing that requires the Court to find any exceptional circumstances to depart from this, when exercising its discretion under CPR.44.2(6)(g). As confirmed by Clarke J in Fattal v Walbrook Trustees (Jersey) Ltd [2009] EWHC 1674*

"the most important criterion is that any order should reflect what justice requires and it is in the pursuit of that goal which should inform the exercise of discretion."

76. The Fifth Defendant also seeks an order for interest. She submitted that section 34(1) of the Judicature Law (2017 Revision) provides that, subject to the rules of the Court, in proceedings for the recovery of a debt, the Court may award interest. In respect of debts that arise before judgment is given, the period for the calculation of interest is the period from when the cause of action arose until the date of payment. A costs award was a '*debt*' for the purposes of section 34(1). Interest can be awarded on costs orders. That was provided for explicitly in GCR O.62, r 4(7)(g).

77. The Plaintiffs submit that the Court has no jurisdiction to make an order for the payment of interest on costs running from a date before the date of the order because, pursuant to rule 5(b)(iii) of the 1995 Rules, interest is only payable on costs orders from the date of service of the certificate of taxation. Rule 5(b) of the 1995 Rules is in the following terms:

> "*Interest shall be payable at the rate prescribed for Cayman Islands Dollars upon all orders for costs with effect from -*
> *…….*
>
> *(ii). in the case of costs assessed pursuant to GCR Order 62, rule 3, the date of service of the judgment or order; or*
>
> *(iii) in the case of taxed costs, the date of service of the certificate of taxation.*"

78. In support of this proposition, they cite the decision in *CVC/Opportunity Equity Partners v DeMarco Almeida* [2013 (2) CILR Note 5] (***CVC***). The note of the decision in *CVC* states as follows (underlining added):

> *"The defendant was awarded indemnity costs and an interim certificate of taxation was issued. This initial amount was paid to the defendant, but a later certificate was issued which awarded a higher amount. The defendant submitted that he was entitled to interest for the entire amount from the date of the original judgment which awarded costs. The plaintiff paid the difference between the awards into court and submitted in reply that the defendant was only entitled to interest from the date at which the costs had been quantified.*
>
> *Held: the interest was only owed from the point at which the costs had been quantified (Hunt v. R. M. Douglas (Roofing) Ltd., [1990] 1 A.C. 398, not followed). The Judgment Debts (Rates of Interest) Rules 1995—which were made under the Judicature Law (2007 Revision), s.34 and promulgated by the Rules Committee of the Grand Court—stated, at r.5(b)(iii), that interest on taxed costs was payable from the date of service of the certificate of taxation. Interest on the costs could therefore only run from the time at which they were quantified in a certificate of taxation and that certificate had been served. The interest on the initial amount had only been owed from the date that the*

interim certificate had been issued until the initial amount had been paid to the defendant, and the interest on the difference was only owed from the date on which the second certificate was issued. Under the Judicature Law (2007 Revision), s.25(a), however, the plaintiff had extinguished its liability by paying the difference into court. The defendant was therefore not entitled to any further sums from the plaintiff and any interest was limited to the rates agreed upon by the Accountant General and the designated banks."

79. In their skeleton arguments neither the Trustees nor the Fifth Defendant considered *CVC* or the issue raised by the Plaintiffs based on the language of the 1995 Rules.

80. In my view, however, the Plaintiffs' submissions should be rejected. There are two issues. First, an order to pay costs to be assessed is construed as a judgment debt so that the provisions that provide for interest on judgment debts are applicable to such an order. The 1995 Rules apply to this issue and stipulate that in the case of taxed costs, interest is payable at the prescribed rate from the date of service of the certificate of taxation. This applies the *allocatur* rule rather than the *incipitur* rule. Second, the Court may, in the exercise of its discretion, order that interest on costs starts to run from a date before judgment and the rate of interest is at large. Where the Court makes an order for the payment of such interest it continues to run until the date when the costs become payable by the paying party under the order for costs as a judgment debt as a judgment debt and the statutory, post-judgment rate of interest begins to run.

81. The decision in *CVC* involved a dispute relating to an entitlement to and payment of post judgment interest on costs. It did not refer to or consider GCR O.62, r.4(7)(g) (which was introduced I believe, although I was not provided with submissions on this issue, by the Grand Court (Amendment) Rules 2011 and therefore should have been in force at the time). That sub-rule is clear and gives the Court the power to award interest on costs running from a date before judgment and by reference to an event other than the Court's order or judgment (for example, the date on which the receiving party has paid its legal fees). The event triggering the date on which interest starts to run is therefore not the costs order and therefore the 1995 Rules do not apply.

82. I was not provided with any submissions by the Plaintiffs as to the circumstances surrounding the introduction of GCR O.62, r.4(7)(g) or its relationship with the 1995 Rules. Importantly for the purpose of this application, the Plaintiffs did not challenge the *vires* or validity of GCR O.62, r.4(7)(g) (and I note that there was no challenge to the sub-rule or to the Court's jurisdiction to award interest on costs running from a date before in judgment in *BDO*, albeit that no such award was made in *BDO*).

83. I note the following helpful passage from the 2019 English White Book at 44.2.29 (which obviously deals with the different rules applicable pursuant to the CPR in England and Wales, but which is helpful for the purposes of interpreting and applying GCR O.62, r.4(7)(g) in this jurisdiction):

> *"Generally civil proceedings operate on a pay as you go basis, with the parties engaged paying the costs that they have incurred in the proceedings as they arise throughout and paying those costs out of their own pockets or financing them through interest bearing borrowings or the indulgence of their lawyers. As a result, when at the end of the proceedings the time comes for the court to consider what order for costs should be made the parties may have been out of pocket to the extent of those payments for a period of time or may be indebted to lenders for interest on loans. An order that a party in such a position should be paid their costs as assessed (if not agreed) will not, without more, be an order which will include any compensation for that party for being out of pocket in this respect or being so indebted. A receiving party worsened in this way may seek such compensation by requesting the court when making a costs order under [GCR O.62, r.4] to exercise its power under [GCR O.62, r.4(7)(g)] to award interest on incurred costs (the amount of costs to be assessed if not agreed)."*

84. I also note the following:

(a). in *Fattal v Walbrook Trustees* [2009] EWHC 1674 (Ch.) Clarke J said as follows:

> *"The ability of the [court] to depart from the incipitur rule [that interest runs from the date of judgment] was conferred in order that the court could take account of the fact that money would often be expended before any judgment. Conversely, where money has not been expended for example where the bulk of the costs have been paid at a date long after the relevant judgment, justice requires that the date of commencement of the interest is postponed beyond the date of the judgment."*

(b). the following passage from Peter Hurst's *Civil Costs* (6th ed., 2018 at 662):

> *"The purpose of the power of the court to order interest on costs including pre-judgment interest is to compensate a party who has been deprived of the use of his money and who has had to borrow money to pay for legal fees. The court's discretion is not fettered by any statutory rate of interest but is at large. In exercising the discretion, the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and receiving parties."*

85. Accordingly, I am satisfied that the Court has jurisdiction to make an order that interest on costs runs from a date before judgment including the date on which the costs were incurred and paid by the receiving party. While neither the Trustees nor the Fifth Defendant set out in any detail the reasons why this was the appropriate in the present case it seems to me that the evidence does support and justify the making of such an order. This has been lengthy, complex and expensive litigation which has required the Trustees to fund their costs by entering into a third party funding agreement with its attendant costs and charges (the details of which have

not been provided in evidence) and they and the Fifth Defendant (and the Plaintiffs) have, to the extent they have previously paid their costs, been out of pocket for some time. In all the circumstances, I have concluded that the proper order is that interest on costs should be charged at the rate sought by the Trustees, being a rate of 2.375% per annum, from the date on which the relevant receiving party with the benefit of an order for costs (the Trustees, the Fifth Defendant or the Plaintiffs) paid the relevant costs until the date of service of the certificate of taxation, in accordance with the 1995 Rules. Thereafter, judgment interest will then run at the same rate until the date of payment.

The Taxation Issue

86. The Plaintiffs seek an order that the taxation process be deferred until after the conclusion of the Appeal. They submit that this will avoid the risk of a wasted taxation process in the event that the Appeal is successful and prevent a situation in which the taxation process has to be repeated once the appeal has been determined. The Plaintiffs are content to agree to BH06's proposal that the time for commencement of taxation of costs be extended until the date which is 3 months after the determination of the Appeal (including any appeal to the Privy Council in due course).

87. The Trustees referred to GCR O.62, r.9, which states that:

> *"(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.*
>
> *(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly……"*

88. The Trustees also referred to the judgment of Smellie CJ in *In The Matter of The Sphinx Group of Companies* [2009 CILR 178], in which he confirmed (at [9]-[10]) that when considering the scope of GCR O.62, r. (9)(1) "*A cause or matter is concluded when the Court in question has finally determined the matters in issue, whether or not there is an appeal from that determination*". The Trustees submitted that following the Judgment, the proceedings have concluded and the Plaintiffs' claims have been dismissed. Therefore, in accordance with GCR 0.62, r.9(1), costs should be taxed immediately unless the Trustees are granted an order for a substantial payment on account. If the Plaintiffs' application for a lengthy stay of assessment was granted and no payment on account is ordered to be paid to the Trustees, they would be kept out of their money in respect of costs for a considerable period. There was no justification for such an approach.

89. In my view it is right, on balance and having regard to all the circumstances, to defer the taxation process as the Plaintiffs request until after the conclusion of the Appeal in order to avoid the risk of substantial costs being wasted and I shall make the order proposed by the Plaintiffs and BH06. I have considered whether having decided that the taxation process should be deferred it would be fair, and I should also order, that interest on costs running from the date of payment to service of the certificate of taxation should also be deferred. However, it seems to me that this is not necessary or appropriate. If the Plaintiffs consider that it is in their interests to proceed with the taxation rather than defer the process while the pre-judgment interest continues to accrue, they are still able, before the order giving effect to this judgment is drawn up, to agree with the other parties that taxation should proceed.

Mr Justice Segal
Judge of the Grand Court, Cayman Islands