

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/01043

IN THE MATTER of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Coral Ridge Trust and of the trusts of the Declaration of Trust dated 23rd February 2001 and designated as The Hightree Trust

AND IN THE MATTER OF an application under Section 3 of the Judicial Trustees Act and/or under the inherent jurisdiction of the Court

BETWEEN:

CHERYL HAMMERSMITH-STEWART

Plaintiff

AND

CROMWELL TRUST COMPANY LIMITED

First Defendant

ADAM STEWART

(acting in his capacity as the Enforcer, a member of the Advisory Board and personal capacity)

Second Defendant

JAIME STEWART-McCONNELL

(acting in her capacity as a member of the Advisory Board and personal capacity)

Third Defendant

BRIAN JARDIM

Fourth Defendant

GORDON STEWART

Fifth Defendant

KELLY STEWART

Sixth Defendant

SABRINA STEWART

Seventh Defendant

ASTON JONATHAN STEWART, SLOANE SARAH STEWART, CAMDEN JAIME STEWART, PENELOPE SKY McCONNELL, ISLA JAMES McCONNELL, FINLEY COLLINS McCONNELL, STELLAN JONATHAN McCONNELL AND THE UNBORN ISSUE OF ADAM STEWART AND JAIME McCONNELL

(acting by JOHANN GORDON EPSTEIN as their Guardian ad litem)

Eighth Defendant

ROBERT STEWART

Ninth Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Eason Rajah KC with John Wilson KC and Vanessa Smith for the Plaintiffs

Elsbeth Talbot Rice KC with Brian Simms KC and Wilfred Ferguson for the First Defendant

Richard Wilson KC with Sean McWeeney KC and John Minns for the Second, Third and Fourth Defendants

Nicholas Le Poidevin KC with Terry North and Wynsome Carey for the Fifth, Sixth and Seventh Defendants

John Delaney KC with Lena Bonaby for the Eighth Defendant

David Brownbill KC with Courtney Pearce and Raven Rolle for the Ninth Defendant

23 and 24 November 2022

DECISION ON NO-CONTEST CLAUSE

WINDER, CJ

This is my decision on the preliminary issue relative to the efficacy of a *no contest clause* in the trust instruments governing the Hightree Trust and the Coral Ridge Trust which were settled by the Honourable Gordon Arthur Stewart O.J.

Background

1. The Honourable Gordon Arthur Stewart O.J. (the Founder) was a successful Jamaican businessman. Butch, as he was called, was the founder of the Sandals & Beaches Resorts in addition to many other successful ventures. Sandals & Beaches Resorts is a hotel and resort chain based in Jamaica, and with resorts in many countries in the Caribbean, including in The Bahamas. Sandals & Beaches Resorts is owned and operated by a company incorporated in Panama called Sandals Resorts International 2000 Inc ('SRI 2000')

2. The Founder died on 4th January 2021. His survivors are divided into two branches:
 - (1) The Jamaican Family, made up of his sons Adam Stewart ('Adam'), Robert Stewart ('Bobby'), and Brian Jardim ('Brian'), and his daughter Jaime Stewart-McConnell ('Jaime'); and
 - (2) The US Family, made up of his partner, Cheryl Hammersmith Stewart and their three children Gordon, Sabrina, and Kelly Stewart.

3. During his lifetime the Founder founded two Bahamian trusts ('the Trusts') namely:
 - (a) The Coral Ridge Trust, which was established by declaration of trust dated 23rd February 2001 ("Coral Ridge"); and
 - (b) The Hightree Trust, which was established by declaration of trust also dated 23rd February 2001 ("Hightree").

Cromwell Trust Company Limited (Cromwell) is the Trustee of the Trusts.

4. Shares in Cromwell are held by Sterling Trust (Cayman) Limited (the 'Cayman Trustee'), a Cayman Islands trustee, on a trust called the Cromwell STAR Trust. Under the terms of the Cromwell STAR Trust, during his lifetime the Founder had the power as 'Enforcer' of the trust to direct the Cayman Trustee to appoint new directors of Cromwell. Following his death, this power is now conferred on Adam.

5. Coral Ridge is reported to hold –

(a) 100% of the issued shares in a Panama incorporated company, Oasis Global Inc ('Oasis Global'). Oasis Global in turn holds:

- (i.) 100% of the issued shares in SRI 2000; and
- (ii.) 100% of the issued shares in a Bahamas incorporated company, Blue Yoda Holdings Limited ('Blue Yoda'), which in turn holds a series of non-hotel assets, as well as the Island Routes Group, which is a tour operator.

(b) 100% of the issued shares in another Bahamas incorporated company, Vinalhaven Holdings Limited ('Vinalhaven'), which as at 18 January 2021 held cash in the sum of circa US\$ 291 million.

A feature of Coral Ridge is the Advisory Board. Paragraphs 8 and 9 of the Declaration of Trust, establishing Coral Ridge. provided as follows:

8. Advisory Board

8.1 The Founder Members of the Advisory Board shall be Mr Stewart, the Principal Beneficiaries and Chris Zacca.

8.2 The Enforcer may in writing appoint or remove members of the Advisory Board

9. Management of the Sandals Shares.

9.1 The Trustees shall not have any investment functions, responsibilities, powers or duties relating to that part of the Trust Fund that consists of the Sandals Shares and any monies (including shareholder loans) owing by the Trustees to Sandals or by Sandals to the Trustees, and any of the underlying assets, investments, transactions and activities of Sandals, any of its subsidiary or affiliated companies, or any company, partnership, or assets in which it invests or with whom it enters into any transaction, and any of the proceeds of the foregoing and the assets from time to time representing the same (together "the Hotel Fund").

9.2 All of the investment functions, responsibilities, powers and duties relating to the Hotel Fund shall be vested in the Advisory Board.

9.3 The Trustees shall (to the extent practicable) ensure that Sandals complies with any investment directions or instructions given by the Advisory Board. Sandals may, however, in its discretion refuse to execute a direction if the Trustees or Sandals bona fide consider that such execution would or might make the Trustees or Sandals subject to any criminal sanction or civil liability to persons not connected with the trust.

9.4 Pursuant to the investment functions, responsibilities, powers and duties vested directly in the Advisory Board, the Advisory Board may from time to

time require the Trustees to exercise (or refrain from exercising) their rights as holder of the Sandals Shares in a particular manner and the Trustees shall only exercise (or refrain from exercising such rights) in such manner as the Advisory Board from time to time directs.

- 9.5 The Trustees shall not (in the absence of their own actual fraud and dishonesty) have any liability for the investment performance of the Hotel Fund, nor for any cost expense liability or loss whatsoever caused to the Hotel Fund or the Trust Fund by complying (or attempting to comply) with any direction given (or which appears to have been given) by the Advisory Board as aforesaid.
- 9.6 At any time the Advisory Board, with the written consent of the Trustees (which they may in their absolute discretion and without any liability or responsibility to any person give or withhold), may designate that a specific part of the Hotel Fund shall no longer be considered to be part of the Hotel Fund but shall thereafter be treated as one with that part of the Trust Fund which is not the Hotel Fund.
- 9.7 The Advisory Board shall not be deemed to be Trustees by reason of the powers conferred by this Clause and shall (provided they are not acting in bad faith) not otherwise owe any fiduciary duties to any person in the exercise or non-exercise of any of the powers under this Clause and shall in any event not be liable under this Clause except in the event of the Individual Advisory Board Member's own willful and individual fraud and dishonesty. The Trustees shall have no duty to inquire whether the Advisory Board is acting in bad faith, unless they have actual knowledge of circumstances which strongly indicate.

Adam and Jaime currently make up the membership of Advisory Board.

6. High Tree is reported to hold:

- (a) 100% of the issued shares in a Panama incorporated company, Hospitality Purveyors Inc ('HPI'), which is a business that acts as the design and procurement arm for all Sandals Group properties.
- (b) 100% of the issued shares in PTT Investments, which is a company that owns real estate in the Turks and Caicos Islands.
- (c) 100% of the issued shares in Pristine Inc, which is a company that owns cars in The Bahamas and the United States of America.
- (d) 100% of the issued shares in Sandford Investments, which is a company that owns real estate in the Turks and Caicos Islands.
- (e) 100% of the issued shares in Tropical Cruises, which is a company that owns certain boats.

- (f) 100% of the issued shares in GBS Paradise Ltd., which is a company that owns real estate in the Bahamas.
- (g) 100% of the issued shares in SAG Investments, which is a company that owns real estate in The Bahamas, including a property at Old Fort Bay which the Founder wished the US Family to receive following his death (the 'Old Fort Bay Property').
- (h) 100% of the issued shares in Jacks Hill Holdings Limited, which is a company that owns real estate in Jamaica.
- (i) 100% of the issued shares in Winders Estate Limited, which is a company that owns real estate in Jamaica.
- (j) 100% of the issued shares in Stewfish Holdings Limited, which is a company that owns real estate in The Bahamas.
- (k) Cash in the sum of, as at 18 January 2021, circa US\$43 million.

7. By Deeds of Amendment dated 16 August 2018, Clause 6 of the Trusts were each amended to include the following:

6.1 Mr Stewart may at any time during the Discretionary Period declare in writing that any person shall cease to be a Beneficiary or shall cease to be capable of becoming a Beneficiary and this Trust shall take effect as if that person had died on the date of the declaration unless state otherwise. Thereafter the Trustees may at any time during the Discretionary Period declare in writing that such person shall from the date of such declaration cease to be a Beneficiary.

6.2 Notwithstanding clause 6.1, if the Trustee in its discretion determine that any one or more of the Beneficiaries has brought any Claim, the Trustee may at any time with the written consent of Mr. Stewart while he is alive, and after his death, without his consent, declare in writing that any one or more of such Beneficiaries shall be excluded from future benefit under this Trust and such exclusion shall have effect from the date of such determination by the Trustee provided that such exclusion shall not derogate from any interest to which any Beneficiary has

previously become indefeasibly entitled whether in possession or in reversion or otherwise.

6.3 For the purposes of clause 6.2 "Claim" shall mean all claims demands actions proceedings or counterclaims of any nature:

6.3.1 in which any one or more of the Beneficiaries shall object to or directly or indirectly contest:

(i) any provision of this Trust or any other deed of trust or trust indenture declared by the Trustees;

(ii) any provision of the Will or Wills of Mr. Stewart dealing with the devolution of his estate upon his death;

(iii) any provision of any gift made by Mr. Stewart;

(iv) any provision of any instrument or agreement governing any business entity owned, in whole or in part, by Mr. Stewart or any of his issue;

(v) any provision of any instrument or agreement governing any business entity owned, in whole or in part, by a trust created by Mr. Stewart or any of his issue; or

(vi) any provision of any instrument or agreement governing any business entity affiliated with Mr. Stewart or his issue; or

6.3.2 by which any one or more of the Beneficiaries shall attempt to prevent any provision under any deed indenture will instrument or agreement described in 6.3.1 above from being carried out in accordance with its terms.

8. Up to introduction of this amendment in 2018, the beneficiaries of the Trusts were Adam and Jaimie. Contemporaneous with the amendment of the Trusts, Bobby and the US beneficiaries were added as new beneficiaries.

9. Cheryl alleges that, prior to his death, the Founder set out detailed wishes as to how he wished the businesses/assets he had put into the Trusts to be dealt with after his death. Much of Cheryl's assertions as to the Founders last wishes are the subject of challenge and its efficacy to be determined if the action proceeds.

10. Cheryl summarizes these purported wishes as follows¹:

- (a.) First, by a letter of wishes dated 18th March 2019 (that was prepared by one of the Defendant's directors), the Founder expressed the wish that after his death me and my children receive the sum ofUS\$100 million from Hightree.
- (b.) Second, in his Last Will & Testament dated 15th May 2020 (the 'Will'), the Founder set out a Table of Properties and listed which properties he wished specific members of his family to receive. Following requests in respect of specific properties, the Table of Properties included a general request that my children receive, "all other homes, apartments or residential units outside Jamaica not mentioned above. (regardless of whether owned by companies falling within the Sandals & Beaches Group or the ATL Group)".
- (c.) Third, in a 'Summary of Trust Arrangements' prepared at the Founder's request by Mr Patterson (who also acted as the Founder's personal attorney during his lifetime and as noted above is a director of the Defendant) the Founder expressed the wish that the parent companies of Sandals, HPI, and another business (The Unique Group, which is held by a Guernsey law trust - the Winton Trust - that is not the subject of these proceedings but is included in the Sandals Group) be distributed to trusts for his family members in the following proportions:
 - (i) A new US Family Trust, for me and my children - 42%.
 - (ii) A trust for Bobby- 16.67%.
 - (iii) A trust for Adam - 16.67%.
 - (iv) A trust for Jaime - 16.66%.
 - (v) A trust for Brian - 8%.

¹ Page 17 of the Affidavit of Cheryl Hammersmith

(d) Fourth, by the 'Summary of Trust Arrangements' the Founder also expressed the wish:

- (i) That me and my children receive 8% veto shares in the parent companies of the said businesses (giving me and my children 50% of the voting rights in the businesses and so the ability to veto shareholder resolutions, protecting our minority position); and
- (ii) That the parent companies be the subject of a Shareholders' Agreements, which would give the US Family and the Jamaican Family balanced representation on the boards of those companies (effectively providing that neither branch would have a majority on, or control of, the boards, unless they were joined by independent directors).

The Summary of Trust Arrangements which was not signed by Founder. Cheryl also relies on a memorandum, prepared by his personal attorney, Trevor Patterson which was purportedly signed by the Founder on 3 January 2021 some hours before his death and at a time when he was seriously ill. The memorandum provided for the establishment of 5 new trusts to hold the shares of the asset holding companies currently held in trust. The memorandum was not forwarded to Cromwell as the Founder died before this could be done and Patterson considered that his agency was terminated on the Founder's death.

11. As indicated, Adam and some of the Defendants assert that Cheryl's representations as to the Founder's wishes do not accurately reflect the genuine, lasting, and free and informed wishes of the Founder².

12. Following the Founder's death relations between the US Family and the Jamaican Family have broken down, Cheryl alleges:

18. Unfortunately following the Founder's death [Cromwell] has refused to implement the Founder's wishes for the Trusts. Instead, and as I summarize below, [Cromwell] has departed or threatened to depart from the Founder's wishes in various ways that would prejudice my and my children's position.

² See paragraph 42.6 of the Amended Defence of the 2nd to 4th Defendants

19. I am deeply concerned that the reason [Cromwell] has departed, or has threatened to depart, from the Founder's wishes for the Trusts is that the majority of the Defendant's directors are subject to serious conflicts of interests and susceptible to the influence of Adam.

20 As to the conflicts that affect the majority of [Cromwell's] directors, these can be summarized as follows:

- (a) As set out above, the majority of the [Cromwell's] directors are officers, employees, or counsel to the Sandals Group. They are thus paid directly or indirectly by the Sandals Group, and have a personal interest in the activities of the Sandals Group and in maintaining their good relations with the Sandals Group.
- (b) The current Executive Chairman of the Sandals Group is a member of the Jamaican Family, namely Adam. Accordingly, the majority of [Cromwell's] directors are subordinate to Adam and have a personal and financial interest in maintaining good relations with him.
- (c) Following my husband's death, it falls to the trustee of the Trusts to take a series of decisions regarding the distribution of the Trusts' assets, which will require the trustee to balance the competing interests of the Founder's family and the Sandals Group, and the competing interests of the Jamaican and US Families. Thus, for example:
 - (i) In deciding whether to put into effect the Founder's wish that my children receive all "homes, apartments or residential units outside Jamaica" not specifically bequeathed by his Will "regardless of whether owned by companies falling within the Sandals & Beaches Group ... ", my children's interests are in direct conflict with the interests of Sandals: it would not be desirable from Sandals' perspective for the trustee of the Trusts to distribute properties held by Sandals to my children.
 - (ii) In deciding whether to put into effect the Founder's wish that me and my children receive veto shares in the businesses, or that the boards of directors of the businesses are balanced between the US Family and the Jamaican Family, my and my children's interests are in direct conflict

with the interests of the Jamaican Family: if the Founder's wish that me and my family receive veto shares and board level protection are thwarted, our 42% minority holding in Sandals would be devalued, and the Jamaican Family - and Adam in particular - will be able to exert more control than the Founder intended. ³

13. Cheryl has commenced this action ("the Claim") by Writ of Summons dated 14 September 2020. The indorsement on the Writ provides a summary of Cheryl's claim. It provides:

The Plaintiffs claim herein is against [Cromwell] as trustee of the settlement established by Declaration of Trust dated 23rd February 2001 and known as The Coral Ridge Trust and as trustee of the settlement established by Declaration of Trust dated 23rd February 2001 and known as The Hightree Trust for the following relief:

- (1) A declaration that the claim does not engage:
 - (i) the no contest clause at clause 6 of the Declaration of Trust of The Coral Ridge, as amended by a Deed of Amendment dated 16th August 2018,
 - (ii) the no contest clause at clause 6 of the Declaration of Trust of The Hightree Trust, as amended by a Deed of Amendment dated 16th August 2018; or
 - (iii) the no contest clause at clause 27 of the last Will and Testament of the late Gordon Arthur 'Butch' Stewart dated 15th May 2020.
- (2) If, but only if, the said declaration is granted:
 - (a) the replacement of [Cromwell] as trustee of the Trusts with The Private Trust Corporation Limited, or alternatively with such wholly independent, professional Bahamian trustee as the Court thinks fit;
 - (b) in the alternative to (a), the appointment of, as a Judicial Trustee of the Trusts in place of [Cromwell], The Private Trust Corporation Limited, alternatively of such wholly independent, professional Bahamian trustee as the Court thinks fit;
 - (c) in the alternative to (b), the appointment of, as an additional trustee of the Trusts to act jointly with [Cromwell], The Private Trust Corporation Limited, alternatively of such wholly independent, professional Bahamian trustee as the Court thinks fit;
 - (d) in the alternative to (c), the appointment of, as a Judicial Trustee of the Trusts to act jointly with [Cromwell], The Private Trust Corporation

³ Page 18 of the affidavit of Cheryl Hammersmith.

Limited, alternatively of such wholly independent, professional Bahamian trustee as the Court thinks fit.

- (3) Such further or other relief as the Court shall consider appropriate; and
- (4) Costs.

The Application

14. Cheryl's subsequent Statement of Claim expands her claim and provides, in part, as follows:

C. The Claim

(1) Conflict of interests/ duties

(a) Nature of the conflict of interests/ duties

32. All of the current directors of the First Defendant save for Mr. Soutter:

- a. Owe duties of loyalty to the Sandals Group in their capacity as officers, employees, and/or counsel to the Sandals Group; and
- b. Have a direct and financially material current relationship with the Sandals Group.

...

PARTICULARS OF CONFLICT

(a) The US\$100 million payment to the US Family

(b) The properties held by the Sandals Group

(c) Ownership and control of the Sandals Group

(d) Potential sale of the US Family 's 42% interest in the Sandals Group

(e) Appointment of further director at behest of Adam Stewart

(f) Unauthorized loan to the Sandals Group

(2) Breakdown in relations and loss of trust and confidence

68. Relations between the Plaintiff and the First Defendant have broken down, and the Plaintiff has reasonably lost all trust and confidence in the First Defendant's ability to administer the Trusts fairly and impartially, as a result of the following matters:

a. The First Defendant's mode of administration of the Trusts, including (as particularized above):

- i.) The First Defendant's failure to recognize the actual conflicts to which it is subject;
- ii) The First Defendant's threat to take decisions in respect of the Trusts notwithstanding the existence of those conflicts; and
- iii.) The First Defendant's attempt to require the Plaintiff to release her claims in exchange for the payment of all or part of the US\$ 100 million which the Founder wished the US Family to receive, which the First Defendant must have known was an improper request by a professional Bahamian trustee; and

b. The First Defendant's unfair and partial treatment of the US Family and the hostility shown by certain of the First Defendant's directors towards the US Family, as particularized below.

PARTICULARS OF PARTIAL/ HOSTILE TREATMENT

- (a) Decision to sell the Gulfstream aircraft after consultation with one side of family
- (b) Hostility and refusal to compromise regarding rental of Old Fort Bay Property
- (c) Trespass and padlocking of boats at Old Fort Bay Property
- (d) Unauthorized distributions to Adam Stewart and Jaime Stewart-McConnell
- (e) Unauthorized loans to Jamaican Family
- (3) Discrepancies in financial information and request for an account

78E. At a board meeting or board meetings, the precise dates of which are not presently known to the Plaintiff, the board of directors of the First Defendant were provided by Mr. Carey and Ms Delva with summaries of financial accounts for the Trusts, which appeared to show a discrepancy in the form of \$30 million missing from the Trust Fund of the Trusts. The Plaintiff will rely on the existence of this apparent discrepancy in support of her claim for an account of the Trustee's administration of the Trusts pleaded at paragraph 91 below.

15. By Summons dated 12 November 2021, Cromwell applied by way of directions for the determination of a preliminary issue, which arose on Cheryl's Writ of Summons. The parties agreed for the hearing of the preliminary issue as framed in Cromwell's Summons. The framing of the issue by Cromwell, for the purpose of the application, provided as follows:

(1) A declaration whether the claim brought by Cheryl Hamersmith-Stewart against Cromwell Trust Company Limited (Action Number 2021/CLE/gen/01043) is, or in the discretion of the respective trustees or executors may properly be determined to be, "a Claim" for the purposes of

- a. Clause 6.2 of the Declaration of Trust of the Coral Ridge Trust, as amended by the Deed of Amendment dated 16th August 2018;
- b. Clause 6.2 of the Declaration of Trust of the Hightree Trust, as amended by the Deed of Amendment dated 16th August 2018;
- c. Clause 27.2 of the last Will and Testament of the late Gordon Arthur "Butch" Stewart dated 15th May 2020.

Paragraph 1(c) is no longer being pursued under the Summons and the application relates only to the Coral Ridge Trust and the Hightree Trust.

16. Cromwell was initially the only defendant who was pursued in the action, however all of the beneficiaries of the Trusts have been joined as defendants. Adam is also joined in his capacity as the Enforcer of the Cromwell STAR Trust and a member of the Advisory Board. Jaime is likewise also joined in her capacity as a member of the Advisory Board. Johann Gordon Epstein (Epstein) was appointed as Guardian ad litem for Aston Jonathan Stewart, Sloane Sarah Stewart, Camden Jaime Stewart, Penelope Sky Mcconnell, Isla James Mcconnell, Finley Collins Mcconnell, Stellan Jonathan Mcconnell and the unborn issue of Adam and Jaime.

The Submissions of the Parties

17. Cromwell asserts a neutral position in the dispute.

18. Jaime, Brian and Epstein supports Adam's case. Any reference to Adam, unless the context suggests otherwise, is also a reference to these Defendants who support his case.

19. The other Defendants, including Robert support Cheryl's view of Clause 6. Any reference to Cheryl, unless the context suggests otherwise, is also a reference to these Defendants who support her case.

20. Cromwell's written submissions puts its case for the bringing of the Summons as follows:

3. ... [W]hether or not the action that has been commenced by Cheryl falls within the definition of "Claim" is the very question raised by the Statement of Claim. Whilst the subjective views of the beneficiaries are not themselves relevant to construction, there is a discrepancy of views as the meaning of the terms. Cheryl argues that she is not seeking to challenge any provision of the Trusts (or any of the other provisions mentioned in the definition), but asserts that she is merely seeking to uphold the Founder's wishes: see her second affidavit at paragraph 8 et seq. Adam Stewart ("Adam"), on the other hand, says that the power to exclude

a Beneficiary who has made "a Claim" was introduced by the Founder as an amendment to the original terms of the Trust precisely in order to deter the US Family (including Cheryl) from bringing such a claim as the present: see paragraph 10 of his first affidavit. Like Cheryl, Adam is a Beneficiary under the Trusts, but he is also the Enforcer of the Cromwell STAR Trust (and, therefore also an Enforcer of the Trusts: see clause 1.10 of the Declaration of Trust of the Coral Ridge Trust, and clause 1.9 of the Hightree Trust), which gives him special powers in relation to the Coral Ridge Trust.

4. Cromwell considers that both Cheryl's and Adam's positions are arguable. Furthermore, it is mindful of the words of caution in Lewin (20th edition, paragraph 6-006) "If trustees are given a discretionary power to act against beneficiaries who take proceedings, they need to act carefully, as it is contempt of court to make threats to discourage prospective litigants from taking proceedings, or to punish them for having done so." For these reasons, Cromwell seeks the guidance of the court as to the correct construction of clause 6 and whether or not it has been triggered by the events that have occurred.

5. Cromwell also wishes to make it clear that it has not, as yet, made any decision as to whether or how it might exercise the power to exclude if the court decides that Cheryl's action constitutes "a Claim" under clause 6 of the Trust. ... Against the background of Cheryl's claim to remove Cromwell as Trustee on the grounds (inter alia) that she has lost trust and confidence in it, any decision Cromwell might take now is liable to be regarded by one or other branch of the family as demonstrating a want of impartiality. If Cromwell were even to exercise the discretion apparently given to it by clause 6.2 – or to purport to do so – to decide that "a Claim" had been made, Cheryl would be likely to seek to rely on this as an additional ground for seeking its removal. In order to clarify the scope of clause 6.2, it is necessary to construe clause 6 of the Trust, as a whole.

...

34. In light of these competing positions, it is for the beneficiaries to vindicate the arguments either way

21. Cheryl asks the Court to declare that the bringing of the Claim does not engage the no contest clause at clause 6 of the Declaration of Trust of the Coral Ridge Trust, as amended by a Deed of Amendment dated 16th August 2018, [or the no contest clause at clause 6 of the Declaration of Trust of High Tree Trust, as amended by a Deed of Amendment dated 16th August 2018]. She summarizes her case as follows⁴:

- a. The issue that the Court is asked to determine in respect of the No Contest Clauses is not procedurally improper. The Court has jurisdiction to grant the relief sought.
- b. The No Contest Clauses are not engaged by either the Removal Claim or the Interim Co-Trustee Application, because, on the true construction of the No Contest Clauses, those claims/applications are simply not within the ambit of the No Contest Clauses.
- c. In any event, and as a matter of fundamental public policy in The Bahamas (as in other common law jurisdictions), no contest clauses will not prevent the bringing in good faith of claims that meet the 'good arguable case' threshold, and both the Removal Claim and the Interim Co-Trustee Application clearly and easily surmount that threshold. Accordingly, and per her Statement of Claim, Cheryl respectfully asks the Court to declare that the bringing of the Removal Claim/Interim Co-Trustee Application "does not engage the no contest clause at clause 6 of the Declaration of Trust of [the Coral Ridge Trust], as amended by a Deed of Amendment dated 16th August 2018, [or the no contest clause at clause 6 of the Declaration of Trust of High Tree Trust, as amended by a Deed of Amendment dated 16th August 2018] or the no contest clause at clause 27 of the last Will and Testament of the late Gordon Arthur 'Butch' Stewart dated 15th May 2020.

22. According to Mr Rajah KC, "Cheryl's primary concern is to ensure that the Founder's wishes are properly taken into account by a trustee who is free from conflict, and who is able to administer the Trusts fairly and impartially, in the interests of the beneficiaries of the trusts, as a whole. Accordingly, the no-contest clauses are not engaged. There is only one question. Either these clauses are engaged by these claims or not. And the determination as to that question, is whether or not it is something which

⁴ Paragraph 4 of the Skeleton Argument.

a trustee could conclude it is a claim. The question is a question for the court and not for anyone else because it is a matter of law and must therefore be determined by [the Court]”.

Adam’s case

23. Adam’s case is that the Claim falls within the *no contest clause* and that the steps which have already been taken by the Cheryl in issuing and pursuing the Claim engage the *no contest clause*. He says that it is an important feature of the *no contest clause* in the present case that its engagement does not result in the automatic exclusion of a claimant beneficiary, but merely feeds into the exercise of a power by the Trustee. He says that a reasonable trustee could properly determine that the steps taken by Cheryl to date constitute the bringing of a “Claim” within the meaning of the *no contest clause*. He says:

- (a) Fundamentally, there is no escaping the fact that Cheryl has issued a claim form on which the removal of the Trustee is sought as part of the relief;
- (b) The Trustee and the Jamaican Defendants have – at Cheryl’s insistence – been forced to incur the costs of filing substantive defences to the claim;
- (c) Cheryl sought the listing of her application for the appointment of an interim trustee prior to the determination of this application;
- (d) There is no relevant qualification within the *no contest clause* in the present case which provided (expressly or implicitly) for a conditional claim to be brought. Moreover, any such qualification would undermine the purpose behind such a clause: as this litigation shows, a conditional claim is no less time-consuming, expensive and reputationally damaging to Sandals than an unconditional claim.

24. Adam accepts that there is a public policy limitation on *no contest clause* which has been recognised by the Court (including in *AN v Barclays Bank*) is that they must not oust the jurisdiction of the Court in such a way as to restrict the beneficiaries’ rights to enforce a trust: in such a case the *no contest clause* would undermine the very existence of a trust because the beneficiaries would have no means of enforcing it. Adam contends that in the present case, however, there can be no sensible suggestion that the No Contest Clause purports to oust the jurisdiction of the Court: the *no contest clause* does not seek to prevent any beneficiary from being able to enforce the rights they have pursuant to the Trusts; it simply provides the power to the Trustee to exclude a beneficiary

in the event that it determines that beneficiary has challenged (directly or indirectly) any provision of the trusts through which the beneficiary has acquired such rights, the Will or an instrument governing any relevant business entity.

25. Adam says that the Claim consists of a fundamental challenge to the trust structure insofar as it constitutes:

- (1) An attack on the trust structure designed by the Founder, including the links between the directors of the Trustee and the Sandals business;
- (2) A challenge to the independence of the Trustee provided by the terms of the trust based on its failure to execute what [Cheryl] claims to have been the Founder's wishes.

Adams also says that:

- (1) the Claim is not one by which Cheryl seeks to vindicate her rights as a beneficiary of the Trusts. She does not allege bad faith on the part of the Trustee (Reply, [19] c), and nor does she seek to challenge any decision taken by the Trustee: “[t]he Plaintiff does not seek to impugn decisions taken or to be taken by Cromwell” (Reply, [70]). Instead, these proceedings are entirely motivated by her dissatisfaction with the Trust Structure designed by the Founder and left intact by him on his death, pursuant to which the [Adam] is the Founder's chosen successor as Enforcer of the Trusts as well as Executive Chairman of Sandals Group.
- (2) the Claim is not concerned with [Cheryl's] rights as a beneficiary of the Trusts: it is designed to dismantle the trust structure created by the Founder for the sole reason that the Trustee has not immediately given to her everything she claims she should receive. The claims fall outside the “probable cause” exception when properly understood. Cheryl has also failed to establish a “good arguable case”.
- (3) the Claim's reliance on the links between the Trustee's directors and the Sandals business fundamentally misunderstands the nature and purpose of the trust structure established by the Founder. Each of the directors of the Trustee were selected by the Founder, in full knowledge of their links to the Sandals business, to serve in that role. The trust structure was set up by the Founder to protect his business empire, of which the Sandals Group was and remains by far the most important part. ... The suggestion that these links, which were known to the Founder when he chose the directors to serve in this role and appointed them to the Trustee's board, somehow disqualifies the Trustee from being able to act is obviously unsustainable.
- (4) the Claim relies on this alleged ‘conflict of interest’ in support of its claim for the Trustee to be removed as trustee of the Asset Holding Trusts. This aspect of the Claim is a fundamental attack on the trust structure set up by the Founder, which was carefully designed to ensure that the Trustee, as trustee of the Asset Holding Trusts, is subject to the control of the STAR Trustee and the Enforcer.

(5) the Claim constitutes a "Claim" - or, rather, the Trustee could reasonably conclude that it does.

26. Adam complains that the Claim also includes criticism of the Trustee for its failure to implement what Cheryl alleges were the Founder's wishes before his death. He says that this aspect of the Claim constitutes the entirety of the alleged 'particulars of conflict' portion within Section C of the Amended Statement of Claim. Cheryl's complaint is not that the Trustee has failed to consider what the Plaintiff alleges to have been the Founder's wishes, but that the Trustee has either failed or failed immediately to implement these alleged wishes. Therefore, in essence, the Plaintiff seeks to attack the discretionary powers conferred on the Trustee and to treat the Trusts as if the Founder had reserved powers to himself which he did not. Adams says that this attack on the Trustee is also misconceived.

27. Adam says that there is no merit to the core complaint made by Cheryl in respect of the nature of the role played by the directors of the Trustee and of their alleged links and/or loyalty to Sandals.

Law and Analysis

28. The first issue for consideration is the question of jurisdiction. It was initially suggested by Adam, that Cheryl's action, which seeks a preliminary declaration as to whether her claim falls within the ambit of the *no contest clause*, was improper and lacked a jurisdictional basis. Adam appears to have resiled from that position and accepted that the action may be pursued in that manner, albeit he asserts that Cheryl may have already offended the terms of the *no contest clause* by this action.

29. The learned authors of *Lewin on Trusts* do tend to support Cheryl's manner of proceeding in this action. According to *Lewin*, at paragraph 6-012:

[6-012] Cautious beneficiaries, who are concerned that a "no contest" clause in the trust might conceivably be invoked against them if they commence any kind of trust proceedings, have in the past sought, as the first claim for relief, a declaration that the substantive relief secondly claimed does not come within the "no contest"

clause, and the substantive relief is claimed only if such a declaration is granted. We consider that this is an effective procedure and is, perhaps, more prudent than before, since it now appears that the application of the “no contest” clause may turn upon whether probable cause can be demonstrated, but there is scope for doubt as to what probable cause amounts to. Yet there is a concern that the court may decline to grant a declaration on the ground that it is inappropriate to determine the existence or otherwise of probable cause until after the substantive claim has been determined, and so leave the beneficiary to take the risk of litigation being caught by the “no contest” clause if he dares to litigate. Such an approach is understandable in the case of a beneficiary who is content to embark on litigation without taking any protective measures, and then seeks to argue the issue of probable cause half way through his litigation. But it would, in our view, be regrettable if the court were unwilling to consider the grant of declaratory relief in circumstances where a beneficiary was advised that he had a meritorious claim but was unwilling to embark on litigation, in view of the draconian consequences, unless he had the protection of an order of the court. There would appear to be no difficulty in the court determining the issue of probable cause at the outset, in much the same way, for instance, that the court determines the question of a serious issue to be tried in applications to serve trust proceedings out of the jurisdiction, though there might be circumstances in which a declaration would be qualified so as to protect the commencement of proceedings but not necessarily their continuation after a particular stage in the proceedings had been reached.

30. The decision on the preliminary issue in this case can only be a purely legal exercise and although significant affidavit evidence has been proffered by the parties none of this has been tested to enable the court to make any factual assessments or findings of facts. There are real and considerable disputes as to the facts which cannot be resolved and could not be expected to be resolved, on an application this nature or which has been run in the manner the parties have done.

31. It is common ground between the parties that *no contest* clauses are generally valid and enforceable. The starting point is that the rights that beneficiaries acquire under a trust are those which the settlor chooses to confer on them. The Settlor therefore has the freedom to decide the terms on which a beneficiary might benefit and in whose hands he would place the power to make important decisions. The rationale was explained by the English court in *Cooke v Turner* and subsequently endorsed by the Privy Council in

Evanturel v Evanturel in an appeal from the Court of the Queen's Bench of Quebec. According to Sir James W Colvile, in giving the judgment of the Board:

"...it is not easy to see why a testator may not protect his estate and representatives against unsuccessful attempts to litigate his will, by saying to a legatee, "I, being master of my own bounty, and free to give or to withhold, give you this legacy subject to the condition that you do not dispute the general disposition of my estate. You may contest the general disposition of my estate. You may contest the validity of my will if you please; but you will do so at the peril of losing, if it be established, what it gives you."

32. This freedom of the Settlor is circumscribed by the need to ensure that there remains the irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. This was the effect of the dicta of Millett LJ in ***Armitage v Nurse [1998] Ch 241 at 253*** requiring Trustees to act bona fide in the interests of the trust and beneficiaries. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

33. In The Bahamas no contest clauses are validated by Statute. Section 87A was introduced into the Trustee Act 1998 by the Trustee Amendment Act 2011. It came into effect on 30 December 2011. Section 87A provides:

87 A. Termination or interest or beneficiary upon trust being challenged.

(1) The terms of a trust may provide that the interest of a beneficiary shall terminate (or may be terminated in exercise of a power in that regard) upon –

(a) the validity of the trust being challenged, in whole or in part, in any court within or outside The Bahamas; or

(b) any action being taken to assist, promote or encourage a challenge.

(2) Subsection (1) applies whether or not the challenge or action-

(a) is brought or taken by the beneficiary; or

(b) is brought or taken in good faith or with reasonable cause.

(3) Unless otherwise provided in the trust instrument, no rule of law or equity giving relief against forfeiture shall apply to a provision referred to in subsection (1).

(4) In this section-

(a) in relation to a beneficiary who is the object of a power or whose interest arises by virtue of his membership of a class, the termination of his interest includes his ceasing to be an object of the power or a member of the class;

- (b) the "validity of the trust" includes the validity of any disposition of property to be held upon the trusts of the trust and any question whether any settlor of the trust intended to create a trust on the terms of the trust instrument.

34. There is very limited authority on the law relating to the nature and effect of *no contest clauses*. The leading authority is the case of ***AN v Barclays Private Bank and Trust (Cayman) Ltd [2006] CILR 367***, a decision of Chief Justice Sir Anthony Smellie of the Grand Court of the Cayman Islands. ***AN v Barclays Private Bank and Trust (Cayman) Ltd*** has also been considered in Bermuda in the case of ***Re Estate of PQR [2014] SC (Bda) 95 Civ***

35. The facts of ***AN v Barclays Private Bank and Trust (Cayman) Ltd.***, according to the headnote were: Two trust deeds included cl 23 which provided that 'Whosoever contests the validity of this deed and the trust created under it, of the provisions of any conveyance of property by any person or persons to the trustee to form and be held as part of the trust fund and of the decisions of the trustee and/or of the protection committee shall cease to be a beneficiary of any of these trusts and shall be excluded from any benefits, direct or indirect, deriving from the trust fund.' One of the beneficiaries took action to challenge a restructure of the shareholdings held by the trustees arguing that it would upset the balance between immediate and remoter beneficiaries. The trustees sought the directions of the court as to whether the beneficiary was already or would become excluded from the trust.

36. Chief Justice Sir Anthony Smellie held that

(1) A beneficiary under a discretionary trust was not to forfeit entitlement under a condition unless the condition was such that the court could see from the beginning, precisely and distinctly, what the event was that would forfeit the entitlement. The question was not whether the events which occurred fell within the definition in the forfeiture clause but whether one could predict from reading the trust document what the forfeiting event was. The prohibition on contesting the validity of the trust was sufficiently certain but the reference to 'decisions of the trustees' was not (see paras [44], [47], [50], [52], post). *Clavering v Ellison* (1859) 7 HL Cas 707 applied. *Sifton v Sifton* [1938] AC 656 considered.

(2) There was no public policy reason why the forfeiture clause should not be enforced where a challenge to the trust or a particular disposition was unsuccessful

and without good cause. The forfeiture clause would not be applied so as to protect an illegal or invalid disposition nor so as entirely to shut out challenges based on probable cause or good faith and which were not vexatious or without good reason. This was so even where Page 1 137 the trust deed contained mechanisms for controlling a defaulting trustee. The trustees could not be exonerated from their core obligations and it would be repugnant to the trusts and contrary to public policy to hold that the beneficiaries could not enforce the trusts. With this gloss the clause could be interpreted so as to eliminate concerns about repugnancy or ouster of the jurisdiction of the courts (see paras [71], [90], [93], [97], post). *Evanturel v Evanturel* (1874) LR 6 PC 1 applied.

(3) Jurisdiction existed to grant relief from forfeiture in appropriate circumstances, even if there were a gift over provided that non-compliance with the forfeiture clause was beyond the control of the beneficiary (see paras [119], [122], [123], post). *Shiloh Spinners Ltd v Harding* [1973] AC 691 applied.

37. *According to Smellie CJ:*

[39] The common law principles do show that a condition of defeasance or forfeiture, such as cl 23 is to be regarded, must be strictly construed. While they will be upheld if they comply with the strict rules of construction, such conditions are liable to be set aside by the courts if they fall foul of any of the three principles relied upon as grounds for objection here.

...

[89] From the foregoing survey of the case law, I consider that it is safe to summarize the principles which guide my decision here as follows: First, to be valid, cl 23, subject to the severability of any invalid limb, must be certain within the meaning settled in *Clavering v Ellison* (1859) 7 HL Cas 707, 29 LJ Ch 761.

[90] Secondly, in the case of a challenge to the essential validity of the trust itself (a limb 1 contest) there is no general public policy reason why a no-contest provision should not be valid (see *Cooke v Turner* and *Evanturel v Evanturel*). Such a challenge, if successful, would likely serve to set aside the trust as invalid and with it, the provisions of the no-contest clause itself. If the challenge is unsuccessful and without any good cause, there appears no public policy reason why the clause should not operate to exclude the contender from benefit and, subject to any discretion of a court if it exists (a matter to be considered below) to give relief from forfeiture, he will be excluded. However, even in a case of a challenge to essential validity (limb 1 or limb 2) as in any other case of challenge, including as to the validity of decisions or actions of a trustee (limb 3), a no-contest clause cannot be validly construed so as entirely to shut out challenges which are based on probable cause or good faith or which are not taken merely frivolously and vexatiously or without good Page 29 165 reason (see *Adams v Adams* [1892] 1 Ch 369, 61 LJ Ch 237, *Re Wynn's Will Trusts*, *Public Trustee v Newborough* [1952] Ch 271, [1952] 1 All ER 341, *Re Williams Williams v Williams* [1912] 1 Ch

399, 81 LJ Ch 296, and *Re Raven, Spencer v National Assoc for the Prevention of Consumption and other forms of Tuberculosis* [1915] 1 Ch 673, 84 LJ Ch 489).

[91] Where the challenge is to a particular transfer of property or disposition a limb 2 contestee, for example, *Powell v Morgan* (1688) 2 Vern 90, 23 ER 668, the challenge, even if successful, will leave the no-contest clause intact with the rest of the settlement. On the authority of that case, such a challenge is deemed not to work a forfeiture. Equally, the obverse would be true there would be no reason why the forfeiture clause should not be valid and effective where such a contest was brought without good or probable cause and failed. From the survey of the decided cases, each case must depend on its own circumstances for an assessment to ascertain whether there has been or is an extant challenge and, if so, whether such good faith or probable cause or good reason can be found. In light of all the cases, it cannot be concluded that the only qualification upon the operation of a no-contest or forfeiture clause must be 'success' as discussed in *Evanturel v Evanturel*.

[92] Thirdly, nor would it matter for these purposes whether the trusts themselves contain, as here, internal machinery for controlling a defaulting trustee. Even if the control mechanism is vested in a majority of beneficiaries so that an aggrieved beneficiary can, by the democratic process, obtain the removal and replacement of a trustee or the protection committee that can be no justification for a complete prohibition against access to the courts. Such a complete prohibition would be repugnant to the trusts themselves, to the beneficial interests of the beneficiaries and to their right to seek vindication of their positions before the court in an appropriate case where such vindication may be necessary (*Re Wynn, Re Raven and Armitage v Nurse*). It would also be contrary to public policy entirely to preclude them from having such access (*Re Wynn, Re Raven, Massy v Rogers* (1883) 11 LR Ir (Ch) 409, *Evanturel v Evanturel* and *Re Tuck's Settlement Trusts*).

[93] Fourthly, the foregoing conclusions are, in my view, only reinforced, in the context of the present deeds, by the provisions of cl 11 in particular (reflecting the principles identified in *Armitage v Nurse*) that the trustees will not be exonerated from claims against them relating to their irreducible core of obligations and arising from their own intentional fault or wilful misconduct. It would be repugnant to the trusts and to the public conscience in such circumstances to hold that the beneficiaries might not be able to enforce the trusts by appropriate action before the courts.

[94] These conclusions do not arise only as a matter of construction of the intentions of the settlor. Taking the leading case of *Evanturel v Evanturel* as expressing an axiomatic statement of principle (no doubt influenced also by the mandate of arts 760 and 831 of the Civil Code which applied in Quebec) considered in the judgment of the Privy Council (set out at para [73] above) there is then support for this proposition. Their Lordships did say: 'Upon principle, it is to be observed that the prohibition cannot be absolute, and can be invoked only

where the validity of a will has been unsuccessfully contested.' That proposition of principle, though differently stated, was, it seems to me, equally axiomatically identified in the other cases which exempt bona fide challenges brought on grounds which could be justified, even if such challenges fell short of success.

[95] Thus viewed, in the context of the present trusts, the principle is not one to be derived merely from a construction of cl 23 itself seeking to find the intentions of the settlors. The principle is one derived from the corpus of the common law as it has developed; law with which those advising the settlor on the resettlement of the XYZ Continuation Trust (as it was then known) to the Cayman Islands would have been well acquainted. Indeed, as Mrs Warnock-Smith and Mr Taube observed from time to time during the arguments, Page 30 166 *Evanturel v Evanturel*, a Privy Council case from Canada, would have been well known to the original draftsman of this settlement which started life in New Brunswick and which, from the outset, included cl 23 but then in its original form as cl 12 of the XYZ settlement.

[96] What then is to be made of cl 23, which contains no such qualifying words as 'success,' 'bona fide,' or 'justified?' The answer must be that the clause must be construed in accordance with all the terms of the deed in the light of the settled common law principles which have been identified. It is plain enough that cl 23 was not intended to be construed as flying in the face of the established principles. Rather, cl 19 of the deed makes it plain that the contrary would have been the intention in as much as it provides that, if possible, any offending provision shall be construed in accordance with the laws of the Cayman Islands.

38. I am not satisfied that the decision in ***AN Barclay*** is wholly applicable in the context of a Bahamian trust, governed by Section 87A of the Trustee Act and settled in the terms of the Trusts.

39. In ***AN v. Barclay, Sir Anthony Smellie CJ*** found that there was no public policy reason [in the Cayman Islands] why the forfeiture clause should not be enforced where a challenge to the trust or a particular disposition was unsuccessful and without good cause. The Cayman Islands' Trust Law regime is not impacted by legislation similar to Section 87A which specifically provides for no contest clauses. Additionally section 87A(2) provides that the no contest clause could be sustained whether or not the challenge is brought in good faith or with reasonable cause. Section 87A must be taken to represent the public policy of The Bahamas. It is clearly no accident that the relevant amendment to the Trustee Act came into force of in December 2011 after the decision in

AN v. Barclay was decided in 2006. Parliament is presumed to know the state of the common law and the amendment appears intended to counter the effects of ***AN v. Barclay***.

40. More importantly, the no contest clause in the Trusts are drafted in an entirely different manner than the clause in trust under review before Smellie CJ in ***AN v. Barclay***. The clause in the Trusts provides for the exercise of a fiduciary discretion by Cromwell as to whether the Claim falls within the no contest clause and whether the beneficiary ought to be removed as a beneficiary. In ***AN v. Barclay*** there was an automatic barring of the beneficiary where the clause applied and no right otherwise to approach the Court. The importance of the distinction is where the Trustee exercises the discretion unreasonably it would be in breach of trust and such a decision reviewable by the Court. I therefore did not accept the submission that there was any ouster of the Court's jurisdiction as advanced by Cheryl.

41. Further, Cromwell having placed the preliminary issue before the Court, I am satisfied that this resolves the question raised as to Cromwell policing a complaint against itself.

42. Cheryl and some of her supporters have made suggestions that Clause 6 may be too vague or uncertain. However, as Mrs Tabot-Rice KC points out, none of them have alleged, as a pleading, that the clause is vague for uncertainty. I expect that this is perhaps strategically done to avoid any direct attack as to the validity of the trust or part of the Trust. Mr Rajah KC however, does say in his reply that if the Court finds that the Claim is caught by Clause 6, and that there is an exception in The Bahamas for claims made without probable cause, they do assert that the clause is indeed void for uncertainty. As it is not pleaded I do not accept that the submission is relevant to the preliminary issue which is to determine whether the Claim falls within the no contest clause. Had it been so pleaded a challenge to the validity of Clause 6 of the Trust obviously falls squarely in the ambit of Clause 6.3.1(a) of the Trust which defines a claim as a direct challenge to any provision of the Trust.

43. The primary question therefore for my determination in this preliminary issue is whether Cheryl's claim falls to be considered as a Claim within the meaning of 6.3.1 of the Trusts. In relation to this dispute that clause would be invoked where:

(a) Cheryl shall object to or directly or indirectly contest:

...

(v) any provision of any instrument or agreement governing any business entity owned, in whole or in part, by a trust created by Mr. Stewart or any of his issue; or

(vi) any provision of any instrument or agreement governing any business entity affiliated with Mr. Stewart or his issue; or

44. The Trusts were amended on 16 August 2018. At the same time the amendments were made, the Founder sent to the Trustees a letter of wishes which included the following:

"Should any of the beneficiaries contest their interest in the Trust, it is my wish that they forfeit their portion which should then be equally allocated to the remaining beneficiaries.

45. Mr Richard Wilson KC, for Adam, argues that the purpose of the amendment, coinciding with the addition of Bobby and Cheryl and her children as beneficiaries, was meant to restrain their activities and in particular any activity by them to challenge the trust structure. Mr Rajah KC, on behalf of Cheryl, counters, that it was more likely aimed at the existing beneficiaries as Bobby, Cheryl and the children were now being introduced to 60 percent of the Trust when they previously had nothing. Far more realistic, he says, was that the Founder was concerned that Adam and Jaime would be unhappy with their interest of 100 percent being reduced to 40 percent. Whilst these are clearly issues for evidence at any trial which may be held, the plain language of the amendment and the letter of wishes were directed at *any beneficiary* and demonstrates a clear intent to discourage any litigation among his family members.

46. Clause 6.3 was carefully drafted by experienced private client attorneys and the language reflects that it was clearly drafted to take into account the specific trust structure established by the Founder. This structure was established in 2001 following legal advice from leading English trust practitioners Simmons & Simmons who had settled a working paper and a proposal. That proposal led to the establishment of the current structure.

47. The working paper, which was titled "**Sandals Group and Trust Structure Reorganization**", is instructive as to show how the structure was intended to operate and that its parts formed a constituent whole. Section B of the working paper sets out the parties to the structure and their purposes:

Parties and Purposes

1. Summary

1.1 Parties

- | | | |
|-----|---|---|
| 1.2 | The Cromwell STAR Trust Limited (Cayman STAR Trust) | Trustees: MeesPierson (Cayman)
Enforcer: G. A. Stewart ("BS")
Successor Enforcer for 7 years after BS' death, Ian Phillipson, Chris Zacca, Adam Stewart and Caroline Garnham
Successor Enforcer thereafter: Adam Stewart |
| 1.3 | The Cromwell Private Trust Company Limited (CPTC) (Bahamian Company) | Initial Directors: Ian Phillipson, Steven Carey, Brian Frith, Caroline Garnham (See 2.2(e)) |
| 1.4 | The Coral Ridge Trust | Trustees: CPTC
Advisory Board: BS, Chris Zacca, Adam Stewart, Robert Stewart and Jamie Stewart |
| 1.5 | The Hightree Trust | Trustees: CPTC |
| 1.6 | Sandals Resorts International Limited (Bahamas) | Directors: MeesPierson (Bahamas) Ltd. |

2 Purposes

2.1 **The Cromwell STAR Trust**

- (a) The Cromwell STAR Trust is a Cayman Islands trust set up under the Cayman Special Trust (Alternative Regime) Law.
- (b) The purpose of the Cromwell STAR Trust is to hold the shares in The Cromwell Private Trustee Company.
- (c) The Enforcer of the Cromwell STAR Trust has the power to:

(i) direct the Trustee of the Cromwell STAR Trust to vote its shares in The Cromwell Private - Trustee Company to appoint and remove directors of that Company

(ii) appoint and remove members of the Advisory Board of the Coral Ridge Trust

(iii) add and remove beneficiaries of the Coral Ridge Trust

2.2 The Cromwell Private Trust Company Limited ("CPTC")

(a) CPTC is a Bahamian company created to act as a Trust Company.

(b) CPTC has been licensed to act as a Trust Company by the Central Bank of the Bahamas.

(c) The shares in CPTC are owned by the Cromwell STAR Trust.

(d) The Directors of CPTC manage CPTC and make decisions for CPTC which acts as trustee of the Coral Ridge Trust and the Hightree Trust.

(e) The Directors of CPTC are appointed initially for the following terms:

Ian Phillipson - 2 years; Caroline Garnham - 3 years; Steven Carey - 1 year; and Brian Frith - 3 years

(a) The Enforcer of the Cromwell STAR Trust must decide whether to re-appoint the Directors. If so, it is intended that the Directors serve for 3 year rotating terms although the Enforcer may procure the removal of a Director before such period if he so wishes.

(b) CPTC will enter into a management contract for day to day administration of the trusts of which it is a trustee with a trust and company administrator.

2.3 The Coral Ridge Trust

(a) The Trustees administer the Coral Ridge Trust and are responsible for all the duties contained in the Trust Deed such as investment management of the Trust Fund and distributions to beneficiaries. They also implement (as far as practicable) decisions of the Advisory Board relating to the shares in Sandal Resorts International ("SRI").

(b) SRI consists of the non-Jamaican hotel assets currently held in trust for BS.

(c) As this is a Reserved Powers Trust, all decisions relating to the shares in SRI are made by the Advisory Board which directs the Trustees how to act in respect of these shares.

(d) The role of the Advisory Board is crucial as the ownership of SRI effectively gives control of the Sandals Business to the members of this Board.

(e) Members of the Advisory Board are appointed initially for seven years after the death of BS whereupon Adam Stewart will assume sole control of the Advisory Board.

(f) The Beneficiaries of the Coral Ridge Trust are the legitimate children and remoter issue of BS although they may be added or removed by the Enforcer of the Cromwell STAR Trust.

2.4 The Hightree Trust

- (a) The Trustees administer the Hightree Trust and are responsible for all the duties contained in the Trust Deed such as investment management of the Trust Fund and distributions to beneficiaries.
- (b) The Trust consists of the non-hotel assets of Mr Stewart currently in trust.
- (c) The Beneficiaries are the legitimate children and remoter legitimate issue of BS although BS has the power to add and remove beneficiaries during his lifetime.

2.5 SRI

- (a) This will be the holding company for the Sandals Group
- (b) Its shares are owned by CPTC as Trustee of the Coral Ridge Trust but voting is determined by that Trust's Advisory Board described in more detail in 2.3 above
- (c) The directors of SRI will be directed by the Advisory Board in the management and operation of the Sandals Group

48. Cheryl's claim in a nutshell is a direct attack on the independence of Cromwell in what she says is the favoring of Adam over her and her children in addition to what she perceives as their failure to carry out the expressed wishes of the Founder, as the Settlor of the Trusts. The relief sought is that Cromwell be replaced whilst she pursues this claim. There is no direct attack on any provision of either of the Trusts or any other deed of trust or trust indenture declared by Cromwell. It is a direct attack on Cromwell's performance. The action on its face is not a challenge to the validity of a provision of the Trusts. No provision of any agreement or instrument is being contested or objected to by the removal and replacement application. There is no attempt to prevent a provision of any agreement or instrument being carried out according to its terms.

49. It is argued by Adam that the action, in seeking the removal of Cromwell, is an indirect attack on the trust structure intricately put in place by the Founder. They say that if Cromwell is replaced, it will frustrate the Cromwell STAR Trust which owns the shares in Cromwell and empowered to appoint Cromwell's Directors. I accept that there is some merit to this complaint as Cheryl's complaints relate to Adam's exercise of his powers under the Cromwell STAR Trust as the Enforcer with the power to determine the constitution of the Board of Cromwell. In my view, the Claim in this action which seeks to remove Cromwell as a Trustee is an indirect attack on the power placed in Adam as the Enforcer of the Star Trust. If Cromwell is replaced in the Structure it erases the Star Trust

from the structure as the Appointer of the Board of Cromwell. It does not however erase the power of the Enforcer or Adam in relation to Advisory Board.

50. Whilst the nature of Cheryl's attack and its effect appears clear, I am not satisfied that it falls squarely into the four corners of the definition a claim as outlined in Clause 6.3.1. I also bear in mind that clauses of this nature must be construed strictly. See *Sir Anthony Smellie CJ in AN v. Barclay* at paragraph 39.

51. I accept Mr Rajah KC's submission that there is no provision in any of the documents which prohibits a claim seeking the removal Cromwell. I also accept the submission that it is not intended that Cromwell will always be the trustee, in perpetuity. The expressed definition of Cromwell in the each of the Trusts is as "the first trustee". Paragraphs 13 and 14 provides for the retirement of trustees and for the appointment of new or additional trustees:

13. Retirement of Trustees.

13.1 Any Trustee may retire at any time, provided he gives 60 days written notice to Mr Stewart (if living) and to his co-Trustees (if any); but a retirement made with a view to facilitating a breach of trust shall be of no effect.

13.2 The retirement shall not take effect unless and until there is at least one corporate or there are two individual Trustees to act as continuing Trustees.

13.3 Notices shall be sufficiently served if sent or delivered to the last known address of an individual, or the registered office of a corporation.

14. Appointment of New or Additional Trustees.

14.1 Where a Trustee (an "outgoing Trustee") is dead or ceases to exist, retires or is dismissed, or refuse, or if unfit to act, then the continuing Trustees, or the personal representatives or liquidator of the last surviving Trustee may by writing appoint one or more other persons (wherever resident) to be a Trustee or Trustees in the place of the outgoing Trustee.

14.2 The Trustees may from time to time by writing appoint another person or persons (wherever resident) to be an additional Trustee or additional Trustees.

14.3 The Trustees shall always consist of at least two individuals or a corporation; but a sole surviving individual Trustee may exercise the powers conferred on the continuing Trustees by clauses 14.1 and 14.2 above (but no other powers).

14.4 The Trustees need not be concerned to enquire as to the suitability of any new or additional Trustees appointed by some other person and shall not be liable in any event for the consequences of such appointment.

14.5 An outgoing Trustee who may be exposed to any liabilities whether existing or contingent, or who may be entitled to charge remuneration shall not be bound to transfer the Trust Fund to the new or continuing Trustees without first being provided with reasonable security against such liabilities or remuneration. Further, an outgoing Trustee shall be indemnified out of the Trust Fund for the full value thereof for so long as such liabilities or remuneration are outstanding.

52. Additionally, these are discretionary trusts where the Trustee has the powers to distribute trust property to the beneficiaries, including power to transfer the whole or a part of a Trust Fund to another trust for settlement. The suggestion therefore, that the structure collapses or is dependent on Cromwell as the trustee, is unsustainable as the structure can have completely different trustees.

53. Adam argues that if Cromwell is replaced it would fundamentally undermine the Cromwell STAR Trust as it is a claim which objects to or contests a provision which governs a business entity owned by a trust created by Mr. Stewart or any of his issue. The argument is that the STAR Trust governs some of the businesses under the Coral Ridge Trust. They say that Clause 6.3.1 is engaged because the claim for the removal of a trustee is a provision contesting or objecting to a provision of an instrument governing a business affiliated to Mr. Stewart or his issue.

54. I did not accept this submission.

55. The Advisory Board has the reserve power to give directions in relation to the management of Sandals. These powers will remain upon the change of trustee. It is true that if Cromwell is no longer the trustee of the trusts, Adam as Enforcer, would not be able to control the composition of the Board of the new Trustee of the Trust. The Advisory Board and not either Cromwell or STAR Trust have decision-making power over the management of the Sandals business. To the extent that Sandals is governed or managed, it is managed by the Advisory Board, not by the STAR Trust. I therefore accept the submission that Cheryl's application to remove Cromwell does not affect the position of the Advisory Board, so there is no severing of the link between Sandals and the Trusts. The STAR Trust Deed is not an instrument governing Sandals 2000, the underlying

business, in which case clause 6.2 is not engaged. In any event there is no challenge to the validity of any clause in the Cromwell STAR Trust.

56. In my view a removal application, even one that will deprive the enforcer of the power to change the composition of the Board of Cromwell, involves no challenge to the validity of anything. Whilst I will grant the declaration sought as to whether the no contest clauses is engaged, any order for the removal of a trustee can only be obtained where it can be shown to be necessary to ensure the proper administration of the Trust and safeguarding of the Trust Fund. This is no easy feat in a factually contentious dispute such as this.

57. In the circumstances therefore, on the preliminary issue, I declare that the claim brought by Cheryl against Cromwell in Action Number 2021/CLE/gen/01043 may not properly be determined to be, "a Claim" for the purposes of:

- a. Clause 6.2 of the Declaration of Trust of the Coral Ridge Trust, as amended by the Deed of Amendment dated 16th August 2018;
- b. Clause 6.2 of the Declaration of Trust of the Hightree Trust, as amended by the Deed of Amendment dated 16th August 2018;

58. I will hear the parties as to the proper order for costs.

59. It would not be appropriate to conclude this judgment without expressing my indebtedness to counsel for their invaluable assistance to the Court in the presentation of this application.

Dated this 22nd day of June 2023



Sir Ian Winder
Chief Justice