Neutral Citation Number: [2022] EWHC 2996 (Ch)

Case No: PT-2021-001062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE

Rolls Building
7 Rolls Buildings, Fetter Lane,
London, EC4A 1NL

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email.

The date of hand-down is deemed to be as shown opposite: Date: 29/11/2022

Before:

MASTER KAYE

- -

Between:

BELEN CLARISA VELUTINI PEREZ	**Claimant**
- and -	
(1) EQUIOM TRUST CORPORATION (UK) LIMITED	**Defendants**
(2) EQUIOM TRUST (SOUTH DAKOTA) LLC	

- -
- -

ANDREW TWIGGER KC AND TIMOTHY SHERWIN (instructed by **Mishcon de Reya**) for the **Claimant**
EASON RAJAH KC AND JAMES MACDOUGALD (instructed by **Sinclair Gibson**) for the **Defendants**

Hearing dates: 13 and 22 June 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER KAYE

Master Kaye:

1. Belen Clarisa Velutini Perez ("**Ms Velutini**" or "**the claimant**") is 98 years old and wealthy. She has no children, no immediate family, and is unmarried. She has health, sight and mobility issues.

2. Her wealth and her family's wealth derive from the Velutini family's involvement in Venezuelan banking which dates back to the 16th Century. This hearing was concerned with assets which have been held within trust structures since about 2011 and are said to have a value of between US$30m and US$50m ("**the Assets**").

3. The BCV Foundations Trust, a revocable English-law settlement was formally established on 15 April 2021 ("**the Trust"**) to replace previous trusts, Betlemitica No3 and Betlemitica No4 ("**the Previous Trusts**"). The defendants were the trustees of the Trust ("**the defendants**" and "**the Former Trustees**"). By a deed dated 8 November 2021 (**"the Revocation**"), Ms Velutini revoked the Trust. She subsequently set up the BCV Trust ("**the New Trust"**) on substantially the same terms as the Trust, including in respect of its beneficiaries, save that the New Trust was irrevocable. The new trustees of the New Trust were Geneva Trust Company (GTC) SA ("**GTC**").

4. Medical evidence obtained on behalf of Ms Velutini confirmed that she did not lack capacity to make the decisions she made in November 2021 including the decision to revoke the Trust. Further medical evidence in December 2021 confirmed that she had capacity to litigate at the time this claim was issued.

The Claim:

5. This was the disposal hearing of a CPR Part 8 claim brought by Ms Velutini dated 10 December 2021 seeking direction from the court pursuant to CPR 64 and by which Ms Velutini sought (i) a declaration that she had revoked the Trust by the Revocation, and that consequently the Former Trustees held the Assets on bare trust for her and at her direction; (ii) an order that the Former Trustees transfer those Assets to GTC, alternatively to Ms Velutini by a specified date; (iii) all necessary and/or consequential orders, accounts, and enquiries which for the purposes of this application included (a) the level of the retention the Former Trustees were to be permitted to retain and (b) whether the Former Trustees should be entitled to rely on their indemnity; and finally (iv) costs.

6. On 15 December 2021, the Former Trustees acknowledged that the Trust had been validly revoked by the Revocation and that they were obliged to transfer the Assets to GTC. In their Acknowledgment of Service dated 21 December 2021 the Former Trustees confirmed that they did not contest the valid exercise of the power to revoke the Trust and that they were willing to transfer the Assets to GTC on provision of appropriate and reasonable indemnities.

7. On 17 December 2021, the claimant acknowledged that the Former Trustees were entitled to be reimbursed for costs and expenses reasonably incurred in the administration of the Trust but joined issue with them in relation to the costs of this claim. Ms Velutini still sought a declaration arguing that in light of the Former Trustees challenge to the Revocation a declaration was of utility and would remove

any doubt about the validity of the Revocation for the benefit of both the claimant and the Former Trustees.

8. The claimant is represented by Mr Twigger QC and Mr Sherwin instructed by Mishcon de Reya ("**MdR**") and the Former Trustees are represented by Mr Eason Rajah QC and Mr MacDougald instructed by Sinclair Gibson ("**SG**"). By the time this judgment was handed down Mr Rajah and Mr Twigger had become KCs. I am grateful for their detailed written and oral submissions which I have taken into account together with the written evidence and documents even if I have not set out all the evidence or each and every argument or point raised.

9. The witness evidence in support of the claim ran to six witness statements and exhibits as follows:

    i) The first witness statement of Ms Velutini dated 3 December 2021 ("**Velutini 1**")

    ii) The first witness statement of Ms Rebeca Campos dated 8 December 2021 ("**Campos 1**")

    iii) The second witness statement of Ms Campos dated 28 January 2022 ("**Campos 2**")

    iv) The first witness statement of Mr Peter Steen of MdR dated 10 December 2021 ("**Steen 1**")

    v) The second witness statement of Mr Steen dated 28 January 2022 ("**Steen 2**")

    vi) The third witness statement of Mr Steen dated 16 May 2022 ("**Steen 3**")

10. The witness evidence in response to the claim consisted of three witness statements and exhibits as follows:

    i) The first witness statement of the Earl of Balfour ("**Lord Balfour**") dated 17 January 2022 ("**Balfour 1**")

    ii) The second witness statement of Lord Balfour dated 4 March 2022 ("**Balfour 2**")

    iii) The third witness statement of Lord Balfour dated 16 May 2022 ("**Balfour 3**")

11. In addition to the witness evidence there was a substantial bundle of documents which primarily consisted of correspondence and documents generated or exchanged between the legal teams, the Former Trustees, GTC and others since the Revocation and relating to these proceedings and the transfer of the Assets.

12. This hearing was part heard and further correspondence and documents were generated both during the first hearing and between the first hearing and the second hearing.

13. Everyone involved with this claim says that they are acting in the best interests of Ms Velutini and to protect her and the Assets. Standing back it is therefore surprising that a dispute such as this should need the court's intervention.

14. The witness evidence and accompanying documents and the inter partes correspondence are primarily focussed on explaining each party's approach to this dispute whilst seeking to allocate "blame", "poor" or "hostile" behaviour to the other party. Lengthy and copious as that evidence and correspondence was, it provided very limited assistance overall and provided more heat than light.

15. Ms Velutini was entitled to expect the Former Trustees and GTC to resolve these types of issues in a cooperative, reasonable and proportionate manner in the best interests of her and the other beneficiaries, her charitable foundations, without the need for court intervention or the expenditure of substantial costs.

16. And substantial costs have been expended even before one considers the handover costs. The combined costs schedules for this Part 8 claim come to in excess of £500,000.

Background

17. Ms Velutini was introduced to Lord Balfour in the early 2000s by Charles Rack ("**Mr Rack**"), who is a distant relative of the claimant. Ms Velutini subsequently appointed Lord Balfour to manage Ursus Investments Inc (a Bahamian company) ("**Ursus**"). He continued to manage Ursus after he set up his own professional trust business known as Virtus Trust ("**Virtus**") in 2005.

18. In about 2007 Ms Velutini was advised that she should establish a trust during her lifetime to enable her to retain some control over her wealth during her lifetime but be able to benefit the charitable foundations she had set up, after her death. The Previous Trusts were established by Ms Velutini for that purpose, with the assistance of Lord Balfour, in about April 2011. Ms Velutini was therefore not only the original settlor but one of the beneficiaries.

19. The Previous Trusts were New Zealand trusts governed by New Zealand law. The trustees were initially Virtus Trust NZ Ltd. Lord Balfour and Virtus subsequently merged with Equiom in 2017, which includes the defendants. Equiom Trust (NZ) Ltd (which is not a defendant) became the trustee of the Previous Trusts ("**the Previous Trustees**"). Lord Balfour remained a constant in the relationship with the claimant, continuing to manage the assets held in the Previous Trusts and the Trust for the claimant through his role in Virtus and subsequently Equiom.

20. The majority of the Assets were held through a structure that involved New Zealand limited liability partnerships holding shares/interests in other corporate entities. The underlying assets were primarily situated in Venezuela and actively managed by Ms Velutini and her private family office from Caracas on a day to day basis. This included, for example, local companies such as Inversiones Altano CA ("**Altano CA**") a Venezuelan company whose shares were held by Inversiones Altano LP (a New Zealand limited partnership) ("**Altano LP**") and whose director was the claimant.

21. Both Ms Velutini and Lord Balfour describe themselves as having had a good business relationship at least until recently.

22. Mr Rack worked at Banca Mora-Boreal. Ms Velutini explains that they developed a good relationship so that when Mr Rack expressed an interest in becoming more involved in her affairs, she asked him to advise on the investment of some of the Assets. He became involved in providing investment advice to her and the Previous Trusts and then the Trust and managing a substantial investment portfolio. His role was not however limited to advice on investments.

23. In about early 2021 Ms Velutini was advised that the Previous Trusts may have been unintentionally revoked in 2016/2017 and that she should set up the Trust on substantially the same terms as the Previous Trusts and transfer the Assets to it.

24. Lord Balfour says the events giving rise to this advice were evidence that Ms Velutini was susceptible to pressure, capable of being unduly influenced or that she was the victim or potential victim of elder abuse. He says this was at least part of the reason the Former Trustees were cautious about the validity of the Revocation in 2021. However, he also says that Ms Velutini was strong minded in terms of the control she sought to maintain over her family office and decisions made in Venezuela. He describes her active involvement in management of the assets of the Trust based in Venezuela.

25. Lord Balfour provides evidence about events in 2013 and 2016/2017 which he says had given him cause to be concerned about third parties including distant relatives seeking to put pressure on or influence Ms Velutini in ways that he did not consider to be in her best interests. He points to three third parties seeking to appoint themselves to the Protector Committee of the Previous Trusts with a view to accessing the Assets or influencing the use of Assets. Two of those third parties were other distant relatives of Ms Velutini.

26. Lord Balfour believed that the "new protectors" were not only seeking to influence Ms Velutini but were responsible for passing on confidential information about the trust structures and Assets to others. He believed they caused the claimant to dismiss a quantity surveyor who was assisting her with a large development in Caracas, the Paseo La Castellana project ("**the Project**") being undertaken by Altano CA. He believed this was with the intention of them having more influence over Ms Velutini in relation to the Project and more easily being able to access her wealth without proper scrutiny.

27. Lord Balfour's evidence suggests that the Project had been the source of some tension between the Previous and Former Trustees and Ms Velutini over a considerable period of time. Ms Velutini was committed to the Project and keen to progress it through to completion. To do this she sought to access further funding from the Previous Trusts, third parties and more recently the Trust. The Previous Trustees and more recently the Former Trustees were resistant to the risk of throwing good money after bad – as they perceived it. From the evidence available it appears the Project was running out of control in cost terms with no clear cost budget or program of works.

28. Eventually in late 2017 matters came to a head. Ms Velutini instructed lawyers in New York and New Zealand to remove the Previous Trustees and appoint Amicorp in

their place. One of the three "new protectors", a distant relative of Ms Velutini worked for the New York law firm. Lord Balfour says that when he explained the effect of what she had done to Ms Velutini she countermanded the original instructions. It was this course of events that resulted in the subsequent advice in 2020/2021 that Ms Velutini's actions may have revoked the Previous Trusts. Lord Balfour relies on this as evidence of Ms Velutini's susceptibility to pressure from third parties and the risk of her being unduly influenced or the subject of elder abuse.

29. Ms Campos is Ms Velutini's personal assistant and someone in whom she appears to have placed an increasing level of confidence and trust in recent years. She says that when the Trust was set up in 2021 to replace the Previous Trusts, Ms Velutini was put under pressure by Lord Balfour and Mr Rack to enter into the Trust on the terms suggested by them rather than on terms that reflected what Ms Velutini wanted to do. Ms Campos said that Ms Velutini had wanted to add not only Ms Campos to the Protector Committee of the Trust, but also other individuals based in her family office in Venezuela. Ms Campos says that Mr Rack threatened to resign if there were any additional protectors other than Ms Campos. She explains that Ms Velutini was put under pressure to sign after being told that if she did not sign the Trust documentation in the form proposed she would not be able to pay staff salaries.

30. The Trust was formally established on 15 April 2021 and was revocable. The nominal settlors were the Previous Trustees and the Former Trustees. The Trust was established to receive the Assets and to ensure they were held on trust. Ms Velutini remained a beneficiary during her lifetime with the Assets to be used to benefit her charitable foundations after her death.

31. The Assets fell into two categories. The investments held and managed by Boreal Capital Securities LLC ("**Boreal**" and "**the Boreal Assets**") managed by Mr Rack. The balance of the Assets were shares or controlling interests in (i) Inversiones Altano General Partner Limited (a New Zealand company), (ii) Inversiones Altano LP (a New Zealand limited partnership), (iii) Inversiones Carrao LP (a New Zealand limited partnership), (iv) San Pedro LP (a New Zealand limited partnership), (v) Ursus, and (vi) Louis Holdings Limited (a Guernsey company) (collectively "**the Non-Boreal Assets**" and respectively "**Altano GP**", "**Altano LP**", "**Carrao**", "**San Pedro**", "**Ursus**" and "**Louis**").

32. The transfer of the Assets to the Trust took about 3 months. Against that as at the time of this hearing it is 7 months since the Revocation, and 6 months since this claim had been issued, and the transfer of the Assets to GTC was yet to complete.

The Trust

33. Clause 2 of the Trust provides:

> "Special Powers of Belen Clarisa Velutini"
>
> "Notwithstanding anything hereafter contained Belen Clarisa Velutini Perez shall be entitled to ask the Trustees to pay any part or parts of the capital of the Trust Fund to or for her benefit."

34. However, despite Ms Velutini's Special Powers, the effect of the terms of the Trust and the longstanding additional processes/arrangements put in place by the Previous Trustees, Former Trustees and Mr Rack to protect the Assets, her ability to access the Assets was not easy or straightforward. Ms Velutini's frustration at her inability to access those Assets in a simple and straightforward way to use them to fund the Project and the unfortunate consequences of not being able to do so appears to have been part of the reason for the Revocation.

35. Clause 17 of the Trust sets out the constitution and provisions of the Protector Committee which consisted of Ms Velutini, Ms Campos and Mr Rack. However, Mr Rack held a particularly powerful position and could not be removed by the other two. In the event of his own incapacity or death whether before or after Ms Velutini's death the powers of the Protector Committee would cease. Thus, Ms Campos and Ms Velutini although members of the Protector Committee in reality had a very limited role.

36. Lord Balfour explains that there were, in addition, longstanding payment controls in place for any payment request from Ms Velutini. He explained that in order to access funds to make payments Ms Velutini first had to discuss matters with Mr Rack. A formal written request for funds signed by Ms Velutini was then made to Mr Rack who would forward it to the Former Trustees for processing. The email from Mr Rack accompanying the payment request would be followed up with call between the Former Trustees and Mr Rack to support the written request from Ms Velutini. Thus Mr Rack was the gatekeeper to and had control over whether Ms Velutini could access any funds or the Assets notwithstanding the terms of the Trust. Lord Balfour explains that Ms Velutini was the sole signatory for authorisations and that given her age and vulnerability including poor eyesight these processes were intended to protect her from abuse by others.

37. Lord Balfour explains that until the summer of 2021 Ms Campos had not been involved in these requests and that the Former Trustees would not pay out on requests from staff including Ms Campos. Ms Velutini was increasingly involving Ms Campos in her day to day affairs and had insisted on her being added to the Protector Committee of the Trust in April 2021. However, it appears that the Former Trustees and Mr Rack had not taken into account Ms Velutini's wish to involve Ms Campos in her day to day affairs and none of the authorisation processes had been changed. Again it appears that this may have been a cause of some of Ms Velutini's frustration.

38. In the summer of 2021 Mr Rack and the Former Trustees continued to insist on Ms Velutini conforming to the longstanding process they had in place which did not involve Ms Campos. They had not taken any steps to adapt their procedures to take into account Ms Campos' new role. Even after the Revocation Lord Balfour sought to explain and justify some of the delays in transferring the Boreal Assets to the New Trust as a failure by Ms Velutini, GTC and MdR to comply with these longstanding arrangements.

39. Although it appears that it may not have been fully appreciated by the Former Trustees, Lord Balfour and Mr Rack at the time, by the late summer of 2021 the processes they had put in place to protect or restrict Ms Velutini's access to the Assets were about to have a significant adverse impact on Ms Velutini.

40. The tension and difficulties caused by these apparent restrictions and blocks on the claimant's access to funds for the Project, in particular, were growing. Two particular incidents seem to have been the catalyst for the Revocation in November 2021. The first related to the Project and its funding over a period of time culminating in events in late October 2021 and the second to Mr Rack who, as set out above, had a particularly powerful role in relation to Ms Velutini's access to Assets and was in effect the gatekeeper.

41. Ms Velutini has been involved with the Project for some time. It appears to be a vast mixed development project in Caracas involving residential, commercial and office accommodation. From the limited documents available it appears it had been the subject of significant delays and changes over the years. Following the departure of the previous main contractor in about 2015 significant remedial work needed to be undertaken.

42. In about 2016 Grupo PMA 0+B Consortium ("**PMA**") were awarded a contract to carry out the remedial work and to complete the Project. The parties to the PMA contract were PMA and Altano CA. Altano CA's shareholder was Altano LP. Altano LP's general partner and Altano GP's current limited partners have been since April 2021 and are still the Former Trustees.

43. Given the size and nature of the Project the contract was awarded in unusual circumstances. No business plan, program of works, timeline, cost budget or even approach to completion costed or otherwise appears to have been provided by PMA at the time or since.

44. The Project appears to be vastly over its original budget with substantial additional work still needed. Attempts to raise independent funding from commercial/financial institutions in Venezuela had not been particularly successful at least in 2020 and 2021.

45. In the later part of 2020 and in 2021 Ms Velutini sought to access funds from the Assets to continue to fund the Project. The Former Trustees (and Mr Rack) were reluctant to release further funds to PMA without a proposal that was costed and/or accompanied by a business plan. They considered that the Trust should not further fund the Project without certain safeguards in place. In April 2021 they told PMA this was their position. They were concerned and had been for some time that PMA and other third parties considered the Trust and the Previous Trusts to be an open cheque book for access to the Assets. The Former Trustees considered that if the Project were to be funded to the extent proposed by Ms Velutini that she would use up the Assets and the Trust would not be able to generate sufficient income to enable her to maintain her household over any extended period of time. I do not doubt that the Former Trustees considered that by trying to ensure that requests for funds for the project were accompanied by a costed business plan they were protecting the Assets and Ms Velutini. Lord Balfour explains that the Former Trustees and Mr Rack had also recommended that Ms Velutini place Altano CA into voluntary administration so that she could restructure but she did not do so.

46. However, it appears that they misjudged the seriousness of the situation, Ms Velutini's concerns and her determination to continue with the Project. In doing so they may have unwittingly planted the seeds of this dispute and the Revocation.

47. PMA believing themselves to be starved of funding commenced an Arbitration against Altano CA, Ms Velutini, Altano LP, Carrao, and San Pedro ("**the PMA Arbitration**") in September 2021. They obtained an order for emergency relief and the seizure of goods against Ms Velutini to the value of approximately US$4m.

48. The seizure order was executed on 27 October 2021 at Ms Velutini's home in Venezuela. Bailiffs attended and took the equivalent of what appears to be walking possession.

49. The position in relation to PMA had been deteriorating for some time and the Former Trustees and Lord Balfour were aware of the PMA Arbitration and the subsequent seizure order. It appears that they had nonetheless continued to resist releasing sufficient funds to head off the seizure. Lord Balfour's evidence is that no request had been provided in the proper form following the longstanding processes that had been put in place.

50. Whilst Lord Balfour and the Former Trustees may have been concerned to protect the Assets for the beneficiaries, and resistant to acting in a way that might have appeared to suggest that the Trust had accepted a liability to make payments to PMA, nonetheless, failing to take steps to protect the primary beneficiary in her lifetime from the emergency seizure of her personal possessions does not seem to me to be reasonable or proportionate action on the part of the Former Trustees or Mr Rack. Allowing bailiffs to attend Ms Velutini's private home to seize goods to the value of the emergency relief, terrifying her and causing her considerable distress given her age and vulnerability on which Lord Balfour seeks to rely seems to me to be inappropriate and untrustee-like. Ms Velutini was understandably upset by the seizure of her personal possessions and her inability to access funds to make the payments to avoid the seizure given the value of the Assets.

51. The other incident which appears to have been significant in Ms Velutini's decision to revoke the Trust and cut her ties with Lord Balfour and the Former Trustees relates to Mr Rack. Given the authorisation process explained above it may also go some way to explaining her reluctance to involve Mr Rack in the release of further funds and the attempts by Ms Campos and Ms Velutini's private office to go direct to the Former Trustees.

52. On or about 30 September 2021 Mr Rack left a "voice note" for Ms Campos.

53. Lord Balfour says that he did not know about the voice note at the time and only came to know about it later. He says that in late September he had a conversation with Mr Rack in which Mr Rack told him that Ms Velutini had shouted at him because she had been told he wanted her dead. Lord Balfour explains that Mr Rack said that this incident had caused Mr Rack to be concerned for Ms Velutini's safety. Mr Rack reported his concerns to the compliance department of Boreal which may have exacerbated later difficulties with the transfer of the Boreal Assets. Mr Rack did not tell Lord Balfour about the voice note.

54. Lord Balfour had a call with Ms Campos on 30 September 2021. She told him that Mr Rack had threatened to kill Ms Velutini. Again he says he was not made aware of the voice note at that time. He explains that he considered that there must have been a misunderstanding about what had occurred. He suggested to Ms Campos that Mr

Rack be kept out of things. He was therefore clearly aware that there was an issue or misunderstanding of some significance between Ms Velutini, Ms Campos and Mr Rack by the end of September 2021.

55. I have been provided with a translation of the voice note, which was originally in Spanish, although it appears that it may not be a complete. There is no evidence from Mr Rack but both Ms Campos and Ms Velutini say the voice note was Mr Rack's voice:

> "On the other hand, perhaps, to solve the problem, it would be better for her to catch COVID and die soon, and that will solve a lot of problems. We can keep her inheritance because with her alive, we won't keep any of her inheritance. Perhaps it is a solution for her to die now."

56. Ms Velutini says when she listened to the voice note she was shocked by its contents. It appeared to her that Mr Rack wished her dead so that he could keep her inheritance. Understandably perhaps, her relationship with Mr Rack and the Former Trustees changed very quickly thereafter.

57. By October 2021 it appears that Ms Velutini had had enough. WhatsApp messages between Lord Balfour and Ms Campos between 30 September 2021 and 5 October 2021 show that Ms Velutini had asked for details of the Trust, the accounts and other information from the Former Trustees. This information would in due course provide some of the information she needed to enable her to revoke the Trust.

58. In the meantime, Ms Velutini was continuing to have difficulties in extracting funds from the Trust to pay the debts on the Project. Ms Campos and the private family office were continuing to seek to obtain access to the funds without going through Mr Rack. Lord Balfour knew there was a problem and had himself suggested that Mr Rack be kept out of things. He knew about the PMA Arbitration. However, no changes appear to have been made to the longstanding payment processes such that without the approval of Mr Rack whom Ms Velutini believed wished her dead she could not get approval for payments out of the Trust for the Project. This seems to me to have presented an almost insurmountable difficulty for Ms Velutini. As set out above this eventually resulted in bailiffs arriving at her home on 27 October 2021 to execute the emergency seizure order.

59. Ms Velutini explains that she had lost trust and confidence in Lord Balfour, Mr Rack and the Former Trustees.

60. Following these events Ms Velutini's decision to revoke the Trust and cut her relationship with Lord Balfour, the Former Trustees and Mr Rack is not at all surprising. Mr Rajah accepted that provided Ms Velutini had capacity she could decide to revoke the Trust and that is what she did on 8 November 2021. It may not have been a decision with which Lord Balfour or Mr Rack, or the Former Trustees agreed but it was her decision to make. However, despite the growing tensions the Revocation appears to have come out of the blue as far as Lord Balfour was concerned.

61. Ms Velutini explains that she created the New Trust free from the involvement of Lord Balfour, Mr Rack and the Former Trustees. She explains that her intention was that the Assets would be used for the same purposes as the Trust. The charitable foundations are beneficiaries of the New Trust, as they were of the Trust, and the Previous Trust and they have confirmed that they have no objection to the Revocation.

62. MdR the claimant's solicitors wrote to Lord Balfour, Mr Rack and the Former Trustees on 9 November 2021 providing a copy of the Revocation. They sought cooperation in relation to the transfer of Assets and asked that all communication be through them only. The Former Trustees did not immediately accept that the Revocation was valid nor that Lord Balfour/they should refrain from contact with Ms Velutini.

63. Lord Balfour's emails between 9 November 2021 and the instruction of SG on 19 November 2021 are to my mind not the measured objective and neutral correspondence one would expect of an experienced professional trustee. Mr Rajah sought to characterise the contents of those emails as being from someone concerned for Ms Velutini. I do not read them in that way.

64. On 10 November 2021 Lord Balfour emailed Ms Campos twice. He also appears to have sent her WhatsApp messages. He appears to have sent emails and messages to the claimant. The first email to Ms Campos/Ms Velutini set out why he thought that the decision to revoke the Trust would lead to complications and queried whether the claimant understood what she had done. The second email was to Ms Campos alone and was more pointed *"…After all [Mr Rack] and I have done to defend [the claimant's] wealth for 20 years this is rough treatment. The lawyers letter to [Mr Rack] is pretty litigious. I think we deserve an explanation…*"

65. On 11 November MdR again asked Lord Balfour to refrain from contacting both the claimant and Ms Campos directly. An email from Lord Balfour to MdR of the same date again queries Ms Velutini's actions and why she had not spoken to him and says, "*We have no idea who has organised all of this for Ms Velutini so we must reserve our right to investigate and have the English Court adjudicate if necessary over the possibility of elder abuse.*"

66. Later on the same day another email from Lord Balfour to MdR said "*Maybe the easiest solution, since we are so sceptical about this whole manoeuvre, and to cover us, is for you to seek an injunction confirming that the revocation was prompted by Miss V of her own free will. But at the hearing of which we would demand that our perspective be heard and, since you state that Miss (sic) has just had her capacity confirmed, we would expect her to appear. … a Eurostar trip should be no problem …*"

67. The Former Trustees were provided with three medical reports on 12 November 2021 which confirmed that whilst Ms Velutini was elderly and suffered from a number of medical issues, she did not lack capacity generally and specifically had the capacity to make the decisions she had made. Dr Barker, a Consultant in Old Age Psychiatry provided a report dated 12 November 2021 (and would later provide a report in relation to the claimant's capacity to litigate). He met with the claimant on 8 November 2021 for the specific purpose of providing an opinion on whether she had

capacity to sign the Revocation. He was satisfied that she understood and recalled what changes she wished to make to the Trust and why.

68. Despite this evidence and the requests that he desist, Lord Balfour emailed Ms Campos again on 15 November 2021. The email is lengthy and whilst it is clear that Lord Balfour was still shocked and upset by the Revocation, I consider it to be ill-judged.

69. The email was entitled "*Evidence we would give to an English judge*" and continued over several pages. It is clear from the content that Lord Balfour had some idea of the tensions that had grown up between Ms Velutini and the Trust albeit he may not have appreciated how serious the situation was. The email both seeks to justify the stance taken by Mr Rack and the Former Trustees in relation to the release of funds and alludes to the difficulties with a transfer of the Assets. And like the earlier emails Lord Balfour threatens to require Ms Velutini to attend court.

70. As for Lord Balfour's approach to Ms Campos in this email, I cannot read it as other than threatening. For example "*I don't know what you will do with this mail but if you don't read it in detail to [the claimant] but only send it to [MdR], bear in mind that a judge will wonder why. We may ask you to appear before the judge to talk about your role in all this as the closest person to her for some years.*" Lord Balfour continues, *"[i]f after you've read this to [Ms Velutini], she still wishes to proceed we will take the steps we have to to act in her best interests. If on the other hand, she realises what a mess things are likely to be and how long bank account changes and other things will take – and how the trust investments can't be traded in the meantime, then we'll obviously accept her rescinding the revocation and no hard feelings*." The claimant relies on this passage as evidence of untrustee-like behaviour. Mr Twigger submitted that Lord Balfour was inviting Miss Velutini to rescind the Revocation; and, appearing to suggest that if she did not, that the transfer of the Assets to GTC would be particularly difficult and time consuming and that the Former Trustees would be uncooperative. The email can certainly be read in that way. And it is certainly the case that the transfer of the Assets has not yet been completed and based on the evidence available there does not appear to have been the level of cooperation that one might have expected. It has been time consuming and difficult although as set out later in this judgment that does not appear to be all one sided.

71. Finally in this email there is another thinly veiled threat to Ms Campos "I *realise you, [Ms Campos], may be under pressure from external forces to go along with all this but it needs thinking through. You are also a trust protector while [the claimant] is still alive and that, it is argued, brings fiduciary duties…*"

72. These email exchanges seemed to me to be high-handed, hostile and entirely inappropriate for an experienced professional trustee. Lord Balfour appears to have lost all perspective and this appears to have become personal.

73. Mr Rajah sought to characterise Lord Balfour as a layperson arguing that one should not treat his initial reaction to the Revocation and his behaviour towards Ms Velutini with the same force as SG's subsequent correspondence. I do not accept this. Lord Balfour and the Former Trustees were part of a professional trust organisation with considerable experience. Lord Balfour had been a professional trustee since at least 2005. He ought to have been acutely aware of the inappropriateness of and impact of

the tone and content of his communications which were framed in a manner inconsistent with the role of a professional trustee even if he had genuine concerns.

74. SG were instructed and commenced correspondence with MdR on 19 November 2021. Mr Rajah says that the court should focus on this correspondence which he says demonstrates the Former Trustees were simply concerned about Ms Velutini and were taking appropriate steps to ensure that the Revocation was valid. The difficulty with this analysis is that the SG correspondence is sprinkled with comments about elder abuse, undue influence and the same historic matters which featured heavily in both Lord Balfour's emails and his evidence. The SG correspondence includes a further demand for a face to face meeting between Lord Balfour and Ms Velutini using the phrase "requires". Although more measured in tone than Lord Balfour's emails the SG correspondence did not progress matters. The correspondence continued into early December with SG continuing to refer to historic incidents without identifying any cause for concern about the Revocation itself but without accepting its validity.

75. Whilst the Former Trustees were entitled to be satisfied that the Revocation was valid that did not require a face to face meeting with Ms Velutini nor did it require her to attend court.

76. Against that brief summary I come to consider the relief sought by the claimant.

Declaration:

77. Ms Velutini seeks a declaration that she revoked the Trust by the Revocation and that consequently the Former Trustees held the Assets on bare trust for her and at her direction. The Former Trustees do not now dispute that the Trust was validly revoked or that they hold the Assets on bare trust subject to their equitable lien and any other reserved rights and powers.

78. In those circumstances should I exercise my discretion to make a declaration in the terms sought by the claimant, that the Trust has been validly revoked and that the Former Trustees are bare trustees?

79. A declaration is a discretionary remedy where the court declares a particular state of affairs. One of the purposes of declaration is to avoid further argument in relation to that state of affairs.

80. The leading authority on the question of the scope of declaratory relief is *Rolls-Royce v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318 Aikens LJ at [120]:

> "For the purposes of the present case, I think that the principles in the cases can be summarised as follows: (1) the power of the court to grant declaratory relief is discretionary. (2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant. (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question. (4) The fact that the claimant is not a party to the relevant contract in respect of

> which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue. (5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned. (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court. (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised. In answering that question it must consider the other options of resolving this issue."

81. The court must be satisfied that it is appropriate to exercise its discretion to grant a declaration in the terms sought and that doing so will do justice not only to the claimant but also the defendants. When considering the justice of the case the touchstone is utility and the declaration must be grounded in concrete facts although an absence of either is not determinative.

82. The claimant argues that the scope and nature of a declaration that the Trust was validly revoked is of real utility. It protects the Former Trustees, the claimant, and GTC from any criticism or argument by any third party who may later challenge or seek to argue that the Trust was not validly revoked and that the Assets should not have been transferred.

83. The only doubt as to the validity of the Revocation was that raised by the Former Trustees for which the claimant says there was no proper evidential basis. However, the Former Trustees' doubts whether legitimate or not have cast a doubt over the exercise of Ms Velutini's power/ability/capacity to revoke the Trust.

84. Whilst the claimant therefore says that the court can be confident that Ms Velutini's exercise of her power of Revocation was not vitiated in any way and that the Revocation was a valid exercise of her power there is also the potential for some doubt about the Revocation in light of the Former Trustees' approach.

85. Given the approach taken by the Former Trustees the claimant submits that a declaration would be useful to remove all doubt about the validity of the Revocation for the future. It will, amongst other matters, protect the Former Trustees against any argument that they should not transfer the Assets to GTC, and will ensure that GTC takes the Assets unambiguously on the terms of the New Trust.

86. It seems to me in light of the history of this matter, and the doubts and concerns raised by Lord Balfour and the Former Trustees about elder abuse and undue influence, and capacity, that a declaration confirming that the Revocation was valid is of utility and is the most effective way of resolving this issue and of providing certainty, comfort and benefit for the Former Trustees, GTC and the beneficiaries including the

claimant. Further, there appears to me to be a real risk that in the absence of a declaration in light of the very existence of these proceedings that further difficulties could arise which would not be in the interests of any of the parties. It provides certainty to third parties who may be concerned with the Trust, the New Trust or the claimant and will avoid unnecessary satellite disputes about the Revocation's validity.

87. Therefore although the defendants no longer challenge the Revocation the very existence of these proceedings and prior challenges and the matters raised in the evidence are sufficient for me to be satisfied that there is real utility in granting the declaration now sought. I am satisfied that the scope of the declaration is no wider than is necessary and is appropriately focussed and I will exercise my discretion to make it.

Transfer the Assets

88. The transfer of the Assets is not complete. The claimant sought an order at the time of the first hearing against the Former Trustees requiring them to complete the transfer of the Assets within 28 days but with permission to apply. The Former Trustees resisted any form of order that would place a deadline on them in relation to the transfer of the Assets.

89. The Former Trustees accept that the Assets must be transferred to GTC to be held in the New Trust. However, the progress made over the past seven months seems to have lacked any sense of purpose or urgency. Given the age and health issues of the claimant, upon which both parties rely that is a concern. I was taken at some length through a selection of the emails, letters and documents passing between the Former Trustees, GTC, various third parties and the legal teams. Each party sought to persuade me that it was the other who was the cause of the delays in effecting the transfer of the Assets.

90. I do not consider it helpful or useful to set out in this judgment on an hour by hour, day by day or even week by week basis the steps that each side have taken or not yet taken, the delays between those steps and what information is still missing or outstanding and who it appears should have provided it. Indeed there was in reality no agreement between the parties as to precisely what had to be done, what remained outstanding on each side or who still had to do what.

91. Despite Mr Twigger's submissions I was not persuaded that the delays lay entirely or almost entirely at the hands of the Former Trustees. It is apparent that the delays in progressing the transfer of the Assets were not all on one side.

92. At the time of the hearing only the Boreal Assets had been transferred. This had only happened in March 2022, 4 months after the Revocation. These were the more liquid assets managed by Mr Rack and ought to have been relatively simple to transfer. Of the Boreal Assets US$1.5m is currently retained by the Former Trustees as a retention against costs and expenses.

93. One of the features of the transfer of the Boreal Assets had been delay. This was said to have been caused by additional compliance requirements from Boreal and/or the Former Trustees which appeared to have been more onerous than expected. It is possible that Boreal's compliance department's additional requirements prior to the

transfer of the Boreal Assets in 2022 was informed at least in part by Mr Rack's report in September/October 2021. It will not have been assisted by the longstanding practice set up by Mr Rack and the Former Trustees prior to the Revocation. Lord Balfour sought to place blame for the delay on Ms Velutini and her legal team for not complying with those longstanding practices after the Revocation. This seemed to me to be an unrealistic and unhelpful approach. I remind myself that the Former Trustees are entitled to charge for their time involved in assisting with the transfer of the Assets and that they and Mr Rack were uniquely placed to resolve any difficulties with the transfer of the Boreal Assets. Instead it appears that additional obstacles were put in the way of the transfer, for example, the additional requirement for wet signatures from Ms Velutini which subsequently appeared to be the Former Trustees' own unexplained additional compliance requirement in March 2022 rather than Boreal's.

94. The Non-Boreal Assets were less straightforward. Transfer of those assets would/will require cooperation and an open exchange of information between the Former Trustees and GTC and, in relation to the New Zealand entities, their respective New Zealand representatives John Hart and Cone Marshall. At different times in the seven months post Revocation both sides produced what were described as step plans intended to set out the steps required to effect the transfer of the Non-Boreal Assets. However, those appear to have been prepared on a one sided basis and without cooperation or engagement between the parties to agree the steps in fact needed, who would do what, or the timing of those steps.

95. By way of summary only it appears that at least the following needed to be completed in relation to the New Zealand assets:

i) Altano GP's shares need to be transferred from the Former Trustees to New Zealand Trustees Limited;

ii) The directors of Altano GP, currently Ms Velutini and three appointees of the Former Trustees needed to resign and new directors from Cone Marshall need to be appointed;

iii) Various other associated changes need to be made at the same time including the changes to other directorships within the underlying structures to remove/replace the Former Trustees or their appointees;

iv) For Altano LP, Carrao and San Pedro, the Former Trustees needed to transfer their interest to GTC with the consent of Altano GP;

v) Other associated changes would need to be undertaken.

96. To effect all of these changes there needed to be an exchange of information to enable any relevant due diligence and compliance issues to be resolved. Had there been more cooperation on all sides it seems to me that this would have enabled the appropriate documentation to be identified, prepared, agreed and executed to enable the various steps to be taken to transfer the Non-Boreal Assets in New Zealand earlier and more effectively. Just prior to the first hearing first draft documents for some of those steps had just been produced by Cone Marshall and provided to John Hart.

97. Between January and April 2021 the Assets were transferred from the Previous Trust to the Trust. Although moving the Assets between Equiom entities may not have been as onerous as moving them to a third party, many of the same steps would have been needed. The Former Trustees/Lord Balfour/Mr Rack had been managing the Assets and the Previous Trusts and the Trust since their inception in 2011. Lord Balfour and Mr Rack had been involved in Ms Velutini's affairs since at least 2005.

98. The Former Trustees ought to have been well placed to provide up to date information and cooperative support to GTC, in the best interests of the beneficiaries, to ensure that the transfer of the Assets was undertaken smoothly, efficiently and effectively.

99. In December 2021, the description of the work the Former Trustees anticipated they would have to undertake to assist with the transfer of the Assets included a compliance review and sign off, preparation of the source of wealth and funds memorandum, and the preparation of financial statements and trial balances and the like. Such of this information as was provided in the seven months prior to the first hearing was provided in a piecemeal fashion. The Former Trustees did not appear to have it readily to hand including for example financial statements despite the transfer of the Assets in early 2021. Provision of some of this information appeared to remain outstanding at the time of the first hearing and appeared to be the cause of at least some of the delays in progressing the transfer of the Assets. In respect of some of the information relating to compliance, source of wealth and funds despite identifying as work they would undertake in December 2021, and despite the involvement in Ms Velutini's affairs since before 2005 it appeared that the information was not available.

100. The shares and directors of Louis and Ursus also needed to be transferred to a new local Registered Office, Registered Agent (RORA). A RORA needed to be appointed in each of the Bahamas and Guernsey by GTC. Although the appointment of a RORA was a matter for the claimant/GTC, to enable them to do so they needed information from the Former Trustees about the underlying assets, structures and source of wealth to enable them to satisfy not only their own compliance and due diligence obligations but those of any proposed RORA. This did not appear to have been completed by the first hearing.

101. Again it was an exercise that ought to have been one where close cooperation would have enabled it to be undertaken quickly. I remind myself that Lord Balfour had of course been managing Ursus since the early 2000s. In any event that work appeared to form part of the description of work provided in December 2021.

102. Given the Former Trustees' entitlement to charge for their handover costs a greater level of cooperation and assistance would not have put them at any financial disadvantage and might have been considered an appropriate course of action having regard to the welfare of and best interests of the beneficiaries of the Trust.

103. However, as I note the delays and difficulties with the transfer do not appear to be one-sided. On the claimant's side it appears that the Revocation took place at short notice. It does not appear that the claimant had yet managed to put in place the necessary structure and framework to enable the transfer of the Assets in short order. Indeed it appears that GTC may not itself have completed its own on-boarding, due diligence and compliance checks at the time the Trust was revoked. It does not appear that GTC or even MdR had a full picture of the nature of the Assets and what might

be required to transfer them. The correspondence between GTC and the Former Trustees does not to my mind demonstrate any real urgency or drive on the part of GTC in terms of, for example, following up on outstanding information.

104. It is notable that in the run up to and on the day of the first hearing and even more so between the first and second hearing there seemed to be a sudden rush of activity on both sides.

105. The structure set up by Lord Balfour is not straightforward. Neither party sought to suggest that the transfer of the Assets should have been instantaneous nonetheless it seemed to me that seven months after the Revocation more progress could and should have been made and it remained unclear why the information had not been provided to enable the transfer to have been completed by the time of the first hearing.

106. The Former Trustees oppose any order setting a time period for the completion of the transfer of the Assets. They argue that there is no need for the court to interfere. They argue that there is no prejudice to the claimant since she intends that the Assets be held in the New Trust once transferred. They also point to her having received the Boreal Assets already. These do not seem to me to be good or compelling reasons for not making an order. Indeed quite the reverse they continue to demonstrate a lack of urgency and a continuing apparent resistance to the transfer.

107. Just because the Assets are to be moved from the Trust to the New Trust does not mean there is no prejudice to the claimant. Given her age and the Former Trustees' views of her infirmity one might have expected the parties to recognise the need to effect the transfer promptly to enable Ms Velutini to undertake any further future planning with GTC as to how to manage the New Trust during her lifetime and after her death.

108. Despite the generation of a considerable amount of correspondence and the time spent going through it at the hearing I was left with no clear picture of what precisely remained outstanding seven months on, who still needed to do what or provide what information, nor any timeline for the transfer of the Assets. The Former Trustees and GTC both owe duties to the beneficiaries and should now ensure that they work together so that the Assets are transferred without any further delay.

109. In light of the apparently limited progress made to date it is far from clear to me that the Former Trustees and GTC will complete the transfer of the Assets in a reasonable period of time without the focus of a court order.

110. Consequently, if the transfer of the Assets has not been completed by the time this judgment is handed down I intend to make an order requiring that both the claimant and the Former Trustees shall take, or shall procure that others will take, such steps or do such things and sign such documents as may be necessary to complete the transfer of the Assets by a date 28 days after the hand down of this judgment. At the end of that period I will require a witness statement from the appropriate officer of the Former Trustees and for the claimant to procure a witness statement from an appropriate officer of GTC. Those statements should set out what each say remains outstanding to enable the completion of the transfer of the assets and who they say needs to do what and provide an indication of the overall timescale to complete the transfer.

111. I will list a hearing approximately 6 weeks after hand down to consider what further order if any should be made in relation to the transfer of the Assets.

Retention

112. The main area of dispute between the parties relates to the issue of retention. By the time of this hearing the differences between the parties as to the legal position in respect of any retention were narrow. As a matter of English Law the question of an indemnity from the Trust was in Ms Velutini's gift whereas the Former Trustees were entitled to make a retention against potential liabilities.

113. The Former Trustees have a right of indemnity from the Assets which acts as a first charge or lien over the Trust in respect of liabilities, costs and expenses. It was therefore common ground that:

> "A trustee may retain trust assets… to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions", but "must make proper enquiries as to what the contingent or future liabilities consist of and the extent of his potential liability at the time he asserts a right of retention" Lewin on Trusts (20th ed.; 2020) at §19-044(3)."

114. As far as the quantification of that retention is concerned:

> "The trustee's right in such circumstances is to make a retention out of the trust assets sufficient to protect him against any prospective or contingent liability which he has incurred in the performance of the trust, though only if the risk is more than merely fanciful. … Where the liability is unquantified, … the amount of the retention should be calculated on the basis of what is, on reasonable but not fanciful assumptions in favour of the trustee, the worst case. They include the prospective costs of defending any claim, including a claim for breach of trust (since the trustees may become entitled to take their costs out of the trust fund). … The retention is for the trustee's benefit: …If the beneficiaries dispute the necessity for a retention or the amount proposed to be retained, either they or the trustee can apply to the court. When the retained fund is no longer needed it can and should be distributed." Lewin on Trusts (20th ed.; 2020) at §24-039.

115. The Former Trustees argue that they were entitled to retain US$1.5m indefinitely until they are satisfied there will be no further liabilities or expenses arising from three different risks:

i) US$500K which the Former Trustees say they need to retain against the risk of having to defend a claim against them arising from the PMA Arbitration;

ii) A sum in respect of the handover costs. They initially sought US$330,000 but by the time of the second hearing the figure sought had increased to US$390,000; and,

iii) A sum in respect of the costs of this claim initially said to be US$275,000 but by the time of the second hearing said to be US$280,000.

116. This comes to a total of between US$1.105m and US$1.175m. On any basis less than the US$1.5m currently retained. The claimant argues that whilst the Former Trustees are entitled to recover some handover and legal costs the retention should be limited to US$250,000 to reflect the nature of the risks and costs with any such retention only to be held for a time limited period of three years. Further, the claimant argues that they should not be entitled to rely on their indemnity, or recover their costs save to a very limited extent.

117. Mr Rajah contends that the retention sought by the Former Trustees was appropriate having regard to the risks and costs identified by the Former Trustees which were not imaginary or fanciful.

118. In respect of the handover costs and the legal costs the issue is primarily one of quantum. However in relation to the PMA Arbitration there is a more fundamental difference between the parties. The claimant does not consider that there should be any retention whereas the Former Trustees consider that they should be permitted to retain US$500,000 against the risk of having to defend themselves from any enforcement action against them that might arise from the PMA Arbitration.

PMA Arbitration

119. The PMA Arbitration was commenced in September 2021. It is subject to Venezuelan law. Neither the Former Trustees nor the Previous Trustees are parties to it. Neither party had adduced any evidence as to the position as a matter of Venezuelan law either in respect of the PMA Arbitration itself nor specifically in relation to the risks which the Former Trustees sought to hold the retention against.

120. Neither the Former Trustees nor the claimant have provided any evidence of the current position in relation to the PMA Arbitration, and it appeared that the legal representatives did not know the current position.

121. The PMA Arbitration notice sets out what might be described as a relatively straightforward construction contract arbitration dispute. It seeks to recover sums which PMA say they have expended on the Project and for which they have not been paid. Altano CA, with whom PMA contracted, is not in a good financial position. Indeed the Former Trustees had recommended to Ms Velutini that she restructure. PMA were aware that Altano CA may not be good for the money itself. Although unusual from an English law perspective they joined Ms Velutini, as a director, and also Altano LP as a shareholder. It is less clear on what basis San Pedro and Carrao were named as parties, but both appear to have assets in Venezuela.

122. Within the PMA Arbitration notice, PMA set out what they understand to be the trust structure. In simple terms they appear to be seeking to provide a factual matrix that would enable them to seek to obtain an arbitration award against Altano CA or Ms Velutini directly and then to enforce by tracing back through the trust structures to the underlying Assets. It is in this context that they refer to the Previous Trustees. Their argument appears to be that if Ms Velutini or Altano CA were to fail to meet any award made against them it would be because of the use of the trust structure intended

to put the Assets out of reach. That explanation makes clear that the purpose of the references to the trust structure is to try to demonstrate a connection between the Assets and Altano CA and Ms Velutini to provide a basis for enforcing any award against the Assets. It is not aimed at or focussed on the Previous Trustees but on the route to the Assets.

123. Mr Rajah sought to rely on the fact that the emergency attachment order executed by the Bailiffs was against Ms Velutini as supportive of the risk to the Former Trustees. But of course whatever the merits of the approach as a matter of English law Ms Velutini is named as a party to the PMA Arbitration unlike the Previous Trustees or the Former Trustees.

124. Mr Rajah sought to characterise PMA's legal arguments as either an attempt to say the Previous Trusts were sham trusts or an attempt to pierce the corporate veil. In either case as a matter of English law there are clear and obvious if not insurmountable difficulties for PMA as Mr Rajah conceded. Indeed the very difficulties which Ms Velutini has had in accessing the Assets to enable her to fund Altano CA and the Project would seem to run counter to any sham trust argument. Mr Rajah submitted that alternatively PMA might seek to argue that the Former Trustees were intermediaries and should be treated as the claimant's agents. However, as Mr Rajah accepted as a matter of English law the possible claims were ill thought out and made no sense and would be unlikely to gain any traction in an English court.

125. Further not only are the Former Trustees not parties to or named in the PMA Arbitration but the trust structure has now moved on twice from the structure described in the PMA Arbitration making the likelihood of any action against the Former Trustees even more remote. Whilst the PMA Arbitration notice is not a model of clarity from an English law perspective its clear purpose in describing the trust structure is for the purposes of enforcement if any award is not otherwise met. It is not an attempt to pursue a direct claim or any claim against the Previous Trustees.

126. The Former Trustees received the PMA Arbitration notice in about September 2021. Surprisingly, they asserted that they were parties to the PMA Arbitration in March 2022 when making the PMA Arbitration retention. They said they would not pursue the PMA Arbitration retention if they ceased to be parties. In May 2022 PMA confirmed that they had not initiated any legal action against either the Former Trustees or any Equiom entity (which would have included the Previous Trustees) and did not intend to do so. They confirmed that they had not initiated any legal action against Lord Balfour or John Hart. Although not a binding indemnity or release it is entirely consistent with the PMA Arbitration.

127. The Former Trustees now accept that they are not and never have been parties to the PMA Arbitration but continue to retain against the risk of any enforcement action. It is therefore necessary to consider the PMA Arbitration retention further.

128. The test to be applied in determining the amount of any retention where the liability is unquantified is to calculate it on the basis of reasonable but not fanciful assumptions with the element of doubt weighing in favour of the Former Trustees when considering what the worst case would be.

129. Lord Scott explained the proper approach to the determination of whether a retention was necessary and what it should cover in *Concord Trust v The Law Debenture Corpn plc* [2005] 1 WLR 1591 at [34]:

> "It is common ground that the Trustee is entitled to an indemnity at least sufficient to cover the legal costs incurred by the Trustee in an unsuccessful defence of the notice. Your Lordships have not been addressed as to the sufficiency for that purpose of the indemnity that has already been offered by Concord. The critical issue is whether the Trustee is at risk not simply of incurring a liability in costs but also of a liability to Elektrim in damages for loss caused by the giving of an invalid notice. It is, or should be, common ground that the Trustee cannot reasonably insist on an indemnity to cover the latter risk unless the risk is more than a merely fanciful one."

130. The question is therefore whether the risk to the Former Trustees of having to defend an attempt to enforce any arbitration award against them arising out of the PMA Arbitration is more than merely fanciful.

131. Mr Rajah relies on a decision of the Jersey court in March 2022 *White Willow (Trustees) Limited v Trilogy Management Limited (as trustee of three charitable sub-trusts) and ors* [2022] JRC 120 to argue that in fact fanciful means either that there is no risk at all, or the risk is imaginary.

132. In *White Willow,* the Jersey court was addressing a claim for a retention in relation to a potential tax risk and potential fines for criminal offences and unknown liabilities. The decision sets out the statutory position in Jersey and refers to English law authorities including *Concord.* At [49]- [50] the Jersey court says:

> "49. Taking first the tax liability, Advocate Baker submits that the liability is fanciful and therefore it is not reasonable to require an indemnity. Dictionary definitions of 'fanciful' include 'unreal', 'imaginary', 'existing only in the imagination', 'preposterous' and 'absurd'. In our judgment, a risk of liability is only fanciful if there is in fact no risk of liability. A risk of liability which is very low or minimal is still a risk and is not therefore fanciful."

> "50. We accept that the risk of either the tax liability or the criminal liability materialising can properly be said to be minimal or very low, but in our judgment that is not sufficient to treat it as fanciful. To do so would be inconsistent with the underlying principle which we have described at paras 14 to 16 above, namely that a trustee is not expected to put his hand in his pocket to pay for trustee liabilities; he is entitled to a full indemnity for all liabilities reasonably incurred. If there is any risk of a liability, why should that risk be placed on the trustee rather than on the beneficiary who is taking the benefit of the trust assets?"

133. Mr Rajah submits that this demonstrates the other side of the longstanding principle that a trustee is entitled to be indemnified in respect of the liability of performing their role as trustees.

134. He argues that the risks of a claim against the Former Trustees is greater than the risk in *White Willow* which the court described as low or minimal because of the allegations made in the PMA Arbitration. The Former Trustees are only seeking to retain against the costs involved in the risk of a bad claim consistent with the conclusion reached by the House of Lords in *Concord* where their Lordships concluded that there was a risk of a bad claim, and the retention or indemnity should be limited to the legal costs of defending such a claim. He argues that once the Assets have been transferred into the New Trust which is irrevocable there is an increased risk of the Former Trustees being pursued to include a claim in relation to the transfer into an irrevocable trust. But it seems to me that is an after the event concern in that it requires there to be a risk in relation to the PMA Arbitration in the first place that overcomes the relevant bar and requires the protection of a retention.

135. *White Willow* does not to my mind reflect the approach of the House of Lords as set out in *Concord* and as referred to in Lewin on Trusts (20th ed.; 2020) at §24-039. Fanciful does not mean no risk at all or a risk that is only imaginary or illusory. It is clear in *Concord,* that Lord Scott was applying a test of reasonably arguable. The approach in *Concord* is clearly less absolute than that advanced in *White Willow.* The bar is not so low that the risk has to be imaginary or illusory before the court can conclude that the risk is fanciful.

136. It is notable that in *Concord* their Lordships considered each of the possible causes of action that might be faced by the trustee concluding variously that they were not reasonably arguable or not remotely arguable rather than imaginary or illusory.

137. For example at [37] when dealing with the possible breach of contract claim Lord Scott says:

> "In my opinion it is not reasonably arguable that the unjustified assertion by the trustee of an event of default or the giving by the trustee of an invalid notice of acceleration exposes the trustee to a risk of being found liable for damages for breach of contract."

138. It seems to me that the risk of a claim against Former Trustees falls somewhere between not reasonably arguable and not remotely arguable but in my view closer to not remotely arguable. For the Former Trustees to be at risk of having to defend a claim made against them there are numerous steps and hurdles for PMA to overcome first. The possible claims identified by PMA are all aimed at an attempt to trace to the Assets and as accepted by Mr Rajah would appear to make no sense as a matter of English law. It is not at all obvious why PMA would make a claim against the Former Trustees at all particularly once the transfer of the Assets was complete.

139. First however PMA will need to succeed against Altano CA as the contracting party. Without that they get nowhere. Whilst as a matter of English law the claims against the other named parties which do not include the Previous Trustees or Former Trustees seem inherently unlikely to be successful, they do at least appear to have a

purpose in that they lead to assets based in Venezuela. For example, the Project itself or Ms Velutini's home are both valuable assets in Venezuela. I am not persuaded that a broad description of the trust structure in the PMA Arbitration creates any risk to the Former Trustees. One can discern nothing which suggests that an attack on the Previous Trustees, or indeed the Former Trustees who are not even named, forms part of PMA's approach or is contemplated.

140. And of course if the transfer of the Assets is completed the Former Trustees will no longer be the relevant trustees in relation to any attempt to unpick the trust structure or pierce the corporate veil by the time the PMA Arbitration has concluded. The risk of a direct claim against the Former Trustees for having transferred the Assets into an irrevocable Trust seems equally fanciful and even more remote.

141. The potential risk identified of having to defend a claim to enforce an unpaid arbitration award is only likely to arise in the event that PMA successfully obtains a primary award against Altano CA and against Mrs Velutini and/or on some basis against any of the other named parties to the PMA Arbitration which is not paid or cannot be enforced against the assets of those parties in Venezuela. Or more surprisingly if PMA choose not to seek to enforce its award against any of the parties it has pursued or to trace to their assets in Venezuela (or elsewhere) but rather to make a direct claim against the Former Trustees who would no longer be the trustees by that stage. It seems to me that risk is entirely fanciful and defies logic and common sense. I do not consider that the risk of a claim against the Former Trustees (or the Previous Trustees who are not a party to this claim) is reasonably arguable. It is entirely fanciful.

142. Further, as here there was a concern in *Concord* as to the applicable law and the approach to be taken. The PMA Arbitration is governed by Venezuelan law, and it seems likely that any claim against the Former Trustees by PMA would also be governed by Venezuelan law. Their Lordships considered what the position might be where a claim might not be one that was governed by English law at [44]:

> "Mr Howard said that the civil liability of the Trustee to Elektrim under the Polish law of tort might be quite different from its liability, or non-liability, under English law and suggested that it was reasonable for the Trustee to seek an indemnity against the uncertainties of an action brought against it in Poland. The Trustee's fear of liability under the law of Poland, or some other foreign law, was not mentioned at all in the courts below. No evidence at all was adduced as to the causes of action in damages that might under Polish law or any other foreign law be available to Elektrim. I quite accept that the Trustee could not be expected to show that a cause of action in damages under some identified foreign law would clearly lie but it could at least be expected to show sufficient differences between the foreign law and English law to give some substance to the expressed fear that such a cause of action might lie. In the circumstances, and **in the absence of any evidence to the contrary, your Lordships are, in my opinion, bound to presume that there is no significant difference for present purposes between the law of Poland,**

> **or the law of any other country in which Elektrim might suffer damage, and the law of England**." (my emphasis)

143. As in *Concord* in the absence of any evidence to the contrary I am bound to presume, as their Lordships did, that there is no significant difference for these purposes between Venezuelan law and English law. As a matter of English law any claim of the type Mr Rajah has sought to tease out of the PMA Arbitration faces insurmountable difficulties and is an entirely fanciful risk.

144. Finally even if I had concluded that the risk were not entirely fanciful, I would still be left with no evidential basis on which to assess what a reasonable sum might be for any retention. These proceedings commenced in December 2021 and the PMA Arbitration in September 2021. In respect of the PMA Arbitration there has been sufficient time for the Former Trustees to have obtained advice about the risks and the likely costs of defending any claim. Indeed Lord Balfour said the Former Trustees were going to.

145. An assertion by Lord Balfour repeated by the Former Trustees' legal team that the defence to a bad claim that has not even been made or intimated against the Former Trustees would require a retention of US$500,000 does not appear to provide any proper basis on which to determine a figure for a retention. That is therefore a further reason not to allow a retention in respect of the PMA Arbitration.

146. There is in my view no evidential basis for the risk which the Former Trustees appear to seek to guard against. It is not reasonably arguable, and the risk is entirely fanciful. I am not satisfied that there is any evidential basis for determining any figure for the retention in any event. I do not therefore consider that there should be any retention at all in relation to the PMA Arbitration.

Handover and Litigation Costs

147. This issue is about the quantum of the retention. Any determination of the amount of the retention does not affect the actual costs which may be incurred or allowed on assessment in due course.

148. All this judgment does is determine the amount to be retained from the Assets to provide certainty of recovery in relation to the risk of those costs actually being incurred. It acts as a form of security for those costs and expenses where no indemnity has been offered by the claimant and the Assets are being transferred.

Quantum:

149. On 15 December 2021 SG wrote to MdR saying that the Former Trustees were ready to work with GTC to effect an orderly transfer and would use their best endeavours to do that expeditiously. The letter continued saying that the Former Trustees were in the process of producing an estimate of the transfer costs including for third parties such as New Zealand counsel.

150. On 18 March 2022, three months later, SG confirmed that the Former Trustees had investigated their future and contingent liabilities and concluded that they should retain:

i) US$500,000 for the PMA Arbitration/Dispute;

ii) US$330,000 for handover costs to GTC. This was said to include additional time for attending to the Revocation, compliance review and sign off, time spent on reviews and preparation of source of wealth and funds memoranda, time spent on the transfer and closure of all entities, preparation of financial statements, trial balances, liaising with new administrator, Cone Marshall costs [this should have been John Hart] and SG costs;

iii) The costs of these proceedings estimated to be US$275,000;

iv) Potential tax liabilities and professional advice in relation to the same (a retention in relation to this heading was not pursued).

151. At the first hearing the estimated costs for (ii) and (iii) were said to be US$275,000 and £320,000.

152. Surprisingly despite SG's correspondence in December 2021 and March 2022, even by the time of the second hearing the figures still appeared to be uncertain. Up to the first hearing only broad global figures had been provided in correspondence, submissions and evidence with no detail of what they included. There was no supporting evidence or explanation of how the figures had been calculated, what had been incurred by whom and what the estimated future costs for the transfer would be. Even the N260 for the legal costs up to the first hearing did not accurately record the litigation costs having wrongly included some handover costs and had to be corrected for the second hearing.

153. For the second hearing SG provided its own invoices for handover costs and litigation costs and an estimate of its future costs covering both the handover costs and litigation costs. They provided an updated N260 for the litigation costs. No supporting evidence or breakdown was provided in relation to the non-SG costs/transfer costs.

154. By the time of Mr Rajah's submissions at the second hearing the figures appeared to be as follows:

i) Handover costs: (a) Incurred US$224,224 and £60,355 legal costs. Future costs US$50,000 and £36,000. In broad terms US$390,000 including the Former Trustees and SG's costs.

ii) Litigation costs: £233,493.70 which equates to approximately US$280,000.

155. Whilst it was common ground that the Former Trustees were entitled to their reasonable costs incurred in relation to the handover the parties had been unable to reach agreement on the amount. Whilst the court should approach the determination of what is a reasonable sum to retain on a similar basis to the underlying question of risk there has to be some evidential basis on which to base that determination.

156. In March 2022 SG sought a retention of US$330,000 for the handover costs with a broad description of the work types. By March 2022 one might have expected more detail since the Former Trustees had been working on the estimate since December 2021. A number of the tasks they identified that they would have to undertake in December 2021, were or should have been well advanced by March 2022. On 29

April 2022 SG explained that the Former Trustees had hoped that Ms Velutini would agree to a full indemnity so had not undertaken any detailed work on the quantification contrary to the prior indication. By this stage, the Former Trustees had retained the US$1.5m from the Boreal Assets. The Former Trustees said they hoped there would be a considerable surplus. That itself suggests the sum sought was more than they envisaged they would incur and implies that there was more information available and/or that there was no proper evidential basis for the figure retained. Notably even at that stage the figure of US$1.5m exceeded the costs which the Former Trustee estimated it would incur on its worst case scenario.

157. In Balfour 3 Lord Balfour seeks a retention of US$330,000 for handover costs. The evidence was provided in a statement dated 16 May 2022, after the Boreal Assets had been transferred and only a few weeks before the first hearing. Lord Balfour still characterises it as an estimate of costs to date and future costs relating to the handover but provides no breakdown between incurred and future costs nor between the Former Trustees direct costs and those of third parties such as John Hart or SG or as between the Boreal and Non-Boreal Assets. Whilst he maintains that Ms Velutini's decision to cut off direct communication had made the handover of the Boreal Assets less straightforward his evidence does not attempt to explain how that had impacted on the amount of the overall costs. He simply maintains that the handover costs retention at US$330,000 is the estimate for those costs.

158. However, by contrast at the first hearing the Former Trustees were only seeking to retain US$275,000 in respect of the handover costs. There was no explanation for this figure or why it differed and was less than the figure in SG's correspondence and Balfour 3. No information such as invoices, estimates from third parties, breakdowns or even a description of the work to be undertaken to support the retention were provided.

159. By the second hearing SG said that the retention sum for the handover had increased to US$390,000. This was substantially more than had been sought in the previous correspondence, at the first hearing or in Balfour 3.

160. The figure was broken down by SG as to US$224,224 said to have been incurred as at 7 June 2022 with a contingency of US$50,000 for future costs - a total of US$275,000. No supporting evidence was provided for this figure. It appeared to represent all the handover costs other than those of SG for which more detailed information was provided. On the face of it this implied that the Former Trustees considered that their work on the handover was all but complete.

161. SG's incurred costs in relation to the handover were said to be £60,355 inclusive of VAT for which invoices were provided. These costs were said to have been wrongly allocated to the legal costs and included in the N260 for the first hearing. SG's estimate of future costs was some £26,000 across both legal costs and handover costs plus £10,000 for the second hearing.

162. If one converts the £96,355 (£60,355 plus £26,000 plus £10,000) to US$ and allocates the entire sum to the handover costs retention the cumulative figure is approximately US$390,000 but clearly now includes some litigation costs.

163. The Former Trustees also seek to retain a sum to cover their legal costs relating to these proceedings. On 18 March 2022 they sought a retention of US$275,000 but as for the handover costs provided no further information. On 8 June 2022 SG explained that the legal fees were £280,000 to 31 May with an additional sum to be retained to cover the costs of the first hearing. They said they would therefore be seeking a retention of £320,000.

164. The N260 filed by the Former Trustees for the first hearing amounted to £188,209.02. Whilst there could have been good reasons why there was a difference between the N260 figure and the total incurred legal costs none was provided. There did not appear to be any evidential basis for the figure of £320,000. And as it turned out the £320,000 was inaccurate including costs that were properly handover costs.

165. By the second hearing the legal costs figure was said to be £233,293.70, consistent with the N260 filed for that hearing, together with some part of the £36,000 referred to above in relation to future costs. When SG had sought a retention of £320,000 it included both the £60,000 referred to above and the £26,000. £233,293,70 plus £60,355 plus £26,000 comes to a total of approximately £320,000.

166. As set out above the entirety of the £36,000 has in fact incorrectly been included in the handover costs retention figure. It seems to me therefore that leaving aside the claimant's other concerns which may be matters for assessment that the retention sum sought for legal costs should be no more than £233,293.70 and a proportion of the additional £36,000 but only if that sum is then removed from the handover costs sum. If one converts the £233,293.70 to US$ it comes to approximately US$275,000.

167. The handover and legal costs retention sought by the Former Trustees by the end of the second hearing was in combination about US$665,000 as opposed to US$605,000 or US$655,000 or any other figure.

168. The court would not normally be asked to engage in determining the amount of the retention for the handover costs or legal costs. However, in this case at least three different figures have been proposed for each so far and there appears to be overlap or even possible duplication between the figures sought. Whilst a determination of the level of the actual handover costs and legal costs themselves is not a matter for this hearing the court still has to be satisfied that it is permitting a retention on some proper evidential basis. Here the figures are uncertain, and the evidence is flimsy and opaque.

169. The claimant had proposed a retention in respect of both the handover and legal costs in combination limited to US$250,000 subject to her argument that the Former Trustees were not entitled to an indemnity for their litigation costs in any event.

170. By the second hearing in light of the provision of invoices for SG's handover costs the claimant submitted that for handover costs only the figure should not be more than the £60,355 for incurred costs and £10,000 for future costs as there was no evidence to support any other figure.

171. It seems to me that the figure of £70,000 for handover costs or US$250,000 for handover and legal costs are too low and provide no better basis for determining a reasonable sum for the retention than the global figures provided by the Former

Trustees. The claimant appears to conflate the arguments that she may have on any assessment about quantum with the identification of a reasonable sum for the retention.

172. I am not persuaded that there is any sufficient evidential basis for directing a retention of US$665,000 but nor am I persuaded that limiting the handover costs to the £70,000 or the legal and handover costs to US$250,000 provides any realistic basis for calculating the retention.

173. The claimant's figure of £70,000 would make no allowance/retention at all for the costs of anyone other than SG. The Former Trustees have had ample time to provide some proper evidential basis to support the retention figures but even at the second hearing Mr Rajah was providing new, different, higher and unevidenced figures to those previously proposed.

174. However, objectively on the basis of the available evidence and the correspondence additional costs have and will be incurred beyond SG's costs in relation to the handover. It is clear from the evidence I was taken to at length that at least some work has been undertaken in relation to the handover by the Former Trustees either directly or through third parties. The Boreal Assets have been transferred, various documents and financial statements have been provided in relation to the Non-Boreal Assets and so on. It has been slow and there have been delays but it is not the case that nothing has been done at all. Indeed based on the sums the Former Trustees provided at the second hearing they appear to consider that the costs of the handover have all but been expended.

175. However, the paucity of evidence to support the various global figures proposed by the Former Trustees since March 2022 remained unexplained. It is a factor that cannot be ignored when the court seeks to determine a reasonable figure for the retention based on reasonable but not fanciful assumptions.

176. As far as the legal costs are concerned the claimant's own costs for these proceedings amount to about £300,000. SG have signed the N260 which provides some evidential basis for the inter partes legal costs sought at £233,292.70.

177. Doing the best I can and exercising my broad discretion it appears to me that it is consistent with the overriding objective to manage cases justly, efficiently and proportionately including at proportionate cost that I should determine a figure for both the handover costs and the legal costs based on the evidence available.

178. It seems to me that I have to have regard to the complexity of the trust structure and the nature of the Assets particularly the Non-Boreal Assets and the evidence of the nature and extent of the work needed to effect the handover. This is clearly not a straightforward transfer of Assets. However, I should also take into account the absence of evidential support for the global figures claimed by the time of the second hearing despite the Former Trustees having ample opportunity to provide some. Any figure should recognise the nature and extent of the work that it is clear needs to be undertaken but should also take into account the SG work for which there are actual figures and invoices despite the criticism of the claimant.

179. In relation to the legal costs and subject to the indemnity argument it seems to me that the signed N260 provides evidence of the legal costs incurred. There are also some invoices. This provides some evidential base for the legal costs retention which is separate to the question of the quantum of those costs if subject to any challenge by the claimant or any decision on the ability of the Former Trustees to be indemnified from the Assets.

180. Doing the best I can on the limited evidence available but having regard to the various figures the parties have put forward, the evidence I have been taken to and recognising that the retention for handover and legal costs has to be based on reasonable but not fanciful assumptions on a worst case scenario it seems to me that US$500,000 as a combined retention for handover and legal costs represents such a reasonable sum. I appreciate that the US$/£ exchange rate has been volatile but since the Former Trustees are holding the retention in US$ and their evidence has been based on US$ it seems more appropriate to specify a sum in US$. I therefore determine that the Former Trustees can retain only US$500,000 and the balance of the retained sums held by them should be released.

Time period

181. Mr Rajah submitted that I should not set any time limit on how long any retention could be held whilst Mr Twigger sought to limit how long the retention was held to a period of 3-years. I was not clear why the entire retention should be held without limit or even for 3 years and particularly now that I have not allowed the Former Trustees to retain a retention in relation to the PMA Arbitration there seems no reason to do so.

182. By the time this judgment is handed down the transfer of the Assets will either have been completed or I will set a time limit. This claim will have been substantially determined and virtually at an end. The US$1.5m has already been held since March 2022. Once the handover has been completed and this litigation resolved the Former Trustees will be in a position to provide their final figures to the claimant and any challenge to those sums can be progressed.

183. Given the apparent difficulties between the Former Trustees and the claimant since the Revocation and indeed the existence and nature of this dispute I am not persuaded that it is appropriate in this case to leave matters open ended or to provide too much latitude. The matter is before me because the parties are unable to agree. To avoid further satellite disputes and to provide some discipline and focus I will set a time limit in relation to the retention. It seems to me that having declined to allow any retention in relation to the PMA Arbitration that a period of 12 months from the hand down of this judgment is more than adequate to allow the final steps in the handover to be concluded, final invoices in relation to both the handover and the litigation costs to be raised and, if not agreed, to be challenged. This time period will provide some focus for the parties in terms of the resolution of any challenge to the costs. The parties will both need to act reasonably to progress any such challenge so that there is no unnecessary delay. I would expect the parties to cooperate in agreeing any extension if there are any outstanding determinations in relation to the costs and expenses which may require at least some part of the retention to be held for longer and for that purpose any order should of course include permission to apply.

Indemnity

184. As a general rule the Former Trustees would be entitled to be indemnified from the Assets in respect of any liabilities, costs or expenses properly incurred in connection with the performance of their role as Former Trustees pursuant to their statutory right to an indemnity by virtue of S31(1) Trustee Act 2000.

185. The final issue between the parties is whether the Former Trustees can rely on their right to an indemnity for those costs and expenses from the Assets in respect of the Revocation and the transfer of the Assets.

186. Lady Justice Asplin summarised the policy behind this statutory right in *Price v Saundry* [2019] EWCA Civ [23] and [24]:

> "…the policy behind the availability of an indemnity has not changed. It is designed to ensure that the trustee is not out of pocket when acting in his capacity as trustee on behalf of the trust and that the trust is efficiently and properly administered..."
>
> The test for whether the indemnity is available or has been lost or curtailed is … best expressed in the form of two questions: were the expenses properly incurred?; and were the expenses incurred by the trustee when acting on behalf of the trust? The answer to those questions is often far from straightforward. They are dependent upon all the circumstances of the case."

187. She continued at [29] to explain that "*properly incurred*" should be interpreted to mean "*not improperly incurred*". Whilst the trustee was to have the benefit of any doubt when considering whether the costs were properly incurred, she explained at [31]:

> "if a breach of trust causing loss to the trust fund or other misconduct is established against the trustee, the trustee may be deprived of his indemnity depending upon all the circumstances. Misconduct in this context should be construed widely to include not only misconduct in the sense of dishonesty but also conduct which is unreasonable in the circumstances. It does not extend, however, to a mere mistake on the part of the trustee."

188. As between the Former Trustee and the claimant as beneficiary, the Former Trustees will be entitled to an indemnity out of the Assets if in all the circumstances they have not misconducted themselves and the costs and expenses or liabilities which they seek to recover are not improperly incurred. But there is no need for there to be dishonesty before the conduct of the Former Trustees, which should be construed widely, taking into account all the circumstances, might justify the loss or curtailment of the indemnity.

189. As a general rule therefore the Former Trustees would be entitled to rely on their indemnity to be paid their costs and expenses for both the transfer of the Assets and

these proceedings from the Assets as far as they were not recovered from another party and were not improperly incurred. However such costs even if "properly incurred" can be challenged in which case they would be assessed on the indemnity basis (which is not an indemnity). This general rule of indemnification subject to the costs, expenses or liabilities being not improperly incurred in all the circumstances is supplemented by CPR 46.3 and CPR PD 46.1 in relation to the costs of proceedings. The effect of this is to provide further guidance on how and when the indemnification is applied in relation to the costs of legal proceedings. The effect of CPR 46.3 and CPR PD 46.1 is that if no order for costs were made in these proceedings the Former Trustees would still be entitled to their indemnity and would be able to recover their legal costs of these proceedings from the Assets unless the indemnity were lost or curtailed. Conversely the claimant, as beneficiary, rather than the Former Trustees, would need an order to enable her to do so even if in substance the claim was for the benefit of the New Trust/the Trust.

190. In *Alsop Wilkinson v Neary* [1996] 1WLR 1220 Lightman J identified three kinds of litigation which trustees might become involved in: (i) a trust dispute; (ii) a beneficiary dispute; and (iii) a third party dispute. Lightman J explained that a trust dispute was a dispute that may arise in the course of the administration of the trust. Where that was the characterisation of the litigation that might be considered to be friendly litigation. However a trust dispute which involved a challenge to say the validity of a settlement might be hostile litigation. He rightly commented that the line between friendly and hostile litigation was not always easy to draw.

191. In *Re Buckton*; *Buckton v. Buckton* [1907] 2 Ch. 406 Kekewich J set out his well-known categorisation of trust disputes. Category 1 concerns most applications made by trustees seeking guidance from the court including in relation to the administration of the trust or the meaning of a trust instrument. This is generally considered to be friendly litigation. Category 2 concerns most applications made by beneficiaries which seek guidance from the court including in relation to the administration of the trust or the meaning of a trust instrument. Whether the trustees or the beneficiaries commence the action, if it is essentially for the benefit of the trust fund then it is generally regarded as non-hostile in a *Re Buckton* sense no matter how "hostile" the conduct of the claim might have been. However, whether the litigation is friendly or truly hostile is of course a matter of degree.

192. Mr Twigger argues that the nature of this claim is closer to hostile litigation given the initial challenge to the validity of the Revocation by the Former Trustees. He points to correspondence from SG in February 2022 in which they asserted that it was the claimant who had brought hostile proceedings against the Former Trustees because they were questioning the validity of the Revocation. Mr Rajah argues that this claim should be treated as essentially friendly litigation as it seeks guidance and directions from the court. Indeed he suggests that once SG had said they would issue proceedings in December 2021 the claimant should have waited for them to do so.

193. In some cases it can be a mere matter of happenstance as to who is claimant and who is defendant. Given the history set out above and the conduct of the Former Trustees from 9 November 2021 it seems to me that these proceedings were by December 2021 inevitable but that does not make them hostile. I do not consider it was unreasonable for the claimant to issue the claim when she did rather than wait to see whether the Former Trustees would do so but that also does not make them hostile. This was

particularly so when despite the requests of MdR the Former Trustees had not identified any proper basis to challenge the validity of the Revocation. Indeed it was only after the issue of the claim that the Former Trustees accepted that the Revocation was valid. The subsequent and ongoing delays in progressing the transfer of the Assets reinforce that view. It is arguably only a timing issue that resulted in the claimant being the claimant although it seems to me that that very timing issue feeds into the question of the conduct of the Former Trustees.

194. Nonetheless the characterisation of the proceedings as friendly or hostile is a matter of fact and degree in a case such as this and is just one of many factors that the court has to take into account when considering its approach to any loss or curtailment of the Former Trustees' indemnity.

195. If a claim falls into a broad category of claims which seek guidance from the court and are for the benefit of the trust, then even if the claim is made by a beneficiary the starting point would be that the trustee in such a claim would be entitled to rely on their indemnity unless it were lost or curtailed in some way. Mr Twigger submits that an objective characterisation of these proceedings is that they are in fact hostile rather than friendly. In particular he points to the fact that the validity of the Revocation remained in issue when the claim was issued despite the information and evidence then available.

196. Mr Twigger's reference to SG's subsequent characterisation of the proceedings and the claimant's attitude as being hostile does not make the proceedings hostile. That seems to be a confusion of the hostility as between the parties that is evident in these proceedings and the categorisation of these proceedings as hostile in a *Buckton* sense.

197. In this case given the hostility in a non-*Buckton* sense that had arisen between the parties following the Revocation it was clear that proceedings were necessary for the court to give such guidance as might be necessary which at the time of issue included in relation to the validity of the Revocation but I do not consider that they should be characterised or are anything other than proceedings seeking guidance and directions from the court.

198. In such claims a trustee whether claimant or defendant should take a neutral position but seek to assist the court. In doing so a trustee does not need to be passive and can properly put arguments or counter arguments in the best interests of the trust.

199. If however a trustee takes an aggressive and/or hostile approach to the claim or behaves unreasonably in all the circumstances including not taking a neutral position and/or not acting impartially [*Lewin* at §48-102 and §48-093] such conduct may lead to a conclusion that the trustees have not acted in the best interests of the trust and have incurred expenses that are not properly incurred or which were in fact improperly incurred.

200. Any consideration of all the circumstances is ultimately an exercise of discretion having regard to those circumstances. Although other similar cases can provide some guidance as to the approach ultimately it is for each judge to consider on the facts and evidence of a particular case whether the indemnity should be disapplied or curtailed.

201. The authorities on which the claimant and the Former Trustees primarily relied were all decisions of HHJ Paul Matthews as he now is. *Price v Saundry*, was an appeal from his first instance decision, to which I have already referred. Mr Rajah also relied on both *Blades v Isaac* [2016] EWHC 601 (Ch), and *Mussell v Patience* [2019] EWHC 1231 (Ch).

202. In *Blades,* a beneficiary sought directions from the court following the failure of the trustee/executor to provide disclosure/information to the beneficiary. The failure to do so stemmed from a misunderstanding of the claimant's entitlement to that information and a concern about providing unbalanced information. The judge concluded that as the trustees had taken appropriate specialist advice and acted in accordance with it that on the facts of the case there was no misconduct, and the indemnity would not be disapplied. As in this case it was the beneficiary not the trustee who initiated the proceedings after the trustee had indicated an intention to do so. Nonetheless the court concluded that the application was to be characterised as an application for directions and not a hostile claim.

203. In *Mussell* the claim related to directions/a claim for an account which the court again characterised as friendly trust proceedings seeking directions from the court. In that case the question for the court to answer was for whom and in what shares an estate was held. He concluded that the questions were ones which needed an answer and that the claimant had not behaved unreasonably or improperly in seeking the answer from the court and did not disapply the indemnity.

204. Both cases turned on a consideration of whether in all the circumstances of those cases the executors/trustees had acted improperly or unreasonably and/or whether there had been any misconduct in the broad sense subsequently described in *Price v Saundry* such as to deprive them of their indemnity.

205. When considering whether the Former Trustees should be deprived of their indemnity in whole or in part the various matters set out earlier in this judgment come back into consideration.

206. Upon receipt of the Revocation the Former Trustees were entitled to seek advice about it and were entitled to incur the reasonable costs of doing so as well as the reasonable costs for assisting with the transfer of the Assets, including the costs of their advisers. The Former Trustees are therefore entitled to rely on their indemnity in respect of the costs of the transfer of the Assets (the handover costs) and the costs of this claim but only to the extent that they are properly incurred or not improperly incurred.

207. However, Mr Twigger seeks a direction that the Former Trustees' costs relating to the transfer of the Assets and this claim have in fact been unreasonably and therefore improperly incurred. He seeks an order that the costs should be disallowed save to the extent that they can be shown on a detailed assessment to have been properly incurred in taking advice on the Revocation, and in facilitating the straightforward transfer of the Assets.

208. In particular he relies on the following matters some of which have already been considered earlier in this judgment which he argues demonstrates the unreasonable

behaviour of the Former Trustees and which was not for the benefit of either the claimant or the Assets:

i) Lord Balfour's correspondence following the Revocation;

ii) SG's correspondence prior to issue of the claim;

iii) SG's correspondence after the issue of the claim including their letter of 23 February 2022 in which they said, "*Ms Velutini has brought hostile proceedings against our clients for no apparent reason other than [the Former Trustees'] questioning the veracity of the revocation given its previous experiences of the abuse of Ms Velutini, and continues to deny they are entitled to the costs of these proceedings from the [Assets]*.";

iv) The delay by the Former Trustees in accepting the validity of the Revocation until after the issue of the claim. In particular he relies on the Former Trustees' failure to do so despite having received the capacity reports on 12 November 2021 and their failure to articulate any arguable basis for the alleged undue influence in relation to the Revocation;

v) The failure of the Former Trustees to act neutrally in relation to the Revocation, for example not seeking the views of the charitable foundations who were content with the Revocation;

vi) The unreasonable approach to the transfer of the Assets. Although I do not consider that the delays were all one-sided Mr Twigger particularly points to the following:

a) The delay in the transfer of the Boreal Assets. In particular Mr Twigger refers to (i) the onerous and piecemeal conditions placed on the transfer of the Boreal Assets; (ii) the discovery that some of those additional requirements were those of the Former Trustees not Boreal; (iii) Lord Balfour's continuing poor behaviours in relation to the transfer of the Assets, for example Lord Balfour's email of 5 February 2022 to GTC in which Lord Balfour said *"nobody has told us why Miss V acted or was advised to act in this way. It's caused huge problems and backfired on Miss V. To resolve she just needs to follow normal procedures demanded by 'providers'. I'm afraid she burnt her boats with Boreal and they hardly cooperate with us, they are so incensed. With a rather blind very old lady with 'previous', I am afraid there is a lot of scepticism about"*;

b) The overall delay in the transfer of the Non-Boreal Assets; and

vii) The amount of the retention held on the release of the Boreal Assets and the lack of any proper evidential basis for the amount retained and the failure to release the excess.

209. Mr Rajah rejects all of these criticisms of the Former Trustees' approach. He argues that the Former Trustees were entitled to be cautious and seek information and advice

in relation to the Revocation at the outset particularly given the concerns they had about Ms Velutini's health and welfare.

210. He sought to focus on SG's correspondence and its more measured approach and the Former Trustees' indication on 10 December that they would issue an application for directions.

211. Whilst the Former Trustees finally accepted the Revocation was valid on 15 December 2021 after the claim was issued in light of their conduct and approach the validity of the Revocation remained in doubt or at least not certain which placed the claimant, the Former Trustees and GTC at risk. The transfer of the Assets is incomplete. Some of the delays in progressing the transfer have been caused by or substantially contributed to by the lack of cooperation from and conduct of the Former Trustees. The retention of US$1.5m from the Boreal Assets in March 2022 without providing any proper basis for doing so and the failure to provide any evidential support for the sums sought appears to me to be another factor when considering the overall conduct of the Former Trustees. It appears to me that much of the cost and argument in this claim about the retention was unnecessarily increased by the conduct of the Former Trustees. Whilst they are entitled to a retention it has to be on some proper basis and properly evidenced.

212. Mr Rajah argues that this claim was necessary to obtain guidance from the court and the Former Trustees have not caused any loss. He robustly rejects the characterisation of Lord Balfour, and the Former Trustees' conduct as untrustee-like. He argues that on that basis the starting point is that the Former Trustees are entitled to their indemnity.

213. It seems to me that I have to approach this decision on the basis that the Former Trustees are professional experienced trustees managing trusts and assets worth US$30m to US$50m. This is not for example a case where it is said that a trustee has not provided information or disclosure because they received incorrect advice. It seems to me on the evidence available that these professional and experienced trustees who had represented the claimant as trustees since 2011 took an inappropriately aggressive and threatening approach to the claimant following the Revocation. Whilst they were entitled to satisfy themselves that the Revocation was valid their overall approach to not only the Revocation but also the transfer of the Assets and the retention and these proceedings has been unnecessarily partial, and self interested rather than neutral. They did not limit their role to either cooperating or assisting with the transfer or assisting the court in a neutral manner. As I set out above there appears to have been a loss of perspective which appears to have characterised their conduct throughout the last seven months.

214. Having accepted the Revocation was valid one might have expected professional well regarded trustees to have seen the benefit of acting in a manner consistent with that role. Instead the approach, which appeared to continue after the Revocation had been accepted as valid, was for Lord Balfour to return to the themes in his earlier correspondence. To suggest that Ms Velutini should not have cut off her communication with the Former Trustees and Mr Rack, to criticise GTC and MdR's lack of knowledge of the trust structures and to suggest that Ms Velutini should go back to following the longstanding procedures put in place by the Former Trustees and Mr Rack.

215. Whilst I do not consider that this can be categorised as "hostile litigation" in the *Re Buckton* sense it has been hostile litigation. It is right that in the events that occurred a claim had to be issued and the court had to give guidance and directions in relation to both Revocation and the retention.

216. This is therefore notionally at least to be categorised as friendly litigation despite the obvious hostility such that the starting point is, as Mr Rajah says, that the Former Trustees are entitled to rely on their indemnity. However, the court can remove or curtail that indemnity if it considers that in all the circumstances the (mis)conduct of the Former Trustees was unreasonable and that the costs incurred in defending these proceedings were improperly incurred.

217. Should the costs incurred by the Former Trustees in defending/arguing their points in the particular circumstances of this case be treated as expenses properly incurred or not improperly incurred such that the Former Trustees get the benefit of the doubt?

218. Can it be said that all the expenses and costs that the Former Trustees will have incurred have been properly incurred? Can it be said that the Former Trustees have been acting on their own behalf or in a manner that was partial rather than neutral?

219. I have to have regard to all the circumstances of the case and the overall effect of the Former Trustees' approach to this claim. I have set out above the nature of the correspondence prior to and after the issue of the claim. I have concluded that the Former Trustees had taken a high handed and hostile approach to the Revocation and the transfer. They had defended the US$1.5m retentions without providing any proper evidential basis for the sums claimed and in relation to the PMA Arbitration I have directed that there be no retention at all.

220. It seems to me that in conducting themselves in the manner they have done in relation to the Revocation and the transfer of the Assets, as well as their approach to the retentions, the Former Trustees have caused both the claimant and the Former Trustees to incur costs that would not otherwise have been incurred. The Former Trustees have not acted neutrally nor reasonably in the best interests of the beneficiaries in effecting the handover of the Assets from the Trust to the New Trust. Whilst the delay in the transfer of the Assets is not all one sided the Former Trustees conduct is such that I am satisfied that at least some of the costs that they have incurred in pursuing the course they have taken cannot be said to have been properly incurred. It seems clear to me from the evidence and correspondence I was taken through that the Former Trustees have been slow to provide information and to cooperate with GTC and others.

221. It appears to me that the Former Trustees' conduct since notification of the Revocation on 9 November 2021 will have caused both parties to incur unnecessary costs and has delayed the ability of the claimant to effect the outcome she sought to achieve by the Revocation. Given the Former Trustees own concerns about the claimant's age and health there can be no proper explanation for the delays in accepting the validity of the Revocation and transferring the Assets. These proceedings themselves have been hard fought in particular in relation to the retention for which no proper evidential basis was provided and they have become unnecessarily protracted and detailed. As set out above it appears to me that the

Former Trustees/Lord Balfour have lost perspective and have not behaved in a neutral manner.

222. Misconduct is to be construed widely and includes conduct that is unreasonable in the circumstances. Here it seems to me that the conduct of the Former Trustees falls within that wider category of misconduct and in considering what order to make I take into account the additional time and costs that will have been incurred by both parties as a result. I take into account the balance between the parties.

223. It seems to me given the nature of the Former Trustees' conduct that this is a case where it would be wrong in principle for the Former Trustees to be able to rely on a full indemnity. Their conduct is deserving of at least some curtailment of the indemnity on which they would otherwise be entitled to rely.

224. Unlike in *Price v Saundry* I have yet to determine the final position on the costs of this claim as between the parties. Whilst a decision about the overall costs might further inform a decision on whether the indemnity should apply it is not a necessary precursor to a decision about whether the Former Trustees are entitled to recover any shortfall in the costs they have incurred or may be ordered to pay in respect of the claim, nor does it preclude some curtailment of their indemnity in respect of the transfer of the Assets.

225. However it seems to me that this is not a case in which it can be said that all of the costs which the Former Trustees will have incurred are ones for which the indemnity should be disapplied.

226. I am not persuaded that the direction that Mr Twigger seeks is appropriate nor does it seem to me to be likely to in fact enable the analysis of the costs and their appropriateness to be fully explored given the nature of a detailed assessment. In any event it appears to me to risk substantial satellite litigation to determine the extent to which the costs incurred in taking advice on the Revocation fall within the range of costs that can be recovered on an indemnity basis. As far as the question of what costs should be incurred in "a straightforward transfer of the Assets" it is unclear how or who is to determine what that should be and how that is to be considered by a costs judge when reviewing the costs claimed against the documents supporting those costs.

227. It was also unclear whether the process of simply having an indemnity costs assessment would or could take into account any additional or improperly incurred costs or misconduct arising from say the approach to the retention or overall.

228. Consequently I am not persuaded that Mr Twigger's proposed solution to how to curtail the indemnity meets the balance. It risks substantial satellite litigation, further substantial costs and is too uncertain. An indemnity basis assessment of particular types of costs may be a course the parties decide to go down in due course, but it seems to me that is separate to the question of how to curtail the indemnity and confuses two different processes.

229. Neither does it appear to me that it is possible or even appropriate in this case on the facts to divide up the different aspects of the conduct or the timeline so as to disapply the indemnity only in relation to the costs before or after a certain date. So for example it is accepted that the Former Trustees could seek advice about the

Revocation but as I have found their approach and conduct in relation to the Revocation was ill-judged and will have caused the parties to have incurred additional unnecessary costs such that the Former Trustees will have improperly incurred costs for which they should not be fully indemnified. It is therefore a proportion of those costs against which the indemnity should be disapplied. For the transfer of the Assets whilst it appears to me from going through the correspondence and emails and noting the delays in the provision of information and the lack of cooperation that the conduct was unreasonable and will both have increased GTC and the claimant's costs, inconsistent with the Former Trustees role as trustees, and will have caused the Former Trustees to have improperly incurred some costs, again it would not be possible to go through the correspondence and individually determine for which periods or in relation to which delay or item of correspondence the indemnity should be disapplied. But nor therefore does it seem realistic to adequately reflect that concern by simply directing an indemnity basis assessment.

230. I have had the opportunity to read that correspondence, the evidence and hear the submissions and form a view about the conduct complained of and have an understanding of the overall costs incurred. It seems to me that I am in the best position to determine in the exercise of my broad discretion the extent of any curtailment of the indemnity in relation to the Former Trustees' costs of the proceedings and the costs of the transfer of the Assets. In all the circumstances and taking into account the conduct of the Former Trustees in its broadest sense as identified by Lady Justice Asplin I consider that I should apply a percentage reduction to the indemnity.

231. It seems to me that the court should approach the determination of the extent to which the indemnity should be curtailed on a similar basis to the approach that it would adopt in determining an appropriate order for costs and deciding to direct that one party pay a proportion or percentage of the overall costs rather then a distinct part. Where as here the court is considering curtailment of the indemnity but as here cannot determine or identify with sufficient precision specific issues or a particular time period, or particular steps against which to make a specific curtailment or limitation of the indemnity but is nonetheless satisfied that the indemnity should be curtailed the court will generally prefer to make a percentage order to reflect the various factors it has taken into account. This is generally regarded as more practicable and a more appropriate approach to reflect the issues or factors which the court has identified.

232. Doing the best I can and having regard to the overall conduct of the Former Trustees and all the circumstances it seems to me that their indemnity should be limited to 70%. Thus subject to any costs orders that might be made as a result of this judgment the Former Trustees are entitled to recover only 70% of their costs/fees expenses or liabilities from the Assets that would otherwise have been covered by the indemnity in relation to the costs of these proceedings and the transfer of the Assets. And I will make an appropriate direction.

233. I should make clear for the avoidance of doubt that is entirely separate to and does not limit in anyway the ability of the claimant to seek to challenge any of the Former Trustees' costs in due course should she wish to do so in the usual way.

234. The parties should seek to agree an order that reflects this judgment. As I have already directed that there should be a further hearing in approximately 6 weeks it may be

convenient if any consequential matters that the parties are unable to agree are dealt with at the same hearing.

Postscript

235. The claimant requested clarification in relation to the amount of the retention in light of the determination that the indemnity should be limited to 70%. The retention should remain at US$500,000. If I had been persuaded that the Former Trustees should be deprived of their indemnity in its entirety it would have been appropriate to revisit the amount of the retention. However, to reduce the retention based on the indemnity % at this stage is to conflate two different processes. The Former Trustees can retain US$500,000.