IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 16

FSD CAUSE NO. 269 OF 2024 (DDJ)

IN THE MATTER OF THE A TRUSTS

BETWEEN

AA

Plaintiff

AND

(1) BB

(2) CC

(3) DD

(4) EE

(5) GG (by GG's guardian *ad litem* FF)

(6) HH

Defendants

Before: The Hon. Justice David Doyle

Appearances:

Alexander Learmonth KC, instructed by Thomas Wright and Norberto Ayala Rodriguez of Bedell Cristin Cayman Partnership for the Plaintiff

Tracey Angus KC, instructed by Esmond Brown and Jackson Messer of Appleby (Cayman) Ltd for the First Defendant

Penelope Reed KC, instructed by Andrew Peedom of Collas Crill LLP for the Third Defendant

Constance McDonnell KC, instructed by Rachael Reynolds KC, Deborah Barker Roye and Chris Vincent of Ogier (Cayman) LLP for the Fourth Defendant

Hector Robinson KC and Jessica Vickers of Mourant Ozannes (Cayman) LLP for the Fifth Defendant

Heard: 10 and 11 February 2025

Draft judgment circulated: 19 February 2025

Judgment delivered: 25 February 2025

Civil Procedure – Order 28 of the Grand Court Rules (2023 Revision) – English and Hong Kong White Books on civil procedure – determination of various issues in respect of progression of proceedings begun by originating process raising issues as to the mental capacity of an individual to execute and deliver certain deeds regarding trusts governed by the laws of the Cayman Islands – determination of issues in respect of a confidentiality order – identification of the substantive issues for determination at the final hearing – whether the proposed seventh defendant should file evidence – whether discovery should be ordered and if so whether further evidence of fact should be ordered – issues in respect of expert evidence – whether a prospective costs pro tem order should be made and what order for costs should be made on the fourth defendant's summons for directions – settlement and alternative dispute resolution

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JUDGMENT

Introduction

1. The parties, driven it appears by their English solicitors, have cast light on the phrase "lawyered up" in respect of what should be relatively straightforward proceedings for the determination of the mental capacity of an individual when he executed and delivered some deeds in respect of various trusts governed by the laws of the Cayman Islands (the "Cayman Trusts"). This "lawyering up" may have something to do with the value of the trust funds, which is stated to be over US$1 billion, but which is reducing because of these proceedings.

2. I shall refer to the Plaintiff for convenience and to preserve anonymity pursuant to the Confidentiality Order I made as long ago as 5 September 2024, as "P" or the "Father". He was represented by Alexander Learmonth KC and the attendance list indicated he was assisted by 2 local attorneys, a solicitor and another barrister attending in person and 5 other lawyers attending remotely.

3. I shall refer to the First Defendant as "D1", a trustee of the Cayman Trusts (who on P's case has been removed). It was represented by Tracey Angus KC. The attendance list indicated that she would be accompanied by 2 local attorneys (one stated to be attending without charge), with a barrister, 3 solicitors (with the third stated to be attending "without charge") and 2 representatives of the client who "may attend the hearing, in full or in part" attending remotely.

4. The Second Defendant has not been served and is not an active party.

5. I shall refer to the Third Defendant as "D3", (who on P's case is the present trustee of the Cayman Trusts). It was represented by Penelope Reed KC. The attendance list indicated that she would be accompanied by a local attorney in person and two solicitors and a barrister remotely.

6. I shall refer to the Fourth Defendant as "D4" or the "Son". D4 is the son of the P. D4 was represented by Constance McDonnell KC and Rachael Reynolds KC. The attendance list indicated that they were joined in person by 2 other local attorneys, their client D4, the Sixth Defendant ("D6") who is D4's wife and plays no active role in the proceedings, and two solicitors. They were also supported by another barrister and 3 solicitors attending remotely. One of the solicitors was stated to be attending "without charge".

7. I shall refer to the Fifth Defendant as "D5". D5, P's former wife acting as guardian *ad litem* for P's young daughter (the "Daughter"). D5 was represented by Hector Robinson KC and another local attorney in person with two solicitors attending remotely, together with D5 (it being stated she "may attend the hearing, in full or in part") and an individual described as "(Financial Advisor-client)".

8. On 10 and 11 February 2025 there was a directions hearing in respect of the future progress of P's Originating Summons dated 27 September 2024 (the "Originating Summons") to a final hearing. I had on 12 December 2024 made an order in respect of the filing of evidence. D4, D5 and D6 were to file their evidence in response to that of P by 3pm on 10 January 2025 (the parties agreed an extension to 13 January 2025), D1 and D3 were to file any evidence in response by 3pm on 31 January 2025 (the parties agreed an extension to 3 February 2025) and P was to file and serve any evidence in reply by 3pm on 21 February 2025 (the parties agreed an extension to 24 February 2025). On 12 December 2024, I had delivered a judgment which outlined some of the brief background to this case and my reasons for making the order.

9. In the afternoon of 5 February 2025, the hearing bundles for the directions hearing were delivered followed by the authorities during the afternoon of 6 February 2025. The estimate for my reading time was 4.5 hours. I spent 3 days reading in before the start of the hearing.

Case Summary

10. I endeavour to provide what I hope is an uncontentious short summary of the case. I record that it is based on what is presently before the court and I keep a mind open to persuasion at the final hearing.

11. P is the settlor of various family trusts the majority of which are governed by the laws of the Cayman Islands. P is a primary beneficiary of some of the Cayman Trusts (save for two) and the Son and the Daughter are primary beneficiaries of all of the Cayman Trusts (save that the Daughter is currently an excluded person of the two children's trusts). P's former wife is not a beneficiary of any of the Cayman Trusts. D6 is a beneficiary of the Cayman Trusts. The Cayman Trusts were administered by D1 as trustee. P is/was also the Protector of each of the Cayman Trusts with power to remove and appoint trustees of the Cayman Trusts and the power to appoint and revoke the appointment of a Successor Protector of the Cayman Trusts. In 2023 P, by way of certain deeds (the "Removal Deeds") purported to remove D1 as trustee and appoint D3 in its place. In 2024, P by way of certain deeds (the "Successor Protector Deeds") purported to remove D4 as Successor Protector and appoint his former wife in his place. D4 disputes the validity of these removals and appointments.

12. P filed the Originating Summons seeking judicial determinations as to his capacity to execute the Removal Deeds and the Successor Protector Deeds.

13. The undated Agreed Case Summary (filed on 4 February 2025) at paragraph 14 indicates that the "substantive issues raised by the Originating Summons are agreed to include":

    (a) whether P ceased to be Protector of the Cayman Trusts prior to executing the Removal Deeds and the Successor Protector Deeds (together the "Disputed Deeds") by reason of becoming unable or unfit to act as Protector in accordance with the terms of the Cayman Trusts. It is noted at footnote 12 that P considers that the question of "unfitness" has been put in issue only so far as it relates to "unfitness by reason of mental incapacity". It is recorded that D4 "does not agree" with P.

(b) whether P had the mental capacity to execute the Removal Deeds on 11 October and/or 4 December 2023; and

(c) whether P had the mental capacity to execute the Successor Protector Deeds on 28 February 2024 and/or 22 March 2024.

14. At paragraph 15 of the Agreed Case Summary, it is stated that D4 seeks confirmation from the court on whether the issues to be determined within these proceedings include whether P is or is not the current Protector of the Cayman Trusts. It is added "If P has lost capacity or has become unfit to act, the current protector is either [P's former wife] or [D4]."

15. The Agreed Case Summary also states that the deeds of the Cayman Trusts each appoint P as Protector. Amongst other powers, the Protector of each of the Cayman Trusts has power to remove and appoint trustees of the Cayman Trusts and power to appoint and revoke the appointment of a Successor Protector of the Cayman Trusts. It is stated that on 18 April 2017 and 21 November 2017 P executed deeds appointing D4 as his Successor Protector of the various Cayman Trusts, pursuant to which D4 would become Protector of these trusts upon P ceasing to be Protector. Under the deeds it is provided that a Protector will automatically cease to be a Protector "on death … or … on becoming unable or unfit to act" (the "Automatic Removal Provision") (paragraph 4 of the Agreed Case Summary).

16. At paragraph 7 of the Agreed Case Summary it is stated that D4 disputes the validity of the Disputed Deeds on the ground that P had already ceased to be Protector of the Cayman Trusts by the time each of the Disputed Deeds was executed and delivered, having lost capacity or become unfit to act as Protector (thereby engaging the Automatic Removal Provision) such that D4 succeeded P as Protector, and D1 remains trustee. Footnote 10 indicates that P considers that the question of "unfitness" has been put in issue only so far as it relates to "unfitness by reason of mental incapacity". It is recorded that "[D4] does not agree with [P]".

17. At paragraph 5 of the Agreed Case Summary, it is stated that on 11 October 2023 P purported to execute, and on 4 December 2023 purported to deliver the Removal Deeds to remove D1 as trustee of the relevant Cayman Trusts and appoint D3 as trustee in its place.

18. At paragraph 6 of the Agreed Case Summary, it is stated that on 28 February 2024 P purported to execute and on 22 March purported to deliver the Successor Protector Deeds to remove D4 as Successor Protector of the relevant Cayman Trusts and appointing D5 (his former wife) as replacement Successor Protector in each case.

19. P's former wife, although not an expert on mental capacity issues, says that she "believes that [P] had capacity to make the decisions that he did on 4 December 2023 and 22 March 2024" (paragraph 10 of the Agreed Case Summary).

The Originating Summons

20. The relief claimed in the Originating Summons was set out as follows:

> "… the Plaintiff seeks the following relief, namely declarations and/or orders that:
>
> 1. In relation to those instruments listed in Part 1 of Appendix B attached hereto (the "Removal Deeds"):
>
>   1.1 The Plaintiff had capacity to execute each of the Removal Deeds on the date on which they were respectively executed;
>
>   1.2 The First and Second Defendants were removed as trustees of The A Trusts with effect from the date on which the Removal Deeds were respectively executed; and
>
>   1.3 The Third Defendant was appointed as trustee of The A Trusts with effect from the date on which the Removal Deeds were respectively executed.
>
> 2. [not for determination at the final hearing]
>
> 3. In relation to those instruments listed in Part III of Appendix B attached hereto (the "Successor Protector Deeds"):

3.1 The Plaintiff had capacity to execute the Successor Protector Deeds on the date on which they were executed;

3.2 The Plaintiff's nomination of the Fourth Defendant as Successor Protector of The A Trusts was revoked with effect from the date on which the Successor Protector Deeds were executed; and

3.3 The Plaintiff nominated the Fifth Defendant in her personal capacity as Successor Protector of The A Trusts with effect from the date on which the Successor Protector Deeds were executed.

4. The First and Second Defendants shall take all necessary steps forthwith to vest the assets of The A Trusts with the exception of the Remaining Trust in the Third Defendant pursuant to the Removal Deeds.

5. Such further or other declarations, orders or directions as the Court may think fit.

6. Costs."

Capacity Issue

21. In view of the fact that the Originating Summons referred to the capacity issue and the hearing was in respect of what directions should be given to progress to the final hearing of the Originating Summons counsel referred to case law on mental capacity and it is convenient to deal with that at this stage of the judgment.

O Trust

22. In *O Trust* 2018 (1) CILR 59 concerns had been expressed over the settlor's capacity. The settlor had established a trust that initially provided for her nephew and niece to be the "remainderman". Later they were replaced by a trusted friend of the settlor D1. In 2012 the settlor revoked her will and made D2 her sole beneficiary and the settlor also, on 30th July 2012, wrote to the trustee to amend the trust to make D2 the remainderman. In March 2015 the settlor made a declaration confirming and explaining the 2012 letter. The trustee was concerned about the settlor's capacity

and declined to give effect to the amendment request. The headnote reveals that it was held by Kawaley J as follows:

> "As the trustee had genuine doubts as to the settlor's capacity and had invited the court to determine the issue, D2, being the party positively asserting that capacity existed, would be required to prove that it did on the balance of probabilities. When determining whether an individual had capacity, the same test that applied to the making of wills should apply to the exercise of any other impugned legal power. For such an act to be valid, the person performing it should have the mental capacity (with the assistance of such explanation as he or she might have been given) to understand the nature and effect of the particular act, as well as knowledge and approval of the details of the act. The level of understanding required depended on the circumstances of each case. The extent of the property to be disposed of and the number and quality of other potential claims would also influence the precise level of understanding required on the facts of each case. In addition, a testator or donor might suffer from conditions which deprived him or her of capacity in certain circumstances while in others he or she had full capacity. In such cases, the crucial question was whether capacity existed at the time the relevant instrument was executed. D2 did not, therefore, have to prove that the settlor was always lucid and competent between July 2012 and April 2015. The courts generally applied a low evidential threshold designed to enlarge rather than to narrow the scope of the dispositive powers of elderly testators or donors (paras. 33-41)."

23. Ms McDonnell referred to [33] of the judgment:

> "I did not find it necessary to decide the question which was not illuminated by any authority placed before me, as to whether the presumption of capacity which arises in relation to a duly executed will (*Devas v. Mackay* (3) ([2009] EWHC 1951 (Ch), at para 61)) applies to instruments made under a trust. The trustee having admittedly genuine doubts about the matter and having invited the court to determine the issue of the settlor's capacity, in my judgment the most practical approach was as follows. To require the party positively asserting that capacity existed to prove that it did on the balance of probabilities."

24. Mr Learmonth referred to [39]-[42]. At [39] Kawaley J referred to *Lindzon* 2015 (2) CILR 1 and commented that the cases demonstrated that an individual might suffer from conditions which

deprived them under some circumstances while in others full capacity was enjoyed. In such cases, the crucial question was whether capacity existed at the time that the relevant instrument was executed which I think Mr Learmonth was using to mean when deeds were "signed, witnessed and delivered". As he put it "execution includes it all".

25. At [40] Kawaley J referred to *Banks v Goodfellow* (1870), L.R. 5 QB 549 and stated that D2 did not have to prove that the settlor was always lucid and competent between July 2012 and April 2015.

26. At [41] Kawaley J stated that *Lindzon* and *Banks v Goodfellow* also illustrate "another important practical legal principle, that the courts generally apply a low evidential threshold designed to enlarge rather than to narrow the scope of the dispositive powers of elderly testators or donors."

Poulton Trust

27. Kawaley J returned to capacity issues 4 years later in *Poulton Trust* 2022 (1) CILR 224 in respect of plaintiffs seeking to set aside their purported removal as beneficiaries of a trust. The case was heavily pleaded and involved many issues, including undue influence. The trial spanned nearly six weeks. Kawaley J commented on the role of experts in capacity cases at [355] emphasising that the issue of capacity is "from first to last, for the decision of the court". It should not be delegated to experts but experts can afford valuable insights into the workings of the mind.

28. Mr Learmonth also highlighted a passage in *Banks v Goodfellow* at page 567 from *Den v Vancleve* 2 Southard, at p660:

> "By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament. But if they have so far failed as that these

> cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

29. Mr Learmonth referred to *Re Smith (deceased)* [2014] EWHC 3926 (Ch) where the judge at first instance on the facts and circumstances of that case concluded at [206]:

> "In conclusion, I am not satisfied that the claimants have discharged the legal burden of proof which they bear to establish, on the balance of probabilities, that Mrs Smith did not have capacity to make the gift of the Proceeds. On the totality of the evidence adduced by the claimant, this has not raised sufficient doubt as to capacity so as to shift the evidential burden to the defendant, or, alternatively, even if the medical evidence is sufficient to raise such doubts, on the totality of the evidence, the claimants' case has not been established. I am not satisfied that Mrs Smith was not capable of understanding the nature and effect of the gift, had its general purport been fully explained to her. Accordingly, the claimants' first ground for impugning the gift of the Proceeds fails."

<u>Order 28 – the Originating Summons procedure</u>

30. These proceedings were commenced by way of the Originating Summons. There has been no application for the court to determine that the proceedings should be continued as if the matter had begun by writ. These proceedings are governed by Order 28 of the Grand Court Rules (2023 Revision) ("GCR"). Order 28 rule 1A of the GCR (which I accept is subject to any direction of the court to the contrary) refers to the service of evidence and provides at (6) that "No other affidavit shall be received in evidence without leave of the Court." I made a Directions Order on 12 December 2024 in respect of the serving and filing of evidence. I am unaware of any appeal against that order.

31. Order 28 rule 4(2) of the GCR importantly provides that:

> "The Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to <u>secure the just, expeditious and economical disposal thereof."</u> (my underlining)

32. Order 28 rule 4 (3) provides that the court should "consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct."

33. Order 28 rule 7 permits a defendant to file a counterclaim. None of the defendants (including D4) have made a counterclaim.

34. Order 28 rule 10 provides that if any party does not comply with Order 28 or with any order or direction of the court as to the conduct of the proceedings the court may order the cause or counterclaim be dismissed or as the case may be the defendant be debarred from adducing such evidence as the court may specify.

35. In my judgment delivered on 12 December 2024, at paragraph 54 I stated that the "issue of capacity raised in these proceedings should, with sensible co-operation amongst the parties and experienced attorneys, be a relatively straightforward issue to determine within a reasonable time and the parties (especially the Plaintiff and the Fourth Defendant) should focus on assisting the court in that respect.".

36. Mr Robinson indicated that it was in the interests of the beneficiaries of the Cayman Trusts, including the Daughter and her unborn descendants, that there should be a prompt, and preferably amicable, resolution of the issues. Concern was expressed in respect of the mounting costs and their impact on the Cayman Trusts. Mr Robinson referred to the significant adverse impact on the family and added "The tone of the language used, including by the lawyers, has partly contributed. The level of hurt and upset will only increase, the more protracted these proceedings become."

37. My overall objective in determining the disputed issues which were argued at the directions hearing was to make directions as to the future conduct of the proceedings to secure the just, expeditious and economical disposal of them.

English and Hong Kong White Books

38. This court is required to have regard to the English Supreme Court Practice 1999 and Hong Kong Civil Procedure known as the White Books (see Practice Direction 2 of 2024) especially as regards the interpretation and application of similar rules. Order 7 of the English White Book concerns originating summonses. Order 7 rule 3 is in similar terms to the Cayman rule. The English commentary at 7/7/5 suggests that an originating summons, certainly for strike out purposes, is treated as if it were a pleading. Order 28 of the English White Book concerns the originating summons procedure with the comment at 28/8/1 that "It is better not to let affidavits stand as pleadings …". Order 7 of the Hong Kong White Book concerns general provisions in respect of an originating summons. It is noted that the procedure was "invented for the purposes of quickly determining simple points without pleadings." Order 28 of the Hong Kong White Book concerns the originating summons procedure. The commentary at 28/0/1 repeats the English commentary. Order 7 rule 3 is in similar terms to the Cayman rule and the commentary at 7/7/5 repeats in substance the English commentary with the addition of a further authority from 1981.

<u>The Agreed Points</u>

39. The parties agreed:

(1) the terms of the stay as between D1 to D3 relating to the non-Cayman Trusts;

(2) the substitution of the Daughter (through her guardian *ad litem*, P's former wife) for P's former wife (as guardian *ad litem*);

(3) the Son and the Daughter to represent their respective issue;

(4) the appointment of Robert Lindley ("Mr Lindley") as representative of the unrepresented beneficiaries and service of the requisite documents on Mr Lindley;

(5) the directions to the final hearing (save as to the timing for the filing of bundles and skeleton arguments);

(6) costs orders in favour of D5 and D6 (provided she takes no active role) and Mr Lindley on an indemnity basis from the assets of the Cayman Trusts;

(7) P's former wife need not be added in her personal capacity to the proceedings if her agreement to be bound is recited in the order; and

(8) liberty to apply.

The Disputed Points

40. At the directions hearing there were 8 points still in dispute which required determination by the court, and these were set out in the Agreed List of Issues as follows:

> "1. The terms in which the Confidentiality Order ought to be varied.
>
> 2. What the scope is of the substantive issues for determination in the Originating Application; whether any additional issues ought to be determined within these proceedings; and/or whether the issuing of a separate originating process is necessary.
>
> 3. Whether any discovery ought to be ordered, and if so what should be ordered.
>
> 4. Whether Mr Lindley should be permitted to file evidence on behalf of the parties he is appointed to represent (if so advised).
>
> 5. If discovery is ordered, whether further evidence of fact ought to be ordered.
>
> 6. What expert evidence ought to be ordered and if so, what directions should be ordered in relation to that expert evidence.
>
> 7. The terms of any prospective costs orders to be made in respect of the Plaintiff's, the trustee parties' and [D4's] costs of the Originating Application.
>
> 8. What costs order should be made in relation to D4's Application of 2 December 2024 (reserved to this hearing)."

Point 1 – *Confidentiality Order*

41. My ruling in respect of Point 1 was that I was content with P's suggested variations. This in effect followed from my rulings in respect of other points. It was extended to specify P's medical advisers and the three experts and to include parties subsequently added to the proceedings. Provision was also included to ensure that the Confidentiality Order as varied applied to all parties and to clarify the position in respect of D1 to D3 and the trusts not governed by Cayman law.

42. D4 had sought much wider variations to include future medical assessors, factual witnesses and other extended issues.

43. At the outset of the hearing I agreed that documentation and information could, on a confidential basis, be disclosed to Mr Lindley and the transcribers.

44. The Confidentiality Order was granted on 5 September 2024. It is not unusual in private trust cases in the Cayman Islands for confidentiality orders to be granted where good reasons exist for such. It was right and proper in the particular circumstances of this case that privacy and confidentiality concerns be properly protected. Confidentiality orders normally cover confidentiality of the documents filed with the court (to be sealed and not to be opened without prior leave of the court) and for hearings to be held in private and judgments to be duly anonymised.

45. The application for a confidentiality order in this case was on the justifiable grounds of:

(1) sensitive medical information;

(2) protection of private lives in an internal trust dispute;

(3) welfare of minors;

(4) the public interest in open justice did not outweigh interests of protecting the welfare of minor beneficiaries and the private lives of the adult beneficiaries.

46. It relied on *Julius Baer Trust Company (Channel Islands) Limited v AB, CD and EF* 2018 (2) CILR 1 to which I was also referred by Ms Reynolds at the directions hearing, which I had and have full

regard to. Kawaley J in that judgment applied *SPhinX Group* 2017 (1) CILR 176 and set out the governing legal principles adding at [18]:

> "Where an offshore jurisdiction promotes the establishment of trusts as an effective mechanism for legitimately conserving and protecting settlors' wealth, the host courts must to my mind be at least sympathetic to confidentiality applications such as the one made in the present case …
>
> The public interest in the Cayman Islands on confidentiality applications may, in terms of an initial knee-jerk response at least, be somewhat less cynical about confidentiality than might be the case elsewhere …"

47. At [30] Kawaley J summarised the position as follows:

> "The court is required to act as a judicial watchdog, with one eye on the private needs of locally established trusts and the other eye on the public requirements of open justice."

48. These principles and sentiments have been applied in numerous other authorities at first instance. See, for example, Segal J in *IGCF SPV21 Ltd* (FSD unreported judgment 1 February 2023 at [24] to [26]).

49. I, like most judges in common law jurisdictions, am a strong supporter of open justice and transparency. In *Silicon Valley Bank* (FSD unreported *ex tempore* judgment 29 June 2023) I stressed the importance of open justice in the context of dismissing an application for a sealing order in winding up proceedings. In *Aubit International* (FSD unreported *ex tempore* judgment 16 October 2023) at [42], again in the context of winding up proceedings, I commented that "the need for open justice and transparency in respect of the serious issues raised in this case to my mind trumps any confidentiality or abuse concerns … Secrecy in this case will only assist any potential wrongdoers and is not in the interests of justice." In jurisdictions (such as the Cayman Islands, Bermuda and the Crown Dependencies) which encourage individuals to set up private trusts on the expectation that their privacy expectations will be respected it is also important, so far as the law and circumstances permit, to protect that privacy. We must take care not to sacrifice a fundamental

and constitutionally protected right of privacy on the altar of generalised assertions of open justice. In law context and specificity are important.

50. In the context of private trusts, Kawaley CJ in *G Trusts* [2017] SC (Bda) 98 Civ put it robustly and clearly at [11] when he stated:

> "The present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts should rest assured that this Court's firmly established practice of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peacefully enjoy their actual and contingent property rights, has a venerable legal basis. The existing practices will continue to be applied in appropriate cases such as the present."

51. At appellate level in Cayman, I do not lose sight of Newman JA's judgment at [10] in *The International Banking Corporation BSC (in administration) v AHAB* 2018 (2) CILR 20 (a case which concerned civil procedure, discovery and third-party inspection):

> "It is firmly established that the administration of justice in Cayman must comply with the principle of open justice."

52. That important principle, of course, has well established exceptions and a nuanced application in Cayman to proceedings in respect of private trusts.

53. In respect of the sealing of court files Rix JA (with whom Chadwick P and Newman JA agreed) in *Sasken v Spreadtrum* 2016 (1) CILR 1 followed Smellie CJ in *AHAB v Saad Invs. Ltd* 2011 (1) CILR 326 and at [17] stated:

> "It is sufficient if, for good reason, the closure of a file, in whole or in part, is needed in the interests of justice."

54. At [22] he concluded: "… I would allow this appeal and grant a closure or sealing order under [GCR O63 r3 (4)] with respect to the two identified documents ….".

55. It is also interesting to note that more recently in *AB v C* 2022 1 CILR N8 (CICA judgment 19 May 2022), a case which involved a patient within the meaning of the mental health legislation, consideration of expert psychiatric reports and mental capacity, Beatson JA (with whom Goldring P and Birt JA agreed) commented at [10] that the judgments at first instance "contained personal information about the plaintiff's injuries and health" and added, "At the conclusion of the hearing, the President stated that, although it might be rather late in the day, he had asked for the judgments to be taken down from the website while the matter was investigated. He also stated that in future cases such as this, consideration should be given to providing an anonymised version of a judgment which did not reveal the identity of the plaintiff." Goldring P at [42] stated "I would only add that this judgment should not be reported until and unless it has been anonymised …".

56. At appellate level in Bermuda, I note that Geoffrey Bell JA (sitting with President Sir Christopher Clarke and Justice of Appeal Sir Anthony Smellie) in *Ingham v Wardman* [2022] CA (Bda) 7 Civ at [33] referred to the judicial acknowledgement "that confidentiality orders are often granted in private trust matters …" and described the underlying circumstances of *DPP v Clarke* [2019] Bda LR 46 as "of a completely different nature". The Court of Appeal of Bermuda restored the Privacy Order.

57. The need for privacy in private trust cases has also been recognised in the Crown Dependencies for many years. In the Isle of Man see *Re Delphi Trust* 2014 MLR 51. In *CMI Trust Company (IOM) Limited* 2014 MLR 45 sitting as a Deemster in the Isle of Man I referred to the principle of open justice and also noted "the practice of this court is also to accord some importance to the confidentiality of private trusts" and I did not "identify the settlor, the beneficiaries or the settlement by name", although in that case I did sit in open court. I made similar orders in *AB v CD* (30 June 2016) and *A* (24 January 2017). In Jersey, see *Saffrey Champness Trust Corporation* [2005] JRC052 to similar effect.

58. In *MN v OP* [2019] EWCA Civ 679, the Court of Appeal of England and Wales considered whether anonymity should be the norm in applications made under the Variation of Trusts Act 1958 as it is for approval hearings in respect of compromises of claims in proceedings brought by or on behalf of a child or protected party. It was common ground (see [61]) that there may be applications under the 1958 Act "where anonymising the proceedings is necessary in the interests of justice in order to protect the rights of the minor beneficiaries." At [65] the court referred to the sensitivity of "highly personal medical and other information". At [76] there was reference to the balancing

exercise between the competing rights under articles 8 and 10 of the European Convention of Human Rights.

59. Far removed from a Cayman private trust context, in *Tickle v The BBC* [2025] EWCA Civ 42 the Court of Appeal of England and Wales considered the principle of open justice in a family law context. Sir Geoffrey Vos, the Master of the Rolls (who delivered the Distinguished Guest Lecture 2024 in the Cayman Islands), referred to the requirements of open justice at [43] to [50] stating at [45] that: "The principle is applicable as much in family proceedings as in any other proceedings." The Master of the Rolls was not considering and did not refer to the position of the open justice principle in the context of private trusts.

60. The English tide (some may describe it as a potential tsunami) of open justice (even in family matters) appears to be building up at a fast rate. There is presently a consultation exercise being conducted by the Transparency & Open Justice Board with the closing date for responses being 28 February 2025. The tsunami alert may be sounded shortly thereafter in common law "offshore" jurisdictions. Insofar as private trusts are involved, the Cayman judiciary will continue to do their best to ensure that the sand on Seven Mile Beach remains fresh and dry in a well-respected financial services jurisdiction which legitimately treats proper privacy and confidentiality concerns in private trust cases as an appropriate exception to the important principle of open justice.

61. If the incoming English tide on open justice generally is left unchecked, it could swamp and adversely impact legitimate private trust industries worldwide. Sitting in the Cayman Islands I shall do my best, in accordance with my judicial oath, to stem that tide in matters which relate to private Cayman trusts. I will also do my best to uphold the principle of open justice, where appropriate. Much will depend on the context within which the privacy and open justice concerns arise. In the present context, applying the relevant local case law as outlined above, I granted the Confidentiality Order on the justifiable grounds upon which the application for it was based.

Point 2 – *the substantive issues for the final hearing*

62. Sensibly counsel focused their submissions on Day 1 on Point 2 and invited me to rule upon it at the end of Day 1 as such would assist them in focusing their submissions on the other points on Day 2.

63. I gave a ruling on Day 1 on Point 2 and on Day 2 clarified the numbering of the issues to be specified in the Order for everyone's benefit. The ruling was as follows:

The substantive issues which properly arise for determination at the hearing of the Originating Summons are as follows (and I use for ease of reference some of the terms as defined in the Originating Summons):

Issue 1

Did P have mental capacity to execute and/or deliver each of the Removal Deeds on the dates they were executed and/or delivered?

1.1 Was D1 removed as trustee of the Cayman Trusts with effect from the date on which the Removal Deeds were executed and/or delivered?

1.2 Was D3 appointed as trustee of the Cayman Trusts with effect from the date on which the Removal Deeds were executed and/or delivered?

Issue 2

Did P have mental capacity to execute and/or deliver the Successor Protector Deeds on the dates they were executed and/or delivered?

2.1 Was P's nomination of D4 as Successor Protector of the Cayman Trusts revoked with effect from the date on which the Successor Protector Deeds were executed and/or delivered?

2.2 Did P nominate D5 in her personal capacity as Successor Protector of the Cayman Trusts with effect from the date on which the Successor Protector Deeds were executed and/or delivered?

Issue 3

Did P cease to be a Protector of the Cayman Trusts prior to executing and delivering the Removal Deeds and the Successor Protector Deeds by reason of becoming mentally incapable to act as Protector in accordance with the terms of the Cayman Trusts?

Issue 4

Should D1 take all necessary steps forthwith to vest the assets of the Cayman Trusts in D3 pursuant to the Removal Deeds?

Issue 5

What costs orders should be made?

Issues 1 and 2 are the crucial issues

64. As I stated when I delivered the ruling in my mind substantive issues 1 and 2 are the really crucial issues. I commented that I had not heard full submissions on the point, but I thought the delivery date was the more important date and that seemed to be common ground based on paragraph 14.1 of D4's skeleton argument dated 6 February 2025 and what Mr Learmonth had said on behalf of P.

Issue 3 – time period

65. In respect of Issue 3 there did not appear to be common ground as to the relevant period. I think D4 was suggesting from June 2021 (on his case, the first time P went to see a doctor in respect of capacity issues) and P was suggesting from August 2022 (on his case, the first time D4 raised issues about capacity). I did not hear full argument on this point and am not in a position to decide it. In considering the issue of mental capacity in respect of Issue 3 the experts should not go any further back than June 2021 and may wish to focus on the period from August 2022. I leave that to the experts.

The need to put issues clearly before the court

66. In respect of specifying the substantive issues for the determination of the court at the final hearing I had regard to the Originating Summons and paragraph 14 of the Agreed Case Summary.

67. Even in proceedings begun by an originating summons, normally without detailed pleadings, sight should not be lost of the need to put the issues for determination clearly before the court. It is well established that in legal proceedings the pleadings inform an important role in providing clarity and certainty in respect of the issues properly before the court for determination. This is why you frequently see judges stressing that the parties must stay within the bounds of the pleaded case (see for example, albeit a very different context, Asif J in *Anglin v Attorney General* (2 December 2024) at [46]). In the context of a wrongful dismissal claim the Judicial Committee of the Privy Council in *Lafresière v New Mauritius Hotels Ltd* [2023] UKPC 38 at [30] stated that "… the purpose of pleadings is to circumscribe the issues in the case" and referred to *Loveridge and Loveridge v Healey* [2004] EWCA Civ 173 where at [23] Lord Phillips MR said: "It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial …".

68. *Carlos Magno, Nery E Medeiros Sociedade de Advogados v BT Global Investments* 2021 (2) CILR 577 was a cause which began by way of originating summons. Smellie CJ (as he then was) referred to Order 7 rule 3(1) of the GCR which provides that:

> "Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy."

69. At [30] Smellie CJ refers to *Tasarruf Mevduati Sigorta Fonu v Wisteria Bay Limited* 2007 CILR 310 and the comment that "Insufficiency of pleading in regard to an important issue can result in the action being struck out". Smellie CJ at [67] stated:

> "The circumstances presented here demand the enforcement of the principles of pleading …"

70. At [72] Smellie CJ, given the confusing and conflicting state of the evidence did not think it appropriate "simply to allow the affidavits to stand as pleadings."

71. It is interesting to note that under B3.2(3)(b) of the Financial Services Division Guide (Second Edition) ("FSD Guide") the agreed case memorandum shall contain a list of issues "to the extent that it is practical to do having regard to the state of the pleadings."

72. The position in respect of pleadings is put with conciseness and crystal-clear clarity in *Roye's Civil Litigation in the Cayman Islands* (Third Edition) in chapter 7 on pleadings at page 96, albeit in a general context and not in the specific context of an originating summons:

> "… The trial is limited to those issues raised by the pleadings. The purpose of pleadings is to:
>
> - clarify the issues in dispute
> - require each party to give proper notice to his opponent of the case he has to answer
> - inform the court of the matters in issue"

General unfitness?

73. D4 in respect of Issues 1 and 2 had argued that the court should also consider unfitness rather than simply restrict its determination to mental capacity. I found this argument deeply unattractive for a number of reasons.

74. Firstly, D4's case on unfitness had not been properly set out either in a pleading or in his evidence or in his skeleton argument. When I questioned Ms McDonnell on this issue the best she could do, with all her first-class advocacy skills, was refer me to paragraph 20.2 of her skeleton argument dated 6 February 2025 and a number of paragraphs in D4's 180-page second affidavit sworn on 13 January 2025. During my three days of reading prior to the hearing I had searched D4's somewhat rambling second affidavit long and hard to find a section clearly and concisely setting out his case on unfitness. I could not find it. It was not there.

75. Paragraph 20.2 of the skeleton argument, almost in purely abstract terms, submits that a fiduciary has to be "fit" and "suitable" to act as such, as well as having capacity to act. It does not set out D4's case as to why he says P was "unfit".

76. As regards D4's case on "unfitness" in his second affidavit, Ms McDonnell placed particular reliance on the following paragraphs:

(1) paragraph 5.2 "my father's <u>fitness</u>" (internal underlining) and "investment strategy" and alleged recklessness surrounding investment decisions;

(2) paragraph 5.17 and issues stated to be in respect of "fitness" under the headings "Suggestions of 'fraud' and 'illegality'", "Lack of compliance with FCA requirements", "Irrationality and lack of understanding", "Lack of cognition", "Aggression", "Dogmatism", "Apathy", "Delusions and paranoia";

(3) paragraph 7.55 "Fentanyl & Anti-depressants";

(4) paragraph 8 "Deterioration in my father's behaviour" "Dishonesty";

(5) paragraph 8.44 "firearms";

(6) paragraph 9 "Concerns raised by others" stated to be relevant to "fitness".

77. Nowhere was there to be found in the evidence or the skeleton argument a clear and particularised statement of D4's position on his unfitness point. D4 had not filed a counterclaim or any document clearly setting out his case on the unfitness issue. The nature of D4's claim on the unfitness issue had not been clearly put before the court. As Mr Robinson put it: "the position is not clearly articulated … we have seen no clearly articulated particularised position with respect to unfitness."

78. Secondly, the unfitness point was raised very late in the day and had the potential of derailing the just, expeditious and economical progression to a hearing of the issues raised by the Originating Summons. The Originating Summons certainly did not raise the unfitness issue. It referred to the "capacity" issue. The substantial focus of the parties had been on the mental capacity of P at the relevant times. To permit the introduction of a potentially wide-ranging inquiry into a largely generalised unfitness issue, which did not arise on the Originating Summons, would at this late

stage not have assisted in the just, expeditious and economical disposal of the Originating Summons (see Order 28 rule 4(2) of the GCR).

79. The unfitness issue simply did not arise on the Originating Summons, and I was not persuaded, absent agreement of the parties, that it should be one of the issues for determination at the final hearing of the Originating Summons.

Present mental capacity?

80. It was for similar reasons that I dismissed D4's attempt to obtain a determination from the court as to whether P is or is not the current Protector of the Cayman Trusts and if he has lost capacity or has become unfit to act, whether the current protector is either P's former wife (D4's mother) or D4. Again, this issue did not arise on the Originating Summons, and it was not necessary to determine it for the purposes of determining the issues that properly arose on the Originating Summons. The court's focus, if there is to be a just, expeditious and economical determination of the Originating Summons, should be on the mental capacity of P at the times the Removal Deeds and the Successor Protector Deeds were delivered.

Point 3 – *Discovery?*

81. In the circumstances of this particular case and bearing in mind that discovery is not the norm in the originating summons procedure, I was not persuaded that there were any good reasons for ordering discovery. Indeed, such would have further delayed the just, expeditious and economical determination of the Originating Summons.

82. D4 emphasises the need for the court to be furnished with the proper materials upon which to base its judgment at the final hearing of the Originating Summons and refers to *Re O Trust v RDK* 2018 (1) CILR 59, *Poulton Family Trust* 2022 (1) CILR 224 and *BOS Trustee Limited* [2023] JRC 1080 and says that the directions made in those cases are reliable guidelines for appropriate directions in a case of this kind instead of the summary disposal directions sought on behalf of P. Each case, of course, must depend on its own facts and circumstances.

83. I searched D4's 180-page second affidavit to find a clear and concise section setting out, after a review of the voluminous documentation disclosed to date, what other documents were required to

be disclosed for a just, expeditious and economical determination of the issues. I could not find it. It was not there. Within that somewhat rambling affidavit, I could not even find a heading or sub-heading marked "Discovery". My next hope was that I would find D4's position on the need for further discovery set out clearly and concisely in his skeleton argument. It was covered in just 3 short paragraphs 48-50. In paragraph 48 the sweeping and generalised statement was made in robust terms that:

> "It is beyond doubt that [P] is in possession or control of highly relevant material, and in circumstances where his current position is that no further documents need to be produced before the issues in this case are determined, it is clear that an order for discovery is required to obtain them."

84. There is no attempt in paragraph 48 to set out exactly what the alleged "highly relevant material" is or why it is "beyond doubt" that P has such in his possession or control and has not already disclosed it. Paragraph 49 is an attack against D3, and paragraph 50 refers to a wide discovery protocol. The draft discovery order proposed by D4 seeks disclosure of a complete copy of P's medical records "wheresoever created" and documents relevant to any of the broad issues identified in D4's draft order including the generalised unfitness issue and whether or not P is the current protector of the Cayman Trusts which do not arise on the Originating Summons with such disclosures being verified by affidavits.

85. Ms McDonnell in her oral submissions referred to the following categories of documents where she said documentation was outstanding (1) trustee documents including meeting notes; (2) documents in respect of the involvement of Dr X; (3) correspondence with investment advisers; (4) employees; (5) non-business conversations; (6) medical records; (7) Dr Y; and (8) the shotgun licence application.

86. Mr Learmonth referred to a letter dated 13 February 2024 where at paragraph 5.1 it was indicated that Dr X did not provide a written report. Mr Learmonth also referred to the fact that the affidavits already exhibited very substantial amounts of documentation and "all the cards are on the table". There had been almost two and a half years of *inter partes* correspondence before proceedings were issued and D4 has had extensive access to P's medical records and reports and business records and members of staff.

87. I had to balance the undesirability of a potentially time-consuming and costly fishing expedition against the need for relevant documents to be made available. I noted all the documentation that had already been produced to date.

88. In this case I was not satisfied that a further discovery exercise was necessary or proportionate for a just determination of the issues properly arising on the Originating Summons.

89. The experts will have all the evidence (including D4's evidence) and documentation produced in this case to the date of their expert reports. It is obviously important that the experts have access to all relevant medical records and for that reason my ruling was that by 3pm on the date 21 days after the order the parties who had filed evidence shall file and serve an affidavit verifying that all medical records insofar as relevant to P's mental capacity at the relevant times that are within each party's possession, custody or power have been included in that party's evidence following a reasonable search (or are included in another party's evidence).

Point 4 – *Mr Lindley*

90. The parties had agreed that Mr Lindley shall be joined as D7 to represent the interests of the unborn, secondary and unascertained beneficiaries of the Cayman Trusts (other than the unborn and further issue represented by D4 and D5).

91. There was a dispute as to whether Mr Lindley should or should not be permitted to file and serve responsive evidence. Mr Lindley was understandably not before the court on 10 and 11 February 2025 and I did not benefit from submissions from him. With the words "just, expeditious and economical" firmly in my mind, I thought it best to make an order to the effect that Mr Lindley was not required to file evidence or adduce expert evidence, but he should file and serve a concise Position Statement 28 days after P's reply evidence. The concise Position Statement should simply set out his position in respect of the Originating Summons. I did not think it necessary for further costs to be incurred in respect of the production of yet further evidence or for Mr Lindley to instruct another expert. Mr Lindley shall however have liberty to apply to vary or set aside the order insofar as it concerns him as it was made in his absence, although he had consented to be joined as D7 as I understand the position on certain terms and his cost estimate did not include the filing of evidence. If Mr Lindley feels that the filing of further evidence is absolutely necessary, he can file an application to vary the Order but if that is his position he should file that application promptly.

Point 5 – *further evidence of fact if discovery ordered?*

92. As I did not order discovery Point 5 did not arise for determination.

93. I did however give the parties liberty to seek, before 3pm on the date 14 days after the filing and serving of P's reply evidence, to call any witness who has provided affidavit evidence to give evidence orally.

Point 6 – *Expert evidence*

94. P's position was that there was no justification for further experts to be engaged and that the three experts engaged to date (Professor A, Professor B and Dr C) should simply file further supplementary reports and did not object to a meeting and joint memorandum.

95. Although he did not resile from using his instructed expert (Dr C), D4's position was that each party be given permission to adduce expert evidence in the field of mental capacity based on P's medical records and an in-person assessment of P (subject to his consent) and that each party may rely upon the report(s) of an expert already instructed by that party or any other expert of their choosing and that there be a meeting of the experts and a joint memorandum identifying agreed issues and those issues on which they disagree and a summary of their reasons for disagreeing. Further, D4 sought an order that if the issues are not agreed between the experts each party who has filed an expert report shall be at liberty to call their expert witness at the final hearing, limited to those experts whose reports have been disclosed. D4 also sought an order that the parties shall agree separate directions pertaining to any tests required or recommended by any experts for the purposes of determining P's capacity, P having been advised that adverse inferences will be drawn if he does not consent to undertake any such test.

96. There was some force in Mr Learmonth's point that D4 should not be permitted to shop around for another expert. There was also some force in Ms McDonnell's point that there needed to be a level playing field and that the experts required sight of the relevant documents and evidence to finalise their supplementary reports. The other directions made should enable the experts to do that.

97. In respect of expert evidence D4 says that it is of particular importance that the experts for each party have access to all relevant information. D4 emphasises the need for P to provide his medical records.

98. P's position is that the existing experts (Professors A and B and Dr C) should be given an opportunity to file supplementary reports updating their opinions in light of the evidence filed. P says that the parties do not have to start all over again as in essence suggested by D4. P says there is no call for any further experts.

99. Ms McDonnell recognised that the three experts in this case were very well known and all of them highly experienced and highly lauded by English judges. In her words, they were very well-known experts who command respect.

100. I do not think these experts will be unduly influenced by those who instruct them. They should have no problem in signing up to the general requirements in B5.2(b) of the FSD Guide and no doubt their evidence will be independent and uninfluenced by the pressures of any party. They are required to provide objective unbiased opinion in relation to matters within their expertise. I note Ms McDonnell's submission that Professor A and Professor B were instructed on behalf of P and Dr C on behalf of D4. I note also that the detailed letter of instruction dated 31 May 2024 to Professor B at 1.11 stated:

> "These instructions were provided to [D1], [D3], [D4] and [D5] in draft for comment, and only [D1] provided some brief comments which these instructions now incorporate. Although these instructions therefore come from [P] alone, your opinion will ultimately be provided to [D1], [D3], [D4] and [D5], and you should regard your role as independent of any party."

101. In any event, as I said during exchanges with counsel at the hearing, expert evidence is not a numbers game. The three experts in these proceedings will be given access to the evidence filed, subject to the Confidentiality Order. I will benefit from their opinions but at the end of the day the issue of mental capacity will be for the court to decide.

102. I am confident that these three experts will provide the court with sufficient expert opinion to enable the court to arrive at a just determination. We do not have to waste further time and money on

starting the process all over again with the parties, or at least D4, instructing fresh or additional experts.

103. Again with my eye firmly on a "just, expeditious and economical" determination of the issues properly arising on the Originating Summons I did not think it appropriate to make directions along the lines suggested by D4 and made an order that no further expert evidence other than that which is contained in P's evidence as filed and served on 22 November 2024 (which includes the expert evidence of Professor A, Professor B and Dr C) shall be adduced by the parties save that the experts relied upon shall be required to file further concise supplementary reports solely in respect of the substantive issues specified in the court's ruling in respect of the mental capacity of P at the relevant times. Such concise supplementary reports shall be exchanged and filed before 3pm on the date 56 days after P's evidence in reply and contain the statements required by B5.4 of the FSD Guide. The experts shall before 3pm on the date 35 days thereafter have a meeting in accordance with B5.6 of the FSD Guide and file before 3pm on the date 21 days thereafter a concise joint memorandum for the court recording the issues on which they agree, the issues on which they disagree and a brief summary of the reasons for any such disagreement.

104. If the issues are not agreed between the experts, then each party whose expert has filed a supplementary report in accordance with the order shall be at liberty to call such expert at the final hearing.

105. There may be further in person assessments and testing of P (if he consents to submit himself to such assessment and testing and if the relevant expert or experts consider it necessary to make a request for the same). I stated that I would not expect an expert to make such a request unless the expert considered it absolutely essential.

106. These directions will assist the court in a "just, expeditious and economical" determination of the issues properly arising on the Originating Summons.

Listing of Final Hearing

107. Sadly, P and D4 could not even agree on the various time periods in respect of the listing of the final hearing. I resolved their differences as follows:

No later than 14 days after the date of the filing of the joint memorandum the parties shall provide the Court Listing Officer (with a copy to Justice Doyle's PA) with their agreed time estimate for the final hearing of the Originating Summons (Final Hearing) and their agreed availability for the same. The Final Hearing will then be fixed for the first available date occurring 35 days after the filing of the joint memorandum.

Dates for skeleton arguments and bundles

108. In preparation for the Final Hearing the parties, except for the Sixth and Seventh Defendants, shall file and serve any skeleton arguments no later than 10 clear days before the Final Hearing. P shall lodge copies of the joint hearing bundle (duly paginated) and the joint authorities bundle at court no later than 21 clear days before the Final Hearing, and the parties shall cooperate to ensure that the contents of those bundles are agreed.

109. I should add that the court would benefit if, at least 10 days prior to the due date for the filing of the skeleton arguments, an agreed factual chronology, a *dramatis personae*, a document setting out those facts which are agreed, and an agreed case summary were filed. This will also help focus the skeleton arguments. Counsel should incorporate these additional requirements in the draft order which I requested be filed within 14 days of 11 February 2025.

Points 7 and 8 – *prospective costs pro tem and costs of D4's summons*

110. On 11 February 2025, I reserved judgment on Point 7 as there seemed to be a serious disagreement between counsel as to the correct approach and counsel in their competing oral submissions had given me a lot to think about. I also reserved judgment on Point 8 as it was connected with Point 7.

P's position on costs

111. Mr Learmonth for P maintained the submissions that the correct principles for prospective costs orders were set out at paragraphs 95 to 98 of his skeleton argument dated 6 February 2025 and submitted that there was no basis for prospective costs orders *pro tem* or otherwise in this case.

McDonald v Horn

112. At paragraph 95 of his skeleton argument Mr Learmonth, relying on *Alhamrani* [2007] JCA 198 submitted that the authorities show that a beneficiary has no general right to be indemnified out of the trust fund. Mr Learmonth maintained that prospective costs orders in favour of beneficiaries will usually be made only where the court is satisfied from the outset that the trial judge would inevitably make an order for costs out of the fund in favour of the beneficiary, irrespective of which way the substantive decision goes. Mr Learmonth placed emphasis on *McDonald v Horn* [1995] ICR 685 at 697A and the words "the judge must be satisfied that the judge at the trial could properly exercise his discretion only by ordering the applicant's costs be paid out of the fund". It is important to put these words in context. The opening words to that sentence read: "I think that before granting a pre-emptive application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a trustee or other fiduciary" and the next sentence reads: "Otherwise the order may indeed fetter the judge's discretion under Ord. 62, r. 3(3)."

113. In his oral submissions Mr Learmonth also took me to pages 695 to 697 which set out parts of Hoffmann LJ's judgment. At page 695H, Hoffmann LJ refers to the "classic statement of principles" by Kekewich J in *Re Buckton* [1907] 2 Ch 406, 413-415. At pages 194-195, Hoffmann LJ refers to the general principle that costs follow the event and at page 695 to "The special principle: costs out of a fund (a) Costs of trustees and other fiduciaries" and then at 695F onwards refers to the position of costs and beneficiaries and I note all that is said in that judgment.

114. Mr Learmonth submitted that in practice in order for D4 to succeed on Point 7 he would have to establish that his case will inevitably be found to fall within category (1) or (2) of *Re Buckton*.

Lewin

115. Mr Learmonth relied on *Lewin on Trusts* 20th edition at paragraph 48-044 and quoted the following extract:

> "…where the court considers that it is unclear whether the proceedings are [*Buckton* category (1) or (2)] or that the proceedings might turn into a *Buckton* category (3) case, a prospective costs order will not generally be made."

116. To set the extract from *Lewin* at 48-044 into proper context, and in view of the fact that the correct law or at least the correct legal approach does not appear to be common ground between all parties, I have considered paragraphs 48-041 to 48-044 of *Lewin* in their entirety.

117. Mr Learmonth at paragraph 97 of his skeleton argument accepted that although the proceedings were issued by P, as protector, they could equally have been issued by D4 or D1 or D3. He says that matters not. He says that what is important is the substance of the dispute, not the form and he relies on paragraph 48-033 of *Lewin*. That focuses on the three *Buckton* categories. Category (1) includes proceedings brought by trustees to have the guidance of the court on some "question of law arising in the administration of the trust". In category (1) cases the costs of all parties are, whatever the outcome, usually treated as necessarily incurred for the benefit of the trust fund and ordered to be paid out of it. But a trustee is at risk as to costs if he commences a claim unnecessarily. Category 2 cases involve proceedings in which the application is made by someone other than the trustee but raises the same kind of point as in the first category and would have justified an application by the trustee. *Lewin* adds that such proceedings "differ in form but not in substance" from the first category and similar considerations apply as to costs. *Lewin* comments that it may however "be less easy to show than in the case of a trustee that the applicant was acting reasonably in making the application and doing so for the benefit of the fund. [Footnote 147 *Re J P Morgan 1998 Employee Trust* [2013] JCA 146; 2013 (2) J.L.R. 239 at [43]]." Lewin describes category (3) cases as proceedings in which the application is made by someone other than the trustee, but differ in substance from the second category, and in substance as well as form from the first category in that "they have the character of a hostile claim founded on a point of construction or law raised by someone other than the trustee to a beneficial interest in or entitlement to the trust fund. The distinction, though not easy to draw in practice, between this kind of litigation and litigation within the first two categories, is that the claim is brought not in substance for the benefit of the trust fund, but for the benefit of the claimant and is resisted for the benefit of the trust fund". Near the top of page 1055 *Lewin* adds:

> "The determination of the category into which a particular case falls is a question of law, not an exercise of discretion on the facts, and so may be appealed [*Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542; [2013] WTLR 121 at [64] – [78]]. That determination is not, however, in itself conclusive as to the costs order to be made in

relation to a trustee's (or any other party's) costs [*J.P. Morgan 1998 Employee Trust* at [28] onwards]."

118. Mr Learmonth at paragraph 98 submits that the costs position as he has outlined as a matter of the law of England and Wales and other common law jurisdictions is also the position under the law of the Cayman Islands. He relies on *Re SPhinX* 2010 (2) CILR 1 at [45] to [47], *Re Onetradex* (unreported FSD 166 of 2019 (MRHJ) 30 June 2022) at [35] to [44] and *Re Cotorro Trust* 1997 CILR 1. I now turn to those authorities.

Re SPhinX

119. *Re SPhinX* was a case regarding pre-emptive costs in the context of a compulsory winding up. It is apparent from [35] that it was common ground between the liquidators and all the other parties that orders for "the pre-emptive costs of the representative parties should be paid from the liquidation estate" should be made. Smellie CJ as he then was (and before his elevation to a member of the Judicial Committee of the Privy Council) applied *Buckton* and the subsequent trust cases by way of analogy. At [39] Smellie CJ commented that the analogy with *Buckton's* first category was "a good one" (see also paragraph [47] "the circumstances are rather like those contemplated by *In re Buckton's* first category") and he made an award on the pre-emptive basis but at [40] did not award costs on the "solicitor client basis" or full indemnity basis but limited the maximum hourly rate as proposed by the liquidators.

120. At [45] Smellie CJ added:

> "It is not the case that a representative party automatically receives the benefit of a pre-emptive costs order … The fact that a party is a representative is not necessarily by itself a special circumstance … It may well be that there are special circumstances to justify the making of a pre-emptive costs order, but it is not a matter of course. Indeed, the normal course is that costs follow the event. In trust cases, where the litigation is contentious as shown by reference to cases in *In re Buckton*'s third category, the guiding principle is that the unsuccessful party will pay the costs of the other parties. Later cases show that in that category of cases, a pre-emptive costs order will only be made where the court concludes that there is a high probability that a costs order would be made in favour of the

representative party at the end of the day, usually at trial – see, classically on this point, *Alsop, Wilkinson v Neary* (1) [[1996] 1 W.L.R. at 1226-1227]. *Re Westdock Realizations Ltd* (20), while recognizing that principle, was a case in which pre-emptive costs were allowed to liquidators so that a "test case" could be resolved and which would be to the benefit of the estate as a whole."

121. At [46] Smellie CJ noted that although frequently made in pension case disputes where there are a large number of under-resourced beneficiaries (and used the example of *McDonald v Horn*) and "in exceptional circumstances of hostile litigation on behalf of a disadvantaged beneficiary" (using *In re Cotorro Trust* as an example) he also accepted that "pre-emptive costs orders should only be made in exceptional circumstances in liquidations, and especially where there may be hostile litigation …".

122. At [47] Smellie CJ although duly observing the relevant principles wisely added "the circumstances presented here must nonetheless be considered in their own context". Each case depends on its own facts.

123. At [48] Smellie CJ adapted the jurisdiction to the need of the Companies Court and added that judicial discretion may permit the imposition of "limits or caps on costs" (and cited *National Grid Co plc v Mayes* [2001] 1WLR 864 in support).

Onetradex

124. *Onetradex Ltd* was also in the context of a provisional liquidation. Margaret Ramsay-Hale J as she then was (shortly before her elevation to Chief Justice) at [35] referred to the "principles on which the court would award costs to beneficiaries" as elucidated in *Re Buckton* and at [36] referred to *Al-Ibraheem v Bank of Butterfield International (Cayman) Limited* 2000 CILR 88 and at [37] to *Cotorro Trust* 1997 CILR 1 and at [38] to *Re SphinX* 2010 (2) CILR 1.

125. At [52] Margaret Ramsay-Hale J felt that the provisional liquidator's application for remuneration clearly fell into *Buckton* category 1 "as a matter arising for resolution in the administration of the trust assets. It was an application on which the [ad hoc committee of clients and creditors] was entitled to appear on behalf of the beneficiaries of the trust assets".

126. Margaret Ramsay-Hale J concluded:

"53. Although the Committee's attitude towards the PL could fairly be described as hostile, and the language employed by the Committee in its Report in which set out the grounds of the Committee's challenge to the PL's remuneration application as adversarial, the Committee's opposition to the PL's remuneration application did not change the character of the proceedings into 'hostile' litigation taking it out of *Buckton* category 1.

54. I consider it a proper exercise of the Court's jurisdiction to order that the Committee's costs of the PL's remuneration application be paid out of the estate on an indemnity basis, consistent with the modern trend described in *Lewin on Trusts*.

55. That said, in exercising the jurisdiction to make *Buckton* category 1 costs orders, the Court has a residual discretion as to costs and can impose a limit on the quantum of costs recoverable, as held by the Chief Justice in *Re SpHinX* at [48]."

Cotorro Trust

127. *Cotorro Trust* 1997 CILR 1 was a trust case in a rather complicated context. Put simply for present purposes, the fifth defendant applied for pre-emptive costs out of the trust fund up to the trial of certain preliminary issues which involved "no hostile claim against the trust" (page 16). Smellie J was convinced that "they come squarely within the first or second of the three categories of *Buckton*". At page 17 Smellie J comments that although instigated by the allegations of the third defendant the matter came before the court upon the trustee's originating summons "pursuant to s.45 of the Trusts Law (Revised), and properly so." Smellie J commented that "hostile issues loomed but they emanated from the third defendant." Smellie J felt that the preliminary issues remained "technically within" *Buckton* (1) "even though the specific issues were first formulated by the fifth defendant, and may then come within the second class. The fact that the fifth defendant's mother may yet harbour hostile intentions is no basis for treating him as hostile for the purposes of deciding whether to allow him his costs of those preliminary issues."

128. Still on page 17, Smellie J referred to *McDonald v Horn* which he described as "the leading modern case on the point".

129. Smellie J at page 18 stated:

> "Although *McDonald v. Horn* is not authority for the proposition that a beneficiary of an ordinary family trust (as distinct from a pension trust fund) should be able to plead his own impecuniosity as a basis for a pre-emptive costs order against the trust, such impecuniosity is bound to be a relevant factor in the exercise of the discretion when taken with all the others. Having said that, I do not go so far as to find that unless the fifth defendant is funded from the trust, some proper claims will never be litigated. None the less, there are factors in this case which persuade me that by funding him, I will be choosing the most economical means for the full and fair investigation and argument of the preliminary issues. Those are relevant factors: see *McDonald v Horn* (9) (*ibid*., at 974-975)."

130. Smellie J appears to have felt that the additional costs incurred by the fifth defendant would not be as significant as the importance of determining the preliminary issues to the "trust as a whole" and felt that those "additional costs are not an important factor".

131. He stressed at pages 18-19 however:

> "All that notwithstanding, it must be clear that the judge hearing the preliminary issues will be bound to make an order in favour of the fifth defendant, otherwise I should now be reluctant to make pre-emptive orders: see *McDonald v. Horn* (9) (*ibid*., at 971). If not clearly so, I would be at risk of unduly fettering the trial judge's discretion. The need for caution in the making of a pre-emptive costs order does not, however, require me now to undertake a scrutiny of the competing merits of the arguments. I think it must therefore suffice that there are serious issues raised to be tried now within the trustee's summons.
>
> With all that in mind, I am satisfied that it is appropriate that a pre-emptive or protective order be now made to secure the fifth defendant's costs of the preliminary hearing – but only up until then. All I need say of events beyond that time is that he will probably come within the third category of the *In re Buckton* (3) principles if he brings litigation which may truly be considered hostile to the trust.

> I think it must follow that the fifth defendant should be entitled to his past costs, at least as from the filing of his summons defining his approach to the preliminary issues. Since then he has acted on advice in an entirely objective and non-hostile manner and has sought nothing more than he should be reasonably entitled to – the clarification of those issues of construction."

Barclays

132. Mr Learmonth also referred to *Barclays Private Bank and Trust (Cayman) Limited v McLaughlin* 1998 CILR 313. In that case the plaintiff trustee applied for directions in a *Beddoe*-type way. The administrator of the trust, the second defendant, had brought proceedings in the United States challenging the capacity of the settlor and his paternity of the first defendant the sole beneficiary under it. The trustee applied to the Grand Court for directions as to how to respond. The US proceedings were dismissed but the administrator raised further challenges to the validity of the settlement in the Grand Court questioning the intentions and capacity of the settlor. The first defendant, an impecunious minor, sought a pre-emptive order that the costs of his participation in the proceedings be met in any event from the trust as the proceedings had been brought for the benefit of the trust as a whole and the trustee was taking a neutral stance.

133. Smellie CJ in *Barclays* referred to *McDonald v Horn* and *Cotorro Trust*, *Lemos v Coutts* 1992-93 CILR 460 and *Westdock Realisations* and at page 318 noted that the proceedings before him were "in essence administrative proceedings in which the trustee remains neutral as to the competing claims …". Smellie CJ added:

> "That being so, unless the first defendant is funded in the action, there is risk that arguments which should be put in his favour … may not be put."

134. Smellie CJ at page 319 commented that:

> "… the first defendant acts to protect the trust, in the context of proceedings brought by the trustee seeking the determination of challenges which have arisen in the administration of the trust."

135. Smellie CJ felt that the case was within the first category of *Buckton*.

136. On the costs issues Mr Learmonth submitted:

(1) The court is unable to determine now or ahead of the final hearing whether these proceedings are within *Buckton* (2). P will contend that D4 has necessitated these proceedings quite wrongly by (i) mounting a covert campaign to find evidence to have P removed (ii) lobbying the trustees to oust his father while hiding his involvement and then (iii) actively disputing P's capacity out of self-interest. It would be wrong to allow D4 his costs from the fund now, even on a *pro tem* basis if there is a prospect that he may be subject to an adverse costs order later, or at least be deprived of his own costs.

(2) D4 has maintained his position even in the face of clear expert reports to the contrary. If D4 is held to be wrong this will be a powerful factor going to the reasonableness of his position in the litigation.

(3) D4's position is, in substance, a removal action against P and is hostile proceedings within *Buckton* (3) to which the usual "loser pays" principle applies.

(4) The extensive directions which D4 seeks are consistent only with him prosecuting these proceedings as hostile litigation and demonstrates that his position is essentially a contentious one.

(5) P believes and will seek to persuade the court at the final hearing that D4 is taking this position not "for the benefit of the trust as a whole" but purely to advance his own personal interests. If that belief is made out, then it would certainly not be a case for costs out of the trust in any event and the court cannot pre-judge that issue.

(6) D4 has repeatedly declined to seek sensible ways through this dispute.

(7) The court cannot consider whether to exercise its discretion in favour of D4 without an inkling of how large the "blank cheque" might be, particularly given the eye-watering sums indicated. I think that was a reference to the third affidavit of D4 approved on 3 February 2025 and only sworn on 10 February 2025 where at paragraph 3 D4 says he owes just over two million pounds to his lawyers in the

Cayman Islands and London for work from July 2024 to the date the affidavit was approved, with the majority going to D4's English solicitors.

(8) D4's own evidence in support, if it is to be accepted at face value, suggests that he will be unable to repay any sums in the event of an adverse costs order.

(9) There is no justification for a prospective costs order, *pro tem* or not. This is clearly, in reality, a hostile dispute between Father and Son – a generational power struggle – which D4 has initiated and propelled forward for his own benefit.

(10) If the court accepts P's submissions, then both parts of D4's summons will have failed (the other point having been resolved against him in December 2024) and he should be ordered to pay all parties' costs of the previous determination on the papers, plus a 1/3 proportion of the hearing on 10 and 11 February 2025, to be taxed if not agreed.

D4's position on costs

137. D4 seeks an order that his costs of the Originating Summons be paid out of the Cayman Trusts on the indemnity basis *pro tem* (paragraph 27 of his draft order) and also seeks the costs of his own summons of 2 December 2024 out of the Cayman Trusts.

FSD Guide

138. Ms McDonnell refers to the FSD Guide at D8.2 and D8.3 and applications for pre-emptive costs and the statement that "The Court will require to be satisfied that there are matters which need to be investigated" which she submits is the position in the present case. The FSD Guide deals in the main with procedural matters and is, of course, subject to Acts, Rules and the general law.

139. D4's position is that he will have to cease active engagement as a party in these proceedings immediately after the directions hearing unless he receives funds from the Cayman Trusts to discharge his existing costs liabilities and a direction that the trustees support his future costs.

140. Ms McDonnell in her skeleton argument dated 6 February 2025 at paragraph 61 says, with some considerable force, that it is important to note that the trustees had been on the verge of bringing proceedings themselves seeking the Court's directions on the mental capacity issue when P

leapfrogged them. She adds that had the trustees made the application there could be little doubt that it would have been treated as a *Buckton* (1) case. She submits that the case falls squarely into the second of the *Buckton* categories. Ms McDonnell at paragraph 65 of her skeleton argument refers to *Re Savile* [2014] EWCA Civ 1632 in which Patten LJ said at [108] that in respect of applications falling within the first two classes described in *Re Buckton* the application is designed to allow the trustee to obtain the guidance it needs for the proper administration of the estate "and the court's determination of that issue necessarily involves a consideration of the position of those affected (beneficiaries or creditors as the case may be) taking into account any objections or other submissions which they make …".

Trustee L

141. Ms McDonnell says that the standard order does not depend on the stance the beneficiary takes in the proceedings and is not disapplied if a beneficiary raises objections or opposes the application provided that their conduct of the proceedings is not unreasonable or improper. Ms McDonnell relies upon the judgment of Hellman J in *Trustee L v Attorney-General* [2016] SC (Bda) 50 Com and submits that a beneficiary should be allowed his costs unless he has acted unreasonably. Helllman J at [20] stated "However even strong opposition by a beneficiary does not in itself amount to acting unreasonably" and referred to the comments of Patten LJ in *Savile* at [112]:

> "… opposition by a beneficiary to a proposed course of action by a trustee … is not, without more, sufficient to justify a departure from the general rule that the costs of all necessary parties to a *Buckton* class 1 or class 2 application should be borne by the trust fund. Strong opposition is often encountered, in my experience, in applications for directions by, for example, the trustees of pension funds particularly, where the proposed course of action will either cost additional financial burdens on the employer or reduce the Fund available to a particular class of member. Nobody has ever suggested that the often lengthy proceedings which this leads to should give rise to adverse orders for cost of the kind made in this case …".

142. Hellman J at [21] referred to the judgment of Nugee JA in *In re JP Morgan 1998 Trust* 2013 (2) JLR 239 at [44] "As the Bailiff said in *In re Dunlop Settlement* (7) [2013] JRC 123, at para 27, it will often, and probably usually, be the case that a beneficiary puts forward a stance that he

considers will be to his benefit; this does not of itself take the matter outside [*Buckton*] category 2 …".

143. Ms McDonnell, understandably, places strong reliance on *Piedmont Trust* [2016] JRC016 a judgment of Sir Michael Birt Commissioner sitting alone (who is of course a present Justice of Appeal in the Cayman Islands) and I now turn to consider that important authority.

Piedmont

144. In *Piedmont Trust* the proceedings related to a discretionary trust with family beneficiaries. The father purported to exercise his power as protector to remove the trustees (his daughters) and appoint another in their place. His daughters were concerned as to the validity of the appointments of the new trustee and applied to the court seeking directions as to what if any action they should take in respect of their purported removal and the purported appointment of the new trustee. There were also issues in respect of the appointment of the sons as protectors and one daughter issued proceedings seeking a declaration that such appointments were invalid or alternatively the court should remove the sons as protectors. The court declared the appointment of the new trustee as invalid as the father had failed to take into account material matters. Much the greater part of the hearing was taken up with the validity of the appointments of the sons as protectors in place of their father. The court concluded that the appointment of the sons as protector was outside the band of reasonable decisions. All parties were agreed that the daughters should be awarded their costs out of the trusts on the usual trustee basis. One of the daughters asked for an order that the daughter and the sons should be awarded their costs out of the trusts on the indemnity basis and that the father should be left to bear his own costs. The daughter also argued in respect of the validity of the appointment of the sons as protector that the sons and father should be ordered to pay the costs of the daughter on the standard basis with the difference between those costs and the daughter's indemnity costs being reimbursed to her out of the trusts. The father and the sons submitted that all the parties should be awarded their costs out of the trusts on the indemnity basis.

145. Commissioner Birt at [15] referred to *Re The JP Morgan 1998 Employee Trust* 2013 (2) JLR 235 and described Nugee JA as emphasising that when considering costs in relation to trust litigation, different principles apply depending on whether the person whose position is under consideration is a trustee (or other fiduciary) or a beneficiary. At [16] to [30] Commissioner Birt helpfully set

out the principles in respect of fiduciaries and from [31] to [32] the principles in respect of beneficiaries relying on *JP Morgan* and *Buckton*. Commissioner Birt from [39] onwards considered the nature of the litigation insofar as it related to the appointment of the sons as protectors. The advocate on behalf of the daughter submitted that this was a beneficiaries' dispute (using the terminology in *Alsop Wilkinson*) and was therefore to be treated as hostile litigation. He submitted that the daughter's summons involved an attack on the validity of appointments made by fiduciaries and costs should follow the event.

146. Commissioner Birt at [41] commented that it was right to bear in mind the cautioning words of Nugee JA in *JP Morgan* at [59]. It is important not to treat the language of Lightman J in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 as if it were contained in a statute. The same goes for the language of Kekewich J in *Buckton* and the categories are not exhaustive (see [110] *Savile* [2014] EWCA Civ 1632 and *Trustee L* [2016] SC (Bda) 50 Com). The court must always stand back, look at the case in the round and decide on the overall nature of the litigation. In Commissioner Birt's judgment at [4] this aspect of the litigation fell within *Buckton* category 2:

> "… Just as it was a matter of administration of the Trusts for all parties to know who was the trustee, it is equally a matter of administration for the parties to know who the protector is. It seems to me that it would have been open to Jasmine and Lutea if they had thought fit, to have included in their representations (by way of amendment as these events occurred after presentation of the original representations) a request for clarification as to whether there had been a valid appointment of new protectors just as they sought clarification as to whether there had been a valid appointment of new trustees. I do not perceive any significant difference in nature between the issue of the appointment of new trustees and the issue of the appointment of new protectors. They all relate to the administration of the Trusts and the validity of any appointments needed to be resolved in the interests of the beneficiaries as a whole. It makes no difference that, in relation to the appointment of a new trustee, the beneficiaries were not in dispute whereas in relation to the appointment of the new protectors they took up adverse stances. It is often the case that beneficiaries put forward opposing stances in category 1 and category 2 cases but this does not change the nature of the proceedings, nor does it lead to the loss of their normal entitlement to costs out of the trust fund on the indemnity basis unless they have behaved unreasonably (see Re the Dunlop Settlement [2013] JRC 123 at paras 27 and 30-33, approved in J P Morgan)".

147. At [42] Commissioner Birt concluded that it was "properly to be considered as a matter falling within category 2 (i.e. an administrative matter but one brought by a beneficiary) rather than hostile proceedings …".

148. It followed from Commissioner Birt's analysis as to the nature of the proceedings that:

> "…to the extent that any party is convened in his or her capacity as a beneficiary, that party is entitled to his or her costs out of the Trusts on the indemnity basis save to the extent that such party has behaved unreasonably. On this basis, the daughter is therefore clearly entitled to her costs out of the Trusts."

149. Commissioner Birt also helpfully at [55] added:

> "Finally, I should deal with a technical point which arises as a result of my decision. There is an important difference in principle between a trustee or other fiduciary being indemnified as to costs which he has incurred and costs which are awarded to a party on the indemnity basis. The former arises as a matter of right (subject of course to the Court's power to deprive a fiduciary of such indemnity as discussed earlier) and confers a full indemnity subject only to such costs being reasonably incurred and in a reasonable amount, whereas the latter is awarded by the Court in exercise of its power to decide who pays the costs of litigation. Such costs are subject to taxation by Greffier if not agreed. The former is commonly referred to in this jurisdiction as 'costs on the trustees basis' whereas the latter is referred to as 'costs on an indemnity basis'."

150. I note that *Piedmont Trust* was not a case in which a prospective costs order *pro tem* or otherwise was being sought. It dealt with issues as to costs after the hearings had already taken place and judgments delivered. It is however informative as to the nature of trust litigation and its proper characterisation and I welcome the guidance contained in it from an internationally well recognised trust expert. However, each case, of course, turns on its own facts and circumstances.

The position of D1 and D3 on costs

151. Both D1 and D3, the trustees, agreed that this litigation was properly characterised as *Buckton* category 2 litigation and raised no objections to D4's costs coming out of the assets of the Cayman Trusts.

Determination of the overall nature of the proceedings and the costs position

152. Standing back and looking at the case in the round, I consider the overall nature of the litigation to clearly fall within *Buckton* category 2, although it is being bitterly fought by P and D4 and sadly allegations and cross allegations are flying between Father and Son. It is correct that D4 raised issues as to capacity but D1 and D3, the trustees, also have concerns in that respect. A protocol was proposed and for his own reasons P declined to submit to an expert, not of his choosing. The trustees were about to come to court for assistance (and that would plainly have been *Buckton* category 1 proceedings) but P filed the Originating Summons.

153. The issues raised by P in the Originating Summons for the court's determination relate to his mental capacity to remove and appoint trustees of the Cayman Trusts and remove and appoint a successor protector of the Cayman Trusts. These issues relate to the administration of the Cayman Trusts. The proper identity of the trustee of the Cayman Trusts is vital to their administration. The proper identity of the protector of the Cayman Trusts is also vital to their administration. The resolution of these important issues is in the interests of the beneficiaries as a whole. D4 was served with the Originating Summons and he is one of the primary beneficiaries of the Cayman Trusts. The fact that the relationship between Father and Son is strained and the fact that D4 is strenuously opposing the relief claimed by P does not change the overall nature of the proceedings.

154. P's position was that these proceedings were necessary to give what he described as his old trustee (D1) the comfort it seeks safely to transfer the trust assets to what he regards as his newly appointed trustee (D3) in accordance with his decision as Protector, by laying to rest a dispute he says was manufactured by his Son (D4) as to P's mental capacity, the result of which has been to leave very valuable trusts in limbo for over 14 months. It is plainly in the best interests of the Cayman Trusts that the issues which arise on P's Originating Summons are determined.

155. In *Buckton* category 2 cases costs would normally be paid out of the trust fund. I think it is in the interests of justice and will assist in the just, expeditious and economical determination of the issues arising from the Originating Summons if I make prospective costs orders *pro tem* (temporarily; for the time being) as requested by D4. I do not seek to fetter the court's discretion in respect of whatever costs orders it considers just to make at the conclusion of the final hearing of the Originating Summons but in the meantime D4's costs of these proceedings should be paid from the assets of the Cayman Trusts *pro tem* on the indemnity basis. D1 and D3, the trustees, sensibly do not oppose such an order.

156. I think it is important to consider the meaning of the word "hostile" when considering whether the overall nature of the case falls within *Buckton* category 2 (those other than trustees in effect seeking guidance on some question arising in or affecting the administration of a trust) or *Buckton* category 3 (hostile claims by a beneficiary against the trustee or another beneficiary). Where the overall nature of the case falls within category 2, the fact that the relief is strenuously opposed by a party or parties and that comments are traded that some may perceive are "hostile" does not change the overall nature of the case or take it out of category 2. As Ms McDonnell persuasively acknowledged there is a distinction to be drawn between hostile adversarial argument and hostile proceedings. The fact that there may be some "hostility" between Father and Son in this case does not take this case out of category 2. Parties and courts need to take care as to how they use the word "hostile" in this area of the law. The court must take care to distinguish between the nature of the proceedings and the attitudes and language of those engaged in the proceedings. The fact that attitudes and language on occasions may be regarded as "adversarial" does not change the fundamental character of the proceedings. It will not normally turn a category 2 case into a category 3 case. Even if one party harbours "hostile intentions" that is insufficient to take a case out of category 2 if the nature of the case otherwise falls within that category.

157. In this case Father and Son have traded what some may perceive as "hostile" language but that does not take this case out of category 2 and neither does the fact that the Son has raised issues in respect of the mental capacity of the Father. The trustees have considered evidence (in particular from Dr C) and information from third parties and are also concerned over capacity issues which need to be resolved in the best interests of the Cayman Trusts and all involved in their administration. This is plainly a category 2 case and the trustees sensibly recognise that and do not seek to oppose an order that D4's costs come out of the trust estate *pro tem* on an indemnity basis.

158. It is also important to have regard to the phrase "*pro tem*". At paragraph 11(a) of the Agreed Case Summary, it is stated that "[D4's] position is that all parties' costs of and associated with these proceedings should be deducted from the assets of the [Cayman Trusts] pro tem." Paragraph 11 (b) reads "[D1] and [D3] have confirmed that they will not oppose an order that [D4's] costs be paid from the assets of the [Cayman Trusts] pro tem." D4 asks the court to make an order in his favour that his costs "of and incidental to these proceedings may be paid from the assets of the [Cayman Trusts] on the indemnity basis *pro tem*" (paragraph 27 of his draft Order). P seeks an order that the costs of D4 "shall be costs in the cause" (paragraph 14.2 of what Mr Learmonth described as the composite draft Order).

159. In my experience this is a somewhat unusual case in that D4 only seeks a prospective costs order *pro tem*. Any such order can be adjusted at the end of the final hearing. It does not fetter the court's discretion.

160. Amongst the 3 files of authorities counsel did not refer me to any pages with the words *pro tem* on them. Hoffmann LJ was not dealing with prospective costs orders *pro tem* in *McDonald v Horn*. I am not making an order that D4's costs are to be paid out of the trust fund on an indemnity basis in any event. Mr Learmonth suggested that it did not matter whether the costs were ordered in any event or *pro tem*. I do not agree.

161. Hoffmann LJ was, in the context of making a prospective costs order which applied whatever the result at the final hearing, setting the bar so high because he was concerned about fettering the discretion of the court in such circumstances. I am not being asked to make such an order. I am being asked to make a prospective costs order *pro tem*. Such order can be, if need be, adjusted at the end of the final hearing. My discretion as to costs is not being fettered.

162. In *pro tem* cases I do not think it automatically follows that the court has to be satisfied that the judge at trial could only properly exercise his discretion by ordering costs be paid out of the fund. At the very least I do not think Hoffmann LJ's strong additional comments in *McDonald v Horn* at 697A should be applied with the same rigour in *pro tem* cases. I appreciate the need to exercise caution when making prospective costs orders but query whether the same level of hesitation or judicial reluctance should be exercised when making a *pro tem* prospective costs order. In doing so, the court is not fettering its discretion to make different costs orders at the end of the final hearing. Moreover, although this court is guided by the principles set out in the case law it has a

discretion when it comes to whether or not to make a prospective costs order *pro tem*. The caselaw makes it clear that in *Buckton* category 2 cases such costs will normally be paid out of the trust fund, usually on the indemnity basis. In the particular circumstances of this case, I think justice is best served by making prospective costs orders *pro tem*.

163. I do not go so far as Deputy Bailiff William Bailhache (as he then was) did in *X Trust* 2012 (2) JLR 260 but the categories of proceedings enumerated in *Re Buckton* should not be regarded as closed (*Singapore Airlines v Buck* [2011] EWCA Civ 1542 at [75]). This case can be regarded as an exceptional case on its own facts where D4's involvement is not solely for himself but for the benefit of the trust fund as a whole. I exercise the court's wide jurisdiction on costs in a way I consider best to achieve fairness and justice for all concerned (*IBM United Kingdom Pensions Trust Ltd v Metcalfe* [2012] EWHC (25 (Ch)).

164. The parties have agreed costs orders in respect of D5, D6 and Mr Lindley. The costs of P and D4 may be paid from the assets of the Cayman Trusts on the indemnity basis *pro tem*. D1 and D3 may be paid out of the assets of the Cayman Trusts on the trustee indemnity basis *pro tem*.

165. None of the submissions so eloquently advanced by Mr Learmonth persuaded me that I should not make a prospective costs order *pro tem*. On the material before the court, I was able to conclude that these proceedings fall within *Buckton* category 2 for the reasons set out in this judgment.

166. One point that did initially concern me was the position if, having made a prospective costs order, the court, after the final hearing, makes an adverse costs order against D4 who on his present evidence would be unable to pay it personally. I think that point pales into relative insignificance when one considers that the court would benefit from D4's focused and funded engagement with these proceedings. It would help the court to arrive at a just determination of the issues properly before it which is in the best interests of the Cayman Trusts. Moreover, D4 has been served. He is one of the primary beneficiaries. He should have a proper opportunity to put before the court his position on the issues for determination by the court. A prospective costs order *pro tem* should give him a proper opportunity to do that. If he is the subject of an adverse costs order at the end of the day and is unable to pay it so be it. This is the price the Cayman Trusts and P will have to pay to enable the court to justly determine the issues placed before it by P, which are so crucial to the future administration of the Cayman Trusts. I agreed with Ms McDonnell that if the trust fund was only worth £2 million there might have been much more force in this prejudice point if D4 could

not repay any funds advanced. In this case however the court does not have to be unduly concerned over any real financial hardship to P or the trustees. In my judgment on Point 7 in the particular circumstances of this case, the balance of justice comes firmly and fairly down in favour of making a prospective costs order *pro tem*, and that is what I do.

167. It follows from my determination on Point 7 that D4's costs in respect of his Summons of 2 December 2024 (Point 8) should be paid out of the Cayman Trusts *pro tem* on the indemnity basis.

168. I should make it clear that I have been concerned over D4's conduct in the past in seeking to inappropriately broaden the issues for the court's determination and his somewhat scattergun approach in his 180-page affidavit. D4 and his advisers must now focus on the issues properly before the court for determination and constructively cooperate with P and the other parties to enable a just, expeditious and economical determination of the Originating Summons. It is not my intention that D4 be given a blank cheque. The trustees will no doubt closely monitor the costs position.

169. Moreover, D4 would be well advised to focus his work and the work of his legal team on complying with the court's orders and preparation and attendance at the final hearing and presenting any appropriate arguments for the court's consideration in respect of the issues properly before the court for determination.

170. If D4 again attempts to raise issues not germane to the issues properly before the court or if he otherwise acts unreasonably or improperly, at the end of the day, he may not only be deprived of his costs, but he may also be ordered to pay the costs of others. D4 must exercise some discipline in respect of the costs he incurs.

171. In respect of paragraph 13 of the Confidentiality Order made on 5 September 2024 which provided that the costs of the application for such order should be costs in the Originating Application, I think that should be varied so that all parties' costs in respect of that application be paid out of the Cayman Trusts on the indemnity basis.

Settlement and ADR

172. Mr Robinson in his skeleton argument dated 6 February 2025 at paragraph 11 had mentioned the possibility of mediation in very general terms and without putting any meat on the bones. Halfway

through Day 2, however, Mr Robinson produced a draft order which he said would encourage the parties to actively consider settlement. No party objected to the court making the order and I therefore indicated that I was content to make the following order on the basis that such activity would be pursued in parallel to these proceedings rather than delay the judicial determination of the issues if settlement did not prove possible:

> The parties shall, at all stages, actively consider settling this litigation by an appropriate means of alternative dispute resolution (including mediation) (ADR). Any party not willing to engage in any means of ADR proposed by the other party shall, within 21 days of receipt of that proposal, serve an affidavit setting out that party's reasons for such refusal. Any affidavit served pursuant to this order shall not be shown to the trial judge until the question of costs arises.
>
> The trial judge may vary any prior order for costs previously made in favour of any party in the matter after taking into consideration the contents of any affidavits.

173. I applaud the efforts by P's former wife and D4's mother to seek an amicable resolution of the disputed issues within the family (in particular between Father and Son) and to restore family harmony. Some wise non-lawyers may maturely recognise that life is just too short to spend a large part of it amongst highly paid lawyers and on expensive, stressful and sometimes personally destructive legal proceedings. I wish the parties well in their endeavours to settle this unfortunate case.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT