

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

IN THE MATTER OF an application by **DELTEC BANK & TRUST LIMITED** as Trustee,
for advice or direction pursuant to Section 77 of the Trustee Act, 1998 Chapter 176 of the Statute
Laws of The Bahamas

AND

IN THE MATTER OF A Bare Trust arising from assets previously held on bank account in the
name of Nicostone SA (the “Trust”)

Before: The Honourable Chief Justice Sir Ian R. Winder

Appearances: John F. Wilson KC, Michelle I. Deveaux and Adrienne Bellot for the
Applicant Trustee

Monique Millar of the Office of the Attorney General on behalf of the
Treasurer

Hearing date(s): 23 January 2024 and 27 February 2024

RULING

WINDER, CJ

[1.] This is an application moved by Deltec Bank & Trust Limited (“Deltec”) pursuant to **section 77(1)** of the **Trustee Act** for the advice and directions of this Court as to whether it ought to transfer assets held to the credit of Nicostone SA (“Nicostone”) to the legal heirs of the company’s former ultimate beneficial owner less (i) all legal fees and expenses and (ii) Deltec’s trustee fees and expenses. The application is brought by an unfiled written statement (made by counsel) dated 14 December 2023 lodged pursuant to **section 78** of the **Trustee Act**.

Background

[2.] The background below is collected from the unfiled written statement lodged on Deltec’s behalf, the Affidavit of Serge Delaude filed on 12 December 2023 in **Nicostone S.A. and Serge Delaude (in his capacity as Former Voluntary Liquidator of Nicostone S.A.) v The Registrar General 2023/COM/com/00069**, correspondence sent to the Court and documents on the court’s file.

[3.] Deltec is a bank and trust company offering fiduciary and banking services. Deltec is the surviving entity of a merger with Ansbacher (Bahamas) Limited (“Ansbacher”). According to Deltec, pursuant to **section 155(2)** of the **Companies Act**, all of Ansbacher’s property, rights, liabilities and obligations immediately prior to the merger with Ansbacher became vested in Deltec upon the merger becoming effective. I accept this proposition as correct for the purposes of the application as nothing before the Court calls its correctness into question.

[4.] Nicostone is an International Business Company (“IBC”) which was continued into The Bahamas from Panama on 24 May 2018 under the **International Business Companies Act**. Nicostone became one of Ansbacher’s customers after Ansbacher acquired the shares of Lyford International Bank Ltd. Deltec has represented that (i) Nicostone was beneficially owned by a French national who died in 2018 and (ii) his legal heirs are his daughter and his son (“the legal heirs”). Despite reservations expressed by the Treasurer as to the identity of the ultimate beneficial owner of Nicostone, I accept Deltec’s assertions as true and correct for the limited purposes of this application.

[5.] There is nothing in the material before the Court which states what specific assets were or are held to Nicostone’s credit by Ansbacher or Deltec. Based on what was placed before the Court, it appears that Nicostone may have held a substantial amount of cash and/or financial assets¹ with Ansbacher, and now Deltec. However, the last account balance disclosed dates from *circa* 2020 and it is only the account balance that was stated. Deltec did not provide the contractual

¹ In an instruction letter dated 23 September, 2023, for example, reference was made to “...clos[ing] all positions, put[ting] all funds in EUR after taking the relevant fees, and transfer[ing] the balance of the account”.

documentation applicable to Nicostone's account, bank statements pertaining to Nicostone's account or details pertaining to how, exactly, Nicostone's assets were, and now are, being held.

[6.] In any case, by a letter dated 5 February 2020, the legal heirs instructed Serge Delaude ("Delaude"), a director and signatory on behalf of Nicostone's sole director, West Winds Ltd, to "close the account of the company NICOSTONE SA and transfer the balance in two equal parts, on the IBANs opened under [their] respective names...". In pursuance of this request, in or around June 2020, Delaude requested on behalf of the legal heirs that Ansbacher close Nicostone's account and transfer the account balance to the legal heirs. Delaude subsequently engaged in correspondence and telephone exchanges with a view to having these instructions executed. Ansbacher required additional information before it would act on the instructions.

[7.] In December 2020, Delaude caused West Winds Ltd to pursue the voluntary winding up of Nicostone under the provisions of the **International Business Companies Act**. That process was purportedly completed by 18 December 2020, when a Certificate of Dissolution was issued in respect of Nicostone. However, at the time that the Certificate of Dissolution was issued, there remained assets standing to the credit of Nicostone in its account at Ansbacher, as Ansbacher had not acted on Delaude's (or the legal heirs') instructions. It is no part of my function in these proceedings to decide whether Ansbacher acted correctly or not in acting as it did.

[8.] According to Delaude, it was only following the dissolution of Nicostone that it was discovered that Ansbacher had not closed Nicostone's account and transferred the assets as instructed. In or around 2022, Delaude wrote to the Chief Commercial Officer at Deltec seeking to ascertain why the assets in Nicostone's account had not been transferred. The Chief Commercial Officer indicated that he would investigate the matter. In February 2023, an officer of Deltec informed Delaude that there were several "deficiencies" with Nicostone's file and requested various documents. In subsequent correspondence, Deltec informed Delaude that the matter was in the hands of its legal department.

[9.] According to Delaude, in July 2023, Lennox Paton were instructed on behalf of the legal heirs. Also in July 2023, McKinney, Bancroft & Hughes issued a legal opinion to Deltec opining on who had legal authority to provide instructions in relation to "the assets which were formerly held in Nicostone's account" and whether Deltec could act upon the request of the legal heirs to transfer those assets to them. McKinney, Bancroft & Hughes advised Deltec that the best means of facilitating a return of Nicostone's assets to the legal heirs would be for Deltec to seek the Court's direction, sanction and approval pursuant to **section 77 of the Trustee Act** in its capacity as the trustee of a bare trust over the assets. Significantly, in their legal opinion, McKinney, Bancroft & Hughes acknowledged that (i) the legal heirs and (ii) the Treasurer were interested in the fate of Nicostone's assets.

[10.] By a letter to Deltec dated 25 September 2023, Lennox Paton requested that the funds in Nicostone's account be transferred to the legal heirs. This letter and its enclosures were quite

properly disclosed in the unfiled written statement lodged on Deltec's behalf. Lennox Paton's letter stated in relevant part:

We have been instructed to act on behalf of [the legal heirs] the heirs of the late [deceased UBO], the beneficiary of account ... held in the name of Nicostone S.A.

Please find enclosed, the letter dated 25th September 2023 from the Raulines requesting transfer of the account balance as instructed. Kindly advise when we can expect the transfer to be completed.

[11.] Deltec took the position that, as Nicostone had been dissolved, it could not comply with the request to close Nicostone's account and to transfer Nicostone's undistributed property, as it had no legal authority to pay out the assets absent an order of this Court. Deltec stated in a letter to Lennox Paton dated 10 October 2023:

We wish to advise that the Bank is unable to accede to your clients' request in that the Company [i.e. Nicostone] was placed into voluntary liquidation evidenced by a Certificate of Dissolution dated 18th December 2020.

In the ordinary course, the Company could only give directions via its directors (or such persons authorized to act on their behalf), and post liquidation, by its liquidator whose office has now come to an end. Consequently, given the status of the assets and the liquidator's powers as per the Companies Winding Up (Amendment) Rules, the Bank holds the Company's assets as bare trustees, having no legal or contractual obligation or authority to transfer the account assets as requested by the legal heirs.

In the circumstances, it has become necessary to seek and obtain the Court's directions in exercise of its inherent and statutory supervisory jurisdiction over trusts to address the issue of ownership and disposition of the Company's assets.

We confirm that we are progressing steps to resolve the issues which arise due to administrative missteps so that the Bank is vested with proper legal authority to deal with the assets.

[12.] By a letter dated 13 October 2023 sent after conferences with counsel, Deltec formally instructed McKinney, Bancroft & Hughes to prepare and move an application pursuant to **section 77 of the Trustee Act** regarding the transfer of Nicostone's assets to the legal heirs.

[13.] By a letter dated 27 October 2023, McKinney, Bancroft & Hughes wrote to Lennox Paton to advise Lennox Paton of Deltec's intention to move an application for the Court's directions:

We are attorneys acting for Deltec Bank & Trust Limited (the "Bank") and have been made privy to the exchanges between your firm and our client, resting with yours of 10th October, 2023. In that connection we can confirm that we have already provided the Bank with our confidential advice in relation to the matter and, in accordance with the Bank's instructions finalising an application to the Supreme Court for directions on behalf of the Bank. We anticipate moving that application within the next 4 weeks.

[14.] Lennox Paton responded in a letter dated 3 November 2023 stating *inter alia*:

In light of the company having been dissolved, please be advised that we have been instructed to make an application for the company to be restored to the Register of International Business Companies. Hopefully this will resolve the Bank's concerns as to the capacity in which [the legal heirs] may take possession of the assets at Deltec Bank. Such application may alleviate the need for the Bank's directions application.

[15.] McKinney, Bancroft & Hughes responded on 3 November 2023 thusly:

We have considered an application to restore the company and have concluded that this is not the best approach. In any event any application to be made will be made by our firm on instructions from Deltec.

[16.] According to McKinney, Bancroft & Hughes, Lennox Paton replied that they did not agree with Deltec's/McKinney, Bancroft & Hughes' approach but would take instructions.

[17.] Neither of the correspondences dated 3 November 2023, nor Lennox Paton's subsequent response, were included or referred to in the unfiled written statement lodged on behalf of Deltec. The written statement addressed the correspondence that had been had with Lennox Paton in a single paragraph:

13. Deltec has now been contacted by Lennox Paton as the attorneys for the legal heirs requesting the payment out of the undistributed sums. Lennox Paton provided the Act of Notoriety verifying the legal heirs' entitlement to the Estate of the UBO and Certified translations of same. Copies of Lennox Paton's correspondence and Deltec's attorneys' response is at pages 40 to 45. Copies of the Act of Notoriety and Certified translation are attached at pages 46 to 64.

[18.] On or about 15 December 2023, Counsel for Deltec lodged this application for advice and directions with the Court. Counsel for Deltec's letter to the Listing Office dated 14 December 2023 stated:

We act for Deltec Bank and Trust (Bahamas) Limited, as Trustee on the captioned application pursuant to Section 77 of the Trustee Act, 1998 Chapter 176 of Statute Law of The Bahamas.

Enclosed herewith is the Written Statement of counsel, Mr. John Fitzgerald Wilson KC, lodged pursuant to Section 77 of the Trustee Act, for orders upon the opinion, direction and advice of the Court ("the Application"). As you are no doubt aware, the Written Statement is not filed as the statutory provision does not require the commencement of an action prior to the Application being heard by a Judge.

We hereby request a date for hearing of the Application and would be grateful if the contents of this letter and its enclosures can be immediately brought to the Court's attention. We look forward to your indication of when the Court may be able to accommodate a hearing of the Application.

[19.] At the first hearing of the application on 23 January 2024, Counsel for Deltec sought to proceed with the application in what was essentially an *ex parte* fashion. However, the Court adjourned the application to enable service on the Office of the Attorney General to ascertain the Treasurer's position on the application. Importantly, no mention was made by Counsel for Deltec of the fact that the legal heirs were unaware of the fact that the application had been made and did

not support Deltec’s application, or that the legal heirs had foreshadowed an application to restore Nicostone before the application was lodged.

[20.] On the continuance of the application on 27 February 2024, the Office of the Attorney General appeared on behalf of the Treasurer. I heard oral submissions and had the benefit of written submissions from both Deltec and the Treasurer. In summary:

- (i) Deltec contended that it held Nicostone’s undistributed assets on bare executory trust for the legal heirs or the Treasurer, with the better argument being that Deltec held the assets for the legal heirs rather than the Treasurer. Deltec accordingly sought a direction that it transfer the assets to the legal heirs; whereas
- (ii) the Treasurer invited the Court to direct either (a) that Nicostone’s undistributed property be vested in the Treasurer, by application of or by analogy with **section 250 of the Companies Act** or (b) that the dissolution of Nicostone be deemed void *ab initio* on the ground of mistake.

[21.] At the end of the hearing on 27 February 2024, I reserved my decision on the application.

[22.] By a letter dated 1 March 2024, Counsel for Deltec informed the Court that, unbeknownst to Deltec or Counsel, Nicostone had been restored to the Register of International Business Companies by Fitzcharles J on 6 February 2024. Counsel’s letter stated in material part:

It would seem that notwithstanding the Directions Application, Lennox Paton (“Lennox”) on behalf of the former liquidator had contemporaneously moved an application for the restoration of Nicostone to the Register, and obtained an Order from Madam Justice Simone Fitzcharles restoring the company on 6th February, 2024, which was filed 14th February, 2024.

It must be noted that we had informed Lennox on 27th October, 2023 (at page 45 of the Written Statement) that we were in the process of finalizing an application for directions on behalf of Deltec. In further exchanges in early November, 2023 in response to Lennox’s position that they had been instructed to make an application to restore Nicostone to the Register, resting with our email of 3rd November, 2023, we advised that we had considered the appropriateness of such an application and in any event, were already instructed by Deltec to make the appropriate application, which in any event we will be doing. Lennox responded that they did not agree with this approach but would take instructions.

Deltec nor its counsel was aware that Lennox had proceeded with its foreshadowed application until Deltec received Lennox’s letter of 27th February, 2024 sent via email on the 28th enclosing a copy of the restoration Order. A Copy of that letter enclosing a copy of the restoration Order is attached.

While it is our view, as expressed in our submissions in support of Deltec’s Directions Application, that the court does not have jurisdiction to make a restoration order in the circumstances of this case, as there was no operative mistake leading to the winding up of Nicostone, Deltec has no interest in challenging the restoration Order. However, as Deltec was acting as a bare trustee in moving the Directions application and acted reasonably in taking advice and moving the

application; on settled principles it is entitled to its costs incurred in both taking advice and moving the Direction Application, out of the assets of Nicostone.

Given that the court had reserved to consider its Judgment we thought it best to bring these developments to the court's attention to avoid the court going to the unnecessary effort of producing a Judgment in this matter. However, Deltec does request an order in the terms of the draft order attached that it be awarded its costs out of the assets of Nicostone in taking advice and moving the Directions Application.

[23.] Fitzcharles J's Order dated 6 February 2024 (the "6Feb24 Order") made in Nicostone S.A. and Serge Delaude (in his capacity as Former Voluntary Liquidator of Nicostone S.A.) v The Registrar General 2023/COM/com/00069 provided so far as is relevant:

1. The Notice submitted by the Liquidator to the Registrar pursuant to Section 138(6) of the International Business Companies Act, 2000 ("the Act") confirming that the winding up and dissolution of the Company was completed is null and void and of no effect.
2. The name of the Company, Nicostone S.A. be restored to the Register of International Business Companies upon the receipt of payment by the Registrar General of the outstanding fees and penalties, owed by the Company in the amount of \$3,425.00.
3. Upon the name of the Company being restored to the Register, the name of the Company shall be deemed never to have been struck off the Register.
4. The Company is deemed at all times to have continued in existence in voluntary liquidation notwithstanding the purported dissolution of the Company.
5. The property owned by the Company immediately prior to the purported dissolution is deemed to have continued to be owned by the Company notwithstanding the purported dissolution.
6. The Certificate of Dissolution issued by the Registrar General on the 18th December 2020, pursuant to Section 138(6) of the Act is hereby cancelled.
7. The Articles of Dissolution issued by the Liquidator of the Company pursuant to Section 139 of the Act are hereby cancelled.
8. There be published in the Official Gazette and in publication of general circulation in the country where the Company has its principal office, a notice stating that:-
 - a. the name of the Company has been restored to the Register;
 - b. the name of the Company is deemed to have been struck off the Register; and
 - c. the Company is deemed to have continued in existence notwithstanding the purported dissolution of the Company.

[24.] There is nothing before me which confirms whether Nicostone's name has in fact been restored to the Register. However, given the urgency which attended the exercise of restoring Nicostone to the Register, and over a month has elapsed since the 6Feb24 Order, I have no reason

to believe that Nicostone's name has not been restored to the Register, pursuant to the 6Feb24 Order.

[25.] Lennox Paton responded to Counsel for Deltec's letter through a letter to the Court dated 4 March 2024. That letter stated in relevant part:

We refer to the above captioned matter, in which we act on behalf of ... the heirs of the late ... beneficiary of account ... held at Deltec Bank ("Deltec") in the name of Nicostone S.A. and Mr. Serge Delaude Liquidator of ("Nicostone or the Company"). Further, we write in relation to the correspondence of Messrs McKinney Bancroft and Hughes ("MBH) dated 1 March 2024 for the attention of His Lordship the Honourable Chief Justice Sir Ian Winder.

We wish to clarify a few assertions made in the letter in order to assist the court's determination on the issues which have arisen, in particular, as it relates to Mr. Wilson KC's request that the costs of Deltec's Directions Application be paid out of Nicostone's account.

Failure to provide Notice of Hearing of S. 77 Application

Firstly, we are disappointed to have not been given any notice of the Directions Application notwithstanding that Counsel for Deltec was fully aware that Lennox Paton ("LXP") intended to proceed with a restoration application ("the Restoration Application") which in our view made the Directions Application unnecessary. Please see attached page 47 of the Affidavit of Serge Delaude filed herein on 12 December 2023 relied on in support of the Restoration Application.

The Restoration Application was commenced by way of Originating Summons filed herein 12 December 2023 a copy of which is enclosed herewith for ease of reference.

Had Deltec provided Nicostone with proper notice of the said Directions Application, Counsel would have been able to appear and make submissions relative to Nicostone's position; thereby avoiding the position which the Court now finds itself in with two separate Judges being vested of Orders relative to Nicostone.

While the Liquidator of Nicostone had no statutory requirement to provide Deltec with notice of its application for restoration, Deltec was statutorily required to notify Nicostone of its Directions Application as Nicostone was an interested party that would be affected by the outcome of the hearing pursuant to Section 77

[Extract of section 77]

The Court's Jurisdiction to restore a dissolved company

Further, we disagree with the position as stated in Mr. Wilson KC's correspondence that "the court does not have jurisdiction to make a restoration order in the circumstances of this case, as there was no operative mistake leading to the winding up of Nicostone".

In fact, the evidence in support of the restoration application as noted in the Affidavit of Mr. Serge Delaude ("the Liquidator") at paragraph [26] was that, "the failure to realize these assets before the company was dissolved was due to an administrative oversight", and hence the court did have jurisdiction to restore the company to the Register.

The Court has the inherent jurisdiction to restore an International Business Company which has been dissolved, on the grounds of mistake. In *Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas* 2014/COM/com/0002, an application was made to restore the name of the company on the ground of mistake in liquidating the company before all assets were distributed. Issacs J, ordered that Higham be restored to the Register of International Business Companies.

Additionally, in *Rushmorehills Limited v Attorney General* 2011/Com/com/000901 and *Kato Holdings Limited v Attorney General* 2012/Com/com/00107, Barnett CJ (as he then was) ordered in that the company be restored to the Register of International Business Companies. It was held in *Ivanishvili and others v the Registrar General* [2017] 2 BHS J. No. 119 at [55] by Charles J. (as she then was),

"Both learned justices accordingly declared the resolutions of the shareholders and directors of the companies to voluntarily wind up the companies and all subsequent acts void and ordered that the companies be restored to the Register so as to allow the respective companies to distribute an asset which was not distributed before dissolution and that the Certificate of Dissolution issued by the Registrar General be cancelled."

Furthermore, as stated in *Baron's Court Holdings Ltd and Welwyn Ltd v the Registrar General* 2021/Com/com/00049 by Moree CJ (as he then was) it was held at paragraph [32] of his judgement, while the court does not have sight of written rulings or judgements in relation to these three cases, "all of these cases were cited in *Ivanishvilli* with a brief description of the facts and a statement of the outcome."

In *Ivanishvili and others v the Registrar General* [2017] 2 BHS J. No. 119 at paragraphs 53-55 of her judgement, Charles J. held:

"53 Notwithstanding that observation with respect to sections 166(6) and 168, learned Counsel Mr. Gaitor submitted that the Court, on multiple occasions, has restored dissolved companies to the Register even in the absence of legislation. In the intervening period and not to legislate from the bench, the Court must step in to cure the *casus omisus* which the statute has created, by obvious mistake, I believe, when section 166(3) of the IBC Act, 2000 was repealed and re-placed by the new section 166 of the IBC (Amendment) Act, 2010 which makes no provision for dissolved companies to be restored to the Register. I do not believe that it was the intention of Parliament not to make any provision for dissolved companies.

54 In the case of *Higham (Bahamas) Limited v Attorney General of the Commonwealth of The Bahamas* (2014/COM/com/00002), the application with respect to Higham was made on the grounds of (i) mistake and (ii) it was just and equitable and/or just and reasonable that the company be restored so as to enable it to distribute the assets which remained to be distributed and which ought to have been distributed before the company was dissolved as was done in at least two previous Bahamian cases, namely, *Rushmorehills Limited v. the Attorney General of the Commonwealth of the Bahamas*, Supreme Court Action No 90 of 2011 and *Kato Holdings Limited v the Attorney General of the Commonwealth of the Bahamas*, Supreme Court Action No. 107 of 2011. These cases, though not binding on this Court, are precedents and persuasive authorities in this jurisdiction for restoration on the ground of mistake (and I will add fraud).

55 In *Higham*, the mistake in liquidating the company before all assets were distributed was recognised by Mr. Justice Stephen Isaacs. In *Rushmorehills Limited and Kato*

Holdings Limited, Barnett C.J. also recognised the mistake. Both learned justices accordingly declared the resolutions of the shareholders and directors of the companies to voluntarily wind up the companies and all subsequent acts void and ordered that the companies be restored to the Register."

...

In the circumstances, considering that Deltec does not seek to challenge the Restoration Order and given Deltec's failure to provide notice of the Directions Application, our clients oppose any costs order being made against Nicostone, in relation to Deltec's Directions Application.

Finally, we leave it to the Court's discretion as to whether a ruling should be rendered in relation to the Directions Application given the development of these proceedings and the cases cited herein which we are unaware as to whether they were raised to the Court's attention.

[26.] The Office of the Attorney General did not comment on this exchange of correspondence.

Section 77 of the Trustee Act

[27.] **Section 77(1)** of the Trustee Act provides:

A trustee or personal representative may without commencing an action apply upon a written statement for the opinion, advice or direction of the Court of Judge in Chambers on any question respecting the management or administration of the trust property or the assets of any testator or intestate.

[28.] The nature of the jurisdiction of the Court under **section 77** of the **Trustee Act** on an application made by written statement was considered in some detail by *Charles J* (as she then was) in **In the Matter of the trusts of the Deed of Settlement establishing the X Foundation Trust** (2021) 24 ITEL R 952. In that case, *Charles J* remarked (at paras [34] to [43]) *inter alia* that:

- (i) **section 77** enables a trustee to apply to the Court upon a written statement for the opinion, advice or direction of a Judge in Chambers on any question respecting the management or administration of the trust property. **Section 77** must be read conjunctively with **section 78**.
- (ii) the purpose of the **section 77** procedure is to provide trustees with an efficient and cost-effective means of obtaining the opinion, advice or direction of a Judge in Chambers on any question regarding the management or administration of the trust property, for the protection of the trust and the trustees.
- (iii) the **section 77** procedure gives effect to the general supervisory jurisdiction of the Court over the administration of trusts and is modelled upon the procedure for obtaining the "opinion, advice or direction" of a judge on isolated questions relating to the

administration of trusts that was introduced in England and Wales by *Lord St. Leonard's Act* but later superseded by Rules of Court.

- (iv) the **section 77** procedure cannot be invoked unless some question respecting the management or administration of the trust property or the assets of any testator or intestate arises. Even where the **section 77** procedure is properly invoked, the Court has a discretion whether to give its opinion, advice or direction.

The current application

[29.] Deltec asserts that given the developments which have occurred, it would be unnecessary to give a decision on the application but nonetheless requests that the Court make an Order:

- (1) granting Deltec leave to withdraw its application for directions; and
- (2) awarding Deltec, from the assets of Nicostone SA, its costs of taking advice and costs of and incidental to the Application and all charges and expenses incurred by Deltec in dealing with the distribution of the assets of Nicostone SA.

[30.] In my view, this is not an appropriate case for leave to withdraw to be granted having regard to the stage that the application has reached, the background to why Counsel for Deltec has sought leave to withdraw and the fact that, even if given leave to withdraw the application, Deltec nonetheless seeks an order that all charges and expenses incurred by Deltec in dealing with the distribution of Nicostone's assets be paid from Nicostone's assets. That is substantive relief and not an incidental consequence of the application being withdrawn.

[31.] Because I have declined to grant leave to withdraw the application, I must next consider whether I ought to grant Deltec the relief it sought in the unfiled written statement lodged on its behalf, which is the application that has been moved before me. The advice and directions which were initially sought by Deltec were (as expressed at para [20] of the unfiled written statement):

...advice and directions...as to whether [Deltec] ought to transfer the undistributed sum less (i) all legal fees and expenses in taking advice and moving this application for directions and (ii) all trustee fees and expenses of Deltec in dealing with the undistributed sum, to the legal heirs of the UBO and an order empowering it to do so.

[32.] In my considered view, having considered the submissions made to me and the papers lodged with the Court, the application ought to be dismissed. This appears to me not to be an appropriate case in which to give advice or directions. It is unnecessary that I grapple directly with the merits of the application.

[33.] Deltec's application was entirely predicated upon Nicostone's dissolution. Deltec's position in the application was encapsulated well at paras [19], [20] and [23] of its written submissions lodged in advance of the first hearing of the application on 23 January 2024:

19. As the undistributed assets were ... not transferred to the Treasurer, upon dissolution of Nicostone, Nicostone's legal existence was terminated. Accordingly, the banker-customer relationship between Ansbacher (Deltec's predecessor) and Nicostone also came to an end, leaving Deltec in possession of the undistributed assets previously held pursuant to the banker customer-relationship.

20. Deltec has no ownership interest in the undistributed assets and so can only hold those assets on an institutional constructive bare trust for the true owner. In *Westdeutsche Landesbank Girozentrale v Islington L.B.C* [1996] A.C. 669 at 714-715 [Tab 7] Lord Browne Wilkinson explained the institutional constructive trust in the following way

“under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which gave rise to it, the function of the court is merely to declare that such trust has arisen in the past.

...

23. The situation in the Pearce case above is not dissimilar to the instant case. Deltec's banker customer relationship has come to an end and its custody of the undistributed assets are likewise subject to a bare institutional constructive trust.

[Emphasis added]

[34.] Deltec's position was explained at the first hearing of the application in the following way (at lines 6 to 21 of page 3 of the transcript):

THE COURT: But Deltec held this property as custodian or this was just a bank account?

WILSON, K.C: No, my Lord, it was a bank account for Nicostone the property that was dissolved. When the company was dissolved, these assets remained on the bank account. The dissolution of the company resulted in the termination of the banker-creditor relationship, because there is not party to the mandate, because the company has been dissolved. So the assets were essentially sitting in abeyance, really. And the possession and custody of Deltec and Deltec's possession would have then been converted to that of a bare trustee holding those assets for the parties entitled. And the question and the debate, My Lord, would be to whom are those assets to be paid.

[Emphasis added]

[35.] On the continuation of the application, Counsel for Deltec stated (at lines 3 to 13 on page 11 of the transcript):

...where money essentially falls into the lap of an individual like it has done with Deltec, it has not become Deltec's money. As of that date Deltec is imposed with a Bare Trust of the institutional kind where he has to uphold and manage that property for the persons who are beneficially entitled. That trust is not affected by any interest of any party, be it the Treasurer or the ultimate beneficial owner of Nicostone. The obligation of Deltec is simply to pay those funds on to whoever is entitled.

[Emphasis added]

[36.] While Deltec was not a party to the proceedings in which the 6Feb24 Order was made, the 6Feb24 Order was evidently intended to have general binding force not limited to the parties before the Court. The 6Feb24 Order deemed Nicostone to have at all times continued in voluntary liquidation notwithstanding its purported dissolution, and deemed all property owned by Nicostone immediately prior to its purported dissolution to have continued to be owned by it. Those declarations or orders, along with the other declarations and orders contained in the 6Feb24 Order, effectively vitiated, or eroded, the entire basis of Deltec's application.

[37.] Whether the 6Feb24 Order affected Deltec's rights despite it not being a party to the proceedings in which they were made, and, if so, how, or, to what extent, is not an issue that I have been addressed upon and it is not something that I am, at present, required to finally decide. However, the existence of the 6Feb24 Order and its effect on the status of Nicostone are matters that I am entitled to take into account. Deltec may believe that the 6Feb24 Order was made without jurisdiction, as a matter of law, but the usual rule is that an order of a competent court of unlimited jurisdiction stands unless and until set aside, even if made without jurisdiction: **Strachan v Gleaner** [2005] 1 WLR 3204 at para [28].

[38.] Deltec is no longer in a legal quandary because it has found itself possessing assets owed to an entity that no longer exists. Nor can there be any question as to whether Deltec ought to transfer Nicostone's assets to the legal heirs. With Nicostone's restoration by the 6Feb24 Order, Deltec does not require the advice or directions of this Court to tell it that the "pre-purported-dissolution" position obtains. The only quandary in which Deltec now appears to find itself is that it incurred expenses, including legal costs, when Nicostone was purportedly dissolved, and it wishes for Nicostone to bear those expenses along with Deltec's charges. That concerns Nicostone or its liquidator, and the legal heirs, but they have not been properly heard.

[39.] Insofar as Deltec seeks a direction to the effect that it may recover all charges and expenses incurred by it in dealing with the distribution of Nicostone's assets, from Nicostone's assets, I have not been informed what those charges and expenses are, or their respective amounts, and Deltec has not identified the specific basis on which it claims a right to those charges and expenses (e.g. contract, **section 36 of the Trustee Act**, general equitable principles etc.). In addition, Delaude and the legal heirs were not convened and given a proper opportunity to be heard on the issue. The appropriate course in the circumstances is therefore to leave that issue open for decision on another occasion, if the decision of this Court is ultimately required.

Costs

[40.] It remains to be decided whether Deltec's costs incurred in connection with the application ought to be paid out of Nicostone's account with Deltec. The legal heirs and Delaude oppose any costs order being made against Nicostone. For Deltec's part, written submissions dated 11 March 2024 were lodged on its behalf seeking to justify an award of indemnity costs including the costs of instructing counsel. The Office of the Attorney General seemingly took no position on costs.

[41.] Counsel for Deltec submitted that the Court retains its general discretion as to costs pursuant to **section 30** of the **Supreme Court Act** and that the power to award a trustee recovery of its costs out of the trust estate is now governed by **CPR 71.19** of the **Supreme Court Civil Procedure Rules, 2022**.

[42.] **Section 30(1)** of the **Supreme Court Act** provides:

Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.

[43.] **CPR 71.19** of the **Supreme Court Civil Procedure Rules, 2022** provides:

(1) Save as is provided in paragraph (2), where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be.

(2) Where paragraph (1) of this rule would otherwise apply but the Court is of the opinion that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, such person has in substance acted for his own benefit rather than for the benefit of the fund, the Court may make such other order as it thinks fit.

[44.] I interpose here to add that **section 77(5)** of the **Trustee Act** expressly provides:

(5) The costs of such application shall be in the discretion of the Judge.

[45.] Counsel for Deltec submitted that a trustee is entitled to recover the costs it incurs in seeking the directions of the Court. In support of this submission, Counsel referred me to the well-known words of *Kekewich J* in **In re Buckton** [1907] 2 Ch 406 at page 414:

In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate. It is, of course, possible that trustees may come to the Court without due cause. A question of construction or of administration may be too clear for argument, or it may be the duty of trustees to inform a claimant that they must administer their trust on the footing that his claim is unfounded, and leave him to take whatever course he thinks fit. But, although I have thought it necessary sometimes to caution timid trustees against making applications which might with propriety be avoided, I act on the principle that trustees are entitled to the fullest possible protection which the Court can give them, and that I must give them credit for not applying to the Court except under advice which, though it may appear to me unsound, must not be readily treated as unwise. I cannot remember any case in which I have refused to deal with the costs of an application by trustees in the manner above mentioned.

[46.] Counsel for Deltec observed that this principle, described as the “**Buckton principle**”, has found “widespread application” and was applied in the judgment of *Charles J* (as she then was) in **Ann Maxine Patton v Alvarex et al** (2020) BS 2020 SC 51 (unrep: 2017/CLE/gen/00777). I considered the **Buckton principle** myself in a decision dated 8 November 2023 in **Cheryl Hamersmith-Stewart v Cromwell Trust Company Limited** 2021/CLE/gen/01043. I need not repeat the discussion of the principle in that decision here but refer to paras [12], [13] and [20].

[47.] Deltec submitted that whether a trustee’s application fails or succeeds does not deprive the trustee from recovering its costs out of the trust assets. In support of this submission, Deltec relied on the case of **In Re Harrison’s Settlement Trust** [1965] 3 All ER 795, a case in which the applicant trustees were awarded their costs notwithstanding that their application for a vesting order failed. *Cross J* (as he then was) said at page 800:

There remains the question of costs. Trustees are entitled to all the costs which they have properly incurred. The mere fact that some application by a trustee fails is not itself any reason why he should have to pay the costs personally.

[48.] Deltec submitted that, as the application was a category 2 blessing application, unless some unreasonable conduct can be pointed to on the part of Deltec in taking advice and moving the application, there is “...no basis on which Deltec should not have its indemnity costs, inclusive of its costs and expenses in dealing with the assets and instructing counsel”. Deltec’s submission, at the time that it moved the application, was that it was a bare trustee, and it acted reasonably in moving the application.

[49.] Counsel invited this Court to consider whether Deltec’s position with respect to the lack of jurisdiction in the Court to restore Nicostone, which Counsel said was the *causa causans* which led Deltec to apply for directions, was reasonably arguable. In this connection, Counsel for Deltec submitted that:

- (i) there is no statutory power under the **International Business Companies Act** to restore a dissolved IBC to the Register of International Business Companies. Any restoration of Nicostone could only occur by reliance on the Court’s common law jurisdiction to restore a dissolved company on the grounds of mistake.
- (ii) on advice, Deltec took the position that, in the circumstances of this case, an operative mistake in the winding up of Nicostone could not be made out. This position was taken after consideration of Moree CJ’s decision in **Baron’s Court Holdings Ltd and another v The Registrar General** [2022] 1 BHS J. No. 112 (“**Baron’s Court Holdings**”).
- (iii) in **Baron’s Court Holdings**, Moree CJ said at paras 78, 84 and 88:

78 The evidence of Mr. Paton does not show that there was any fraudulent activity which caused or led to the dissolution of BCH. Rather, on his evidence, this is a clear case of mistake. LPCS acted on instructions to voluntarily wind up and dissolve the company from a party (i.e. Pestalozzi) who it thought was authorized to act on behalf of BCH when, in fact, that party had no such authority. ...

84 ... [i]t must be remembered that Welwyn, the shareholder and director of BCH which signed the Resolution approving the Plan of Dissolution of BCH involving the voluntary winding-up of the company, was a mere nominee of LPCS. On these facts, the mistake in this case is a vitiating element in the circumstances surrounding the dissolution of BCH thereby leaving it open to the court to declare the dissolution void ab initio. ...

88 After considering the authorities, I am of the view that the court has an inherent jurisdiction, unrelated to statute, to restore the name of a dissolved IBC on the ground of mistake in appropriate circumstances. In this case, the evidence shows that there was never a proper basis to voluntarily wind-up HCB and dissolve the company. The entire process, which was dealt with by LPCS (and its nominees), was a mistake and carried out from start to finish without valid instructions from persons who were authorized to act on behalf of BCH. On that basis, and given the scope and fundamental nature of the mistake in this case, I am of the opinion that the winding-up and dissolution of BCH are null and void.

- (iv) Moree CJ observed (at para [87]) that the decision of Charles J in **Ivanishvili and others v the Registrar General** [2017] 2 BHS J. No. 119 (“**Ivanishvili**”) was based on fraud and, therefore, what Charles J said about mistake in the course of her judgment was *obiter*.
- (v) **Baron’s Court Holdings** establishes that to invoke the mistake jurisdiction one needs to point to “a vitiating element in the circumstances surrounding the dissolution”, i.e. the mistake must be the causal factor leading to the dissolution. A mistake as to something done in the course of the liquidation, such as a mistake in payment of creditors or in returning undistributed assets to contributories, would not be such a vitiating element. **Re Pinto Silver Mining Company** (1878) 8 Ch. D 273 makes clear that some mistake extraneous to the decision to wind up does not suffice. **Re Pinto** is supported by **In re London and Caledonian Marine Insurance Company** [1879] 11 Ch D 140.

[50.] I start with the jurisdiction of the Court to deal with the costs of the application. In my view, the costs of the application are, by statute, in the discretion of the Court pursuant to **section 30(1)** of the **Supreme Court Act** and **section 77(5)** of the **Trustee Act**. The Court may determine “by whom” and “to what extent” costs are to be paid. **Section 30(1)** of the **Supreme Court Act** in fact invests the Court with discretion as to the “costs of and incidental to” all proceedings in the Court. The costs “incidental” to proceedings may include costs incurred before the relevant proceedings have begun: see **Re Gibson’s Settlement Trusts** [1981] Ch 179, which was helpfully summarized in **Jasmine Trustees Limited and Lutea Trustees Limited v M and others** [2022] JRC 071 at para [27].

[51.] The result of the declarations and orders contained in the 6Feb24 Order is that, on one analysis at least, Deltec was never a trustee of the assets in Nicostone's account on the basis that it identified. But whether the 6Feb24 Order has affected Deltec's rights, and how, or to what extent, is not an issue that has been argued or thrown up for decision. I am satisfied that, even if it is the case that the principle that governs Deltec's entitlement to costs is (as Deltec essentially submits) that Deltec ought to be awarded its costs, if properly incurred, on an indemnity basis, in my view, Deltec acted precipitately and unreasonably and therefore cannot be said to have acted "properly", after 3 November 2023. I leave open the possibility that Deltec acted reasonably before 3 November 2023.

[52.] While weight must be given to the fact that Deltec acted on advice, in the absence of urgent circumstances requiring that a **section 77** application be made in haste, without coordinating with the legal heirs, Deltec, as a prudent putative trustee, ought to have opened communications with Lennox Paton to coordinate positions with the legal heirs and to keep abreast of the progress of any potential restoration application. It ought to have been obvious in the circumstances that, if the intended restoration application was brought and it succeeded, Nicostone would be restored to the Register and consequential orders would be made attempting to unwind its purported dissolution. Priority ought therefore to have been afforded to the restoration application and, at a minimum, Deltec ought to have confirmed whether that application would be proceeded with before moving its own application.

[53.] The stance that Deltec took on the Court's jurisdiction to restore a dissolved IBC for mistake is not one that I would characterize as a prudent one on the current state of the authorities. Orders were made by the Supreme Court in **Higham (Bahamas) Limited v Attorney General of the Commonwealth** 2014/COM/com/00002, **Rushmorehills Limited v The Attorney General of the Commonwealth of The Bahamas** Supreme Court Action No. 90 of 2011 and **Kato Holdings Limited v The Attorney General of the Commonwealth of The Bahamas** Supreme Court Action No. 107 of 2011 ordering that IBCs be restored to the Register on the ground that the IBCs were liquidated before all of their assets were distributed (see **Ivanishvili** at paras [54] and [55]). None of those decisions have been overruled to date. In the latest reported decision emanating from a judge of this Court on the subject, **Baron's Court Holdings**, Moree CJ, at para [90], expressly declined to hold that those cases, based on a liberal view of the Court's jurisdiction, were wrongly decided. The existence of precedents in this Court for the very thing the legal heirs intimated an intention to attempt ought to have encouraged forbearance even if Deltec entertained doubts about their application's prospects of success.

[54.] Beyond the precedents, Deltec has always maintained that it was merely a bare trustee of the assets held in Nicostone's account for the benefit of the legal heirs. A bare trustee is a trustee that holds property for the absolute benefit and at the absolute disposal of other persons and has no present beneficial interest in the property and no duties to perform in respect of it except to transfer it to the persons entitled to it. As a putative bare trustee, Deltec ought to have closely

consulted with its putative *cestuis que use* about the course of action to be taken in respect of Nicostone's assets and respected their wishes where practicable. Deltec failed to identify any particular situation of emergency that required it to act preemptively to transfer the assets to the legal heirs. The legal heirs were not mere discretionary objects but, on Deltec's own assessment, the persons absolutely entitled to the assets about which Deltec would seeking advice and directions. Deltec, in effect, preferred its own views to theirs, at their expense, in a manner inconsistent with its role as a putative bare trustee. Incidentally, Deltec also failed to consult the Treasurer (as one might have expected) who, in the event, appears to have held a view supportive of the legal heirs' own.

[55.] Finally, Deltec did not serve the application on the legal heirs or Delaude, as was required by **section 77(2)** of the **Trustee Act**. Counsel for Deltec sought to shift the blame for this onto the Court in its submissions because the Court did not direct Deltec to do so at the first hearing of Deltec's application. That effort was, however, misguided, as Counsel never disclosed that neither the legal heirs nor Delaude supported Deltec's application or that neither the legal heirs nor Delaude were aware that Deltec had moved its application. Counsel for Deltec also never raised the issue of whether the legal heirs or Delaude ought to be served or permitted to attend the hearing of the application. Deltec must take the consequences of failing to serve the legal heirs and Delaude and failing to place the issues of notification and participation squarely before the Court. Had the legal heirs or Delaude been given notice of the application, it is virtually certain that the existence of the restoration application would have been brought to the Court's attention.

[56.] Looking at the matter in the round, even if one grants that the application was brought by Deltec for the benefit of the legal heirs, they did not support it and did not participate in it. It would be unjust for them to bear any costs incurred in connection with it after they indicated that they would be taking steps to address the same basic issue that the application was intended to address. Nothing done after that point could be said to have been necessarily required or, in the events that have actually transpired, to have benefited them. Those considerations, in addition to those that I have canvassed above, appear to me to be sufficient grounds for disallowing Deltec the recovery of its costs incurred in connection with the application after 3 November 2023. I ought, however, to allow Counsel for the legal heirs and/or Delaude to make written submissions, if they wish, on Deltec's ability to recover legal costs incurred prior to 3 November 2023.

Conclusion

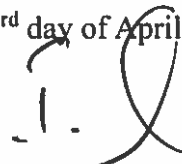
[57.] **Section 79** of the **Trustee Act** empowers the Court to make such orders as from time to time shall seem necessary to give effect to the provisions of **sections 75, 76, 77 and 78** of the **Trustee Act**.

[58.] In the premises, the order that I make is as follows:

- (i) Deltec's application for leave to withdraw its application for directions is dismissed.

- (ii) Deltec's application for directions is dismissed.
- (iii) A copy of this Ruling is to be provided to Counsel for the legal heirs and Delaude (Lennox Paton).
- (iv) Deltec must bear its own costs of and incidental to its application for directions which were incurred after 3 November 2023.
- (v) Counsel for the legal heirs and Delaude are to lodge with the Court and serve upon Counsel for Deltec any written submissions they may wish to make as to Deltec's entitlement to legal costs incurred prior to 3 November 2023 in connection with taking advice and moving this application for directions by 17 April 2024.
- (vi) Counsel for Deltec are to serve (a) a copy of the unfiled written statement dated 14 December 2023, (b) a copy of Counsel for Deltec's written submissions lodged in advance of the hearing on 23 January 2024 and (c) a copy of Counsel for Deltec's written submissions dated 11 March 2024 (if not already served) on Counsel for the legal heirs and Delaude by 8 April 2024. Counsel for Deltec may make redactions if necessary to preserve confidential information.
- (vii) Counsel for Deltec are to lodge with the Court and serve upon Counsel for the legal heirs and Delaude any response they may wish to make to the written submissions lodged by Counsel for the legal heirs by 24 April 2024.

Dated the 3rd day of April 2024



Sir Ian R. Winder
Chief Justice