Neutral Citation Number: [2023] EWHC 1919 (Ch)

Claim No: PT-2021-000914

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST

Rolls Building
Fetter Lane
London, EC4A 1NL

28 July 2023

Before :

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the High Court

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Between :

(1) FREDDIE FREED
(2) MINNIE FREED — **Claimants**

- and -

(1) SAFFRON MANAGEMENT LIMITED — **Defendants**
(a company incorporated under the laws of Hong Kong)
(2) MONIKA FREED
(3) HELENA CAHOVÁ
(4) MARCELA LIPPOLD
(5) RADKA DUŠKOVÁ
(6) ELIŠKA DUŠKOVÁ

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Mr Andrew Holden and **Ms Alina Gerasimenko** (instructed by Rise Legal (STB) Limited) appeared for the Claimants
Mr Romie Tager KC (instructed by **W Legal Limited**) appeared for the First Defendant

Hearing date: 4 July 2023

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JUDGMENT

Mr Nicholas Thompsell:

1. BACKGROUND

1. This judgment deals with two interim applications relating to an action that is being brought by Mr Freddie Freed and Ms Minnie Freed who were, and consider that they remain, beneficiaries of a trust called the Fennel Trust (the "**Trust**"). The First Defendant (the "**Trustee**") is the trustee of the Trust. The Second Defendant is the Settlor named in the trust deed relating to the Trust (the "**Trust Deed**"). The Third to Sixth Defendants (whom I will also refer to as the "**Replacement Beneficiaries**") are beneficiaries or, in the case put by the Claimants, alleged beneficiaries of the Trust.

2. As many of the parties involved here have the same surname, for clarity and brevity and meaning no disrespect, I will refer to the First Claimant as "**Freddie**", the Second Claimant as "**Minnie**" and to the Second Defendant as "**Monika**" and also as the "**Settlor**". I will also refer to some other individuals who are referenced here by their first names.

3. In brief (and I will expand on this later) the Claimants are seeking various forms of relief on the basis that the Trustee, in concert with Monika, committed serious breaches of trust by excluding the Claimants as beneficiaries of the Trust and purporting (according to the Claimants) to replace them with the Replacement Beneficiaries, who are all members of Monika's family (but not related to Norman).

4. The Trust was settled by Monika. At the time that the Trust was established, Monika was the second wife of Freddie and Minnie's grandfather, Mr Norman Freed ("**Norman**"). The Claimants' case is that Monika acted as a purely nominal settlor of the Trust. They say that the true source of the wealth settled on the Trust, and the person who has been principally responsible for managing and growing that wealth, is Norman. At the time that the Trust was established, Monika had retained a domicile in the Czech Republic and the family perceived tax advantages in having her act as the settlor of the Trust.

5. The Trustee is a company incorporated in Hong Kong with a business providing corporate and trustee services within Hong Kong. Its directors include Norman's brother, Mr Mark Freed ("**Mark**") (who is an Israeli citizen, resident in Switzerland). Choosing as trustee a company in which he was the prime mover allowed the arrangements to be kept within the family.

6. The main assets of the Trust have been, and remain, shares in an investment and property holding company incorporated in the British Virgin Islands (BVI) called F & M Investments (Holdings) Limited ("**F&M**"). Norman has been involved for many years in the day-to-day management of F&M but is not a director. F&M has a single corporate director called Saffron Directors Limited (a company incorporated in the BVI). The directors of Saffron Directors Limited again include Mark and members of his family. F&M has as one of its investments a shareholding in a company called Key People Ltd ("**KPL**"). Outside the action currently before this court, there have been other proceedings

relating to an alleged purchase of shares in KPL by F&M from Moshe Freed ("**Moshe**") who is Mark's son.

7. Sadly, the family has been riven by divisions. Monika and Norman are currently engaged in protracted divorce proceedings in the Family Division and Norman's family have ceased to have anything to do with Monika outside the divorce proceedings or other hostile proceedings. In or around late 2020 the relationship between Norman and Mark broke down.

8. A point of contention between the brothers related to dealings involving Moshe. Moshe claimed that he was owed £900,000 by F&M under a promissory note issued by F&M to secure consideration due to him from an alleged sale of KPL shares. Eventually, Moshe issued a winding up petition (the "**Petition**") against F&M. The Trustee did not oppose the Petition. On 28 April 2022, the Claimants applied successfully to the Business and Property Courts of England and Wales (Insolvency and Companies List) for permission on a double-derivative basis for the Claimants to oppose the Petition in the name of the Trustee and of F&M, and they obtained an order to this effect. F&M applied on 6 May 2022 for that order to be set aside on its merits and on grounds that the Claimants had been guilty of breaches of their duty of full and frank disclosure.

9. Another relevant dispute related to a claim by Mark against KPL's Swiss subsidiary for arrears of salary (as its director and employee). The subsidiary's defence was handled by Norman (who had control of KPL). The Swiss proceedings were conducted throughout 2022 with judgment on the claim and counterclaim being entered in Mark's favour on 10 February 2023.

10. The Claimants' case is that the falling out between their grandfather Norman and his brother Mark led to Mark using his position as the controlling mind of the Trustee and the corporate director of F&M to undertake various improper actions. The improper actions alleged include: seeking to sell the Trust's shareholding in F&M at an undervalue; seeking to sell one of F&M's subsidiaries to Moshe for £1; and the sale of a London property at an undervalue. They claim that these events led them to instruct solicitors to seek an account of the Trustee's administration of the Trust and further information about a number of issues. When they did not obtain this information, they requested details for service of proceedings with a view to commencing proceedings to remove the Trustee as trustee. They claim that these circumstances were influential in:

    I) a decision made by the Trustee, which the Trustee says was made at the request of Monika, to exclude the Claimants as beneficiaries of the Trust and

    II) the Trustee's decision to accept a nomination by Monika to appoint the Replacement Beneficiaries as beneficiaries.

11. These two decisions are at the centre of Freddie and Minnie's claim. In broad terms, the claim is that the addition of Monika's relations and the exclusion of Freddie and Minnie as beneficiaries constituted frauds on the Trustee's power

and a serious breach of trust by the Trustee, because the actions were outside the scope of the relevant powers; the actions were vitiated by an actual and serious conflict of interests; and/or the actions were taken for the improper purpose of stifling the claims that had been intimated against the Trustee.

12. Accordingly, Freddie and Minnie seek:

    i) declarations that the Trustee's purported exercises of its power of addition and removal are void, alternatively voidable, and an order setting them aside;

    ii) an order removing the Trustee and replacing it with a fit and proper person.

13. The claim did (prior to the notice of discontinuance filed by the Claimants on 22 June 2023 (the "**Notice of Discontinuance**")) also seek relief in respect of Monika's use of her power as Settlor to nominate members of her family as beneficiaries. Following the Notice of Discontinuance, this point is not being pursued by the Claimants, although they still claim that the Trustee was acting improperly in accepting this nomination.

2. PROCEDURAL HISTORY

14. On 21 October 2021 the Claimants made an *ex parte* application to the court for injunctive relief in relation to what was then a proposed claim. Injunctive relief was sought against the Trustee and against F&M. This was heard by Fancourt J on 21 October 2021. He found (on the evidence before him which, of course, included no evidence or argument from any Defendant) that the Claimants had a strong *prima facie* case and on the basis of undertakings given to the court, including an undertaking by the Claimants to serve a claim form as soon as practicable, granted, on an interim basis, the injunctive relief sought against the Trustee.

15. Amongst other things:

    I) the Trustee was required to disclose documentation relating to the exclusion of the Claimants as beneficiaries of the Trust and the nomination of the Replacement Beneficiaries as additional beneficiaries; and

    II) injunctions were put in place restraining the Trustee from exercising any dispositive or other powers under the Deed and restraining the Trustee from removing assets from England and Wales and from dealing with its assets in England and Wales.

16. On 10 November 2021 the Claimants filed a notice with the court amending their original Claim Form (issued on 21 October 2021) to add the Replacement Beneficiaries to the claim. As the original Claim Form had not yet been served, they could do so under CPR 17.1(1) without the consent of the court. I will refer to the claim form as so amended as the "**Amended Claim Form**".

17. On 14 November 2021 Deputy Master Linwood approved a consent order, which was sealed on 15 November 2021, noting the desire of the Claimants to add the Replacement Beneficiaries to the claim, ordering the Trustee to provide details of the last known addresses and email addresses of the Replacement Beneficiaries to allow service of the Amended Claim Form upon them.

18. On 30 November 2021 following a hearing before Bacon J it was ordered that (amongst other things) the orders originally made by Fancourt J would continue until trial or further order, subject to certain variations and upon undertakings having been given by the Trustee and by F&M. An application made by the Trustee for the proceedings to continue under Part 7, rather than Part 8, was adjourned to be heard by the Master.

19. By application dated 26 November 2021 the Claimants applied for permission to serve the Amended Claim Form on the Second to Sixth Defendants out of the jurisdiction in the Czech Republic. Permission was granted by Deputy Master Linwood on 6 December 2021 pursuant to CPR 6.3.6 and Deputy Master Linwood gave various further directions. This order was sealed on 10 December 2021.

20. Although the original Claim Form was amended under CPR 17.1(1) and states that it was so amended on 10 November 2021, it was not sealed until 12 January 2022.

21. The sealing of the Amended Claim Form was the first point at which the Claimants were able to serve the Third to Sixth Defendants. Under the strict time limits as are set out in CPR rule 7.5 (as discussed further below) they were obliged to serve the Amended Claim Form within six months of such date, unless that time period had been extended by the court. I will call this period the "**relevant six months**".

22. After receiving the sealed Amended Claim Form on 12 January 2022, the Claimants took no further formal steps in relation to these proceedings (as regards the Second to Sixth Defendants) until filing the notice to discontinue their claims against the Second to Sixth Defendants on 22 June 2023, recognising that they no longer had a right to pursue claims against these defendants within these proceedings.

23. The Claimants made no attempt to serve the Amended Claim Form and did not apply for the time for service to be extended.

24. This failure of the Claimants has given rise to two applications. The First Defendant has applied for the claim to be struck out on the basis that it is insupportable now that the Claimants are prevented from pursuing it against the Second to Sixth Defendants. The Claimants are asking for permission to serve their Notice of Discontinuance out of the jurisdiction on the Second to Sixth Defendants.

25. The hearing before me was to consider these two matters.

3. THE APPLICATION TO STRIKE-OUT

26. On 20 January 2023, representatives of the First Defendant made an application asking the court to make an order under CPR 3.4(2)(c) that the claim be struck out because of the Claimants' abuse of process in not serving the Claim on the Second to Sixth Defendants and their failure to progress the Claim for over a year.

27. I agreed to hear this matter before hearing argument on the Claimants' application for leave to serve their Notice of Discontinuance out of the jurisdiction, but suggested to Mr Tager, who was presenting this argument on behalf of the First Defendant, that in making his argument on this point, he should address the possibility that I would grant the Claimants' application, so that the Second to Sixth Defendants would be served with the Claimants' Notice of Discontinuance.

28. Mr Tager presented his argument. Whilst he did not break his argument down in this way, I agree with Mr Holden that there were various strands to Mr Tager's argument which needed to be considered separately.

4. THE EFFECT OF CPR RULES 7.5 AND 7.6

29. Mr Tager took me to the White Book at CPR rule 7.5 which dealt with the timing of the service of the claim form. The usual rule, where the claim form is served within the jurisdiction, is that the claimant must undertake service by one of the means set out in CPR 7.5 before midnight on the calendar day four months after the date of issue of the claim form. However this time limit is extended to 6 months where service is to take place outside the jurisdiction.

30. These time limits can be extended by permission of the court under CPR rule 7.6 but the general rule is that an application to extend time must be made within the relevant time period. Where an application is made outside this time period, the court may make such an order only if the court has failed to serve the claim form or the claimant has taken all reasonable steps to comply with CPR rule 7.5 but has been unable to do so.

31. Mr Tager emphasised the strictness of these provisions, as explained by Rix LJ in the Court of Appeal decision in *Aktas v Adepta* [2011] QB 894 at [15]:

> "…where the time for service has not yet passed, the rule provides an open discretion to extend time. Where, however, the time for service has passed, the rule is tightly and strictly drawn: there can be no extension unless either the court or the claimant has been unable to serve the claim form. Therefore, the fact that not only the claim form in question but the cause of action which it reflects may be lost (for reasons of limitation) is no excuse or mitigation. The jurisprudence … demonstrates the strictness with which both CPR r 7.6(2), as a matter of discretion, and CPR r 7.6(3), as a matter of the effect of the rule itself, has been applied. Thus an extension requested within time cannot be granted merely to save against incompetence."

32. Mr Tager took me through, in some detail, what was happening between the parties during the relevant six months. To put the matter shortly, the Claimants and Norman, were busily involved in relation to the Petition, particularly during April, although in Mr Tager's submission, the intensity of that involvement tailed off after April. Throughout much of, but not all of this period, there were negotiations with a view to settling all outstanding issues between Mark, Moshe and Norman, Freddie and Minnie. These negotiations were not specifically addressed at dealing with the current action but various of the compromises being proposed, had they been adopted, were expected to have had that effect, for example by changing the trustee of the Trust to one approved by the Claimants.

33. There is no evidence that during the relevant period the Claimants took all reasonable steps to serve the claim form on the Second to Sixth Defendants (or that the court was responsible for the failure to serve). Quite the opposite, correspondence between the solicitor for the First Defendant and the solicitor for the Claimants demonstrated that the Claimants would have been fully aware of the time limit, and indeed there was some evidence that at one stage Freddie had instructed the solicitors to hold off serving the claim.

34. It is understandable that the Claimants might have wished to avoid the expense of arranging for translation of the claim and of supporting documents into the Czech language (which the Claimant put in total at around £18,000), the other costs of service and the increased costs and complications of dealing with multiple Defendants once they were served and started to respond. However, it is difficult to understand why the Claimant would have deliberately chosen not to take this step at any time between April and 12 July 2022 when the negotiations were in abeyance. (The settlement negotiations remained in abeyance until September.) The Claimants have suggested that this was because the Claimants and Norman were distracted in dealing with the Petition. Mr Tager suggested that this activity relating to the Petition did not take up much time after the end of April, leaving plenty of time for the Claimants to get on with serving the claim. He suggested that the continued failure to do so was deliberate.

35. I found this difficult to believe as it was difficult to understand the basis on which the Claimants could have thought they would be advantaged by failing to serve the claim.

36. Mr Tager put forward the suggestion that the advantage was that the Claimants would save the £18,000 it would cost them to serve the claim, but they could still pretend that the claim was on foot in their negotiations with Mark, Moshe and the Trustee. As evidence of this intention, he points to Mr Kushner's witness statement as showing that:

    I) until October 2022, the Trustee believed that either service on the other Defendants had been effected, or that the Claimants had successfully applied for an extension of time to serve,

II) between 13 November 2022 and 5 January 2023, the Trustee repeatedly sought confirmation from the Claimants' solicitor that the other Defendants had been served but had been given no proper response on this question.

37. The Claimants' lack of candour at this point does them no credit. Nevertheless, it seems unlikely that the Claimants might have thought they would receive some advantage in the litigation from deliberately failing to serve during the period from April to 12 July when negotiations were not proceeding. The cost of £18,000 and avoiding the complication of dealing with the other Defendants, was worth saving when there was a prospect litigation might be avoided, but would hardly have been a decisive factor when it looked like there would be a need to proceed with the litigation, bearing in mind that the Claimants understand the Trust to be holding assets with a value in excess of £10 million.

38. On the other hand, I note that if the Trustee did believe between August and October that the Amended Claim Form had been served on all parties there was no reason for it not to proceed with its application for the proceedings to continue under Part 7, rather than Part 8, and to that extent it must share the blame for the failure to progress the action.

39. Whilst the Claimants almost certainly originally made a deliberate decision to delay serving the notice of claim while negotiations were proceeding, I find it more likely than not that their failing to proceed with serving the claim form (which undoubtedly has had the effect of disadvantaging them in this litigation) or to ask for an extension of time was accidental rather than deliberate.

40. These considerations, however, are not relevant to the question whether they should now be given an extension of time to serve these notices. Whether the Claimants' failure was deliberate or accidental, it is clear that in the absence of any of the excuses referred to in CPR rule 7.6(3), there is now no prospect of the court extending the time for service. This point was accepted by the Claimants. Where the parties differ, however, is as to the effect of this, when taken with their notice of discontinuance against the Second to Sixth Defendants.

5. CAN THE CASE CONTINUE AGAINST THE FIRST DEFENDANT?

41. Being out of time to serve the claim on the Second to Sixth Defendants, there is no doubt that the Claimants cannot now proceed against those Defendants. The Claimants' case, however, is that they can nevertheless proceed against the First Defendant, on the basis that their Notice of Discontinuance does or will discontinue the case against the other Defendants and these Defendants are not necessary parties to the action as modified by the Notice of Discontinuance.

42. Mr Tager takes the point that the Notice of Discontinuance is not effective until it is served on the Defendants as required by CPR rule 38.3(1)(b), but that is not to my mind a relevant point if the court is satisfied that it should give permission for it to be served on the Second to Sixth Defendants.

43. Mr Tager also points out that the certificate at the bottom of the Notice of Discontinuance signed by Mr Garson (the Claimants' solicitor) is plainly untrue. He certified on 22 June 2023 that it had been served on "*every other party to the proceedings*". As a solicitor, Mr Garson should have known better than to sign an untrue certificate.

44. I do not consider, however, that these procedural drawbacks are insurmountable. The point is that the Claimants acknowledge that it is insupportable for them to continue their action against the Second to Sixth Defendants and wish to discontinue their action against those Defendants. If the Claimants are correct that they can nevertheless proceed against the First Defendant, then I consider that the court should accommodate this wish, if possible.

45. Whether this view of the Claimants is correct, to my mind, turns on the question whether the Second to Sixth Defendants are necessary parties to the action having regard to the relief sought by the Claimants. No one has been able to offer a statutory or judicially approved definition of "necessary party" in this context. Mr Tager suggested that it should include anyone whose interests might be prejudiced by the prosecution of the claim, but I think this is too wide, particularly in the trust context given points discussed further below concerning CPR rules 19.10 and 64.4. One can imagine other contexts, such as administrative law proceedings, where this formulation would also be too wide.

46. Whilst the potential for prejudice to a defendant may be one yardstick to judge whether that defendant's participation in an action is necessary, I consider the matter needs to be looked at in the round having regard to all the circumstances including the directness of the prejudice, and whether there are other mechanisms for ensuring that the interests of someone potentially affected in the litigation are taken into account. In my view, the question is to be approached by taking a holistic view of the question whether it would be impossible, improper or unjust for the claim to proceed without the involvement of the putative necessary party.

47. It must be acknowledged, however, that at various points in this action these Defendants have been regarded as necessary to the action:

    I) At the original hearing before Fancourt J, Mr Lewison, representing the Claimants, explained that the Claimants understood that Monika had nominated some beneficiaries but the Claimants did not know who they were and stated that "*They will need to be joined to the trust claim in due course.*" Fancourt J agreed with that proposition.

    II) In the consent order made by Deputy Master Linwood on 14 November 2021 it was recited that the Claimants were desiring to add these parties "*as necessary and proper parties*" to the claim.

48. Mr Holden explained the latter reference deriving from common practice where consent is being sought for leave to serve out of jurisdiction under the general ground set out in paragraph 3 of Practice Direction 6B which allows service out of the jurisdiction with the permission of the court where:

> "A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and—
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

49. Whilst this so-called "gateway" refers to a "necessary **or** proper party" it was, in Mr Holden's experience, routine, when this was translated into orders, to refer to the relevant defendants as a "necessary **and** proper party".

50. Whilst the points raised at [47.] are slightly embarrassing to the Claimants as they now wish to say that these parties are not necessary, I do not think that they can be determinative of the matter or create any estoppel (including any issue estoppel) against the Claimants. I consider that I should decide on its own merits the proposition that it is necessary for the other current Defendants to remain joined into the action for the claim against the Trustee to proceed.

51. The Claimants have, following the hearing, provided a further amended claim form (the "**Re-amended Claim Form**"). This shows on its face amendments made from the Amended Claim Form that was sealed on 12 January 2022 to remove any relief directly sought against the Second to Sixth Claimants, as follows:

> "1. A declaration that the purported exercise of the power of removal is void, alternatively voidable;
> 2. A declaration that the purported exercise of the power of addition ~~and the nomination that prompted~~ is ~~are~~ void, alternatively voidable;
> 3. In the event that one or both purported exercises is or are voidable, an order setting it or them aside;
> 4. An order removing the ~~First~~ Defendant as trustee of the Saffron [*I note that this should say "Fennel"*] Trust and replacing it with a fit and proper person;
> 5. Further or other relief;
> 6. Costs."

52. The Claimants' argument is that these (remaining) remedies are aimed against the Trustee and to reverse wrongful actions taken by the Trustee and as such do not require the participation of any other party.

53. Again there is a procedural irregularity with this point. The Amended Claim Form has, I understand, been served on the First Defendant. Under CPR rule 17.1(1), amendments to the Amended Claim Form will require the permission of the court or the written consent of all of the parties. Once again, however, I do not think that this procedural points should be allowed to derail these proceedings, and I will deal with it in my conclusion.

54. Meanwhile, I will consider the argument whether the Claimants can proceed in their action against the Trustee without also proceeding against the Replacement Beneficiaries and the Second Defendant on the assumption that such irregularities are cured and that the Claimants have properly served a Notice of Discontinuance and have been allowed to amend further the Amended Claim Form with the amendments set out in the Re-amended Claim Form.

55. This question should be considered separately by reference to (i) the Replacement Beneficiaries and (ii) the Second Defendant as the issues are slightly different in each case.

5. ARE THE REPLACEMENT BENEFICIARIES NECESSARY DEFENDANTS?

56. The First Defendant argues that the Replacement Beneficiaries are affected by this claim both in that they may lose their potential to benefit as beneficiaries of the Trust, and/or from their potential benefit from the Trust being diluted through Freddie and Minnie being restored as beneficiaries. Therefore, the First Defendant argues, it is necessary that these persons should be parties to the action in order to be able to defend their interests.

57. The Claimants answer this by saying that, as a matter of law, the only necessary defendant to each of those claims is the Trustee itself. CPR rule 19.10 explicitly provides that:

> "(1) A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').
> (2) Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings."

58. This approach, they say, is also manifest in CPR rule 64.4(1), which provides that:

> "(1) In a claim to which this Section applies, other than an application under section 48 of the Administration of Justice Act 1985 –
> (a) all the trustees must be parties;
> (b) if the claim is made by trustees, any of them who does not consent to being a claimant must be made a defendant; and
> (c) the claimant may make parties to the claim any persons with an interest in or claim against the estate, or an interest under the trust, who it is appropriate to make parties having regard to the nature of the order sought."

59. The policy objective underlying CPR rule19.10 is explained in a note in the White Book at 19.10.1:

> "This rule …enables trustees, executors and administrators in their capacity as such to sue or be sued without their beneficiaries being joined. Sub-rule (2) states that any judgment or order obtained in the proceedings is binding upon beneficiaries who were not added as parties unless the court otherwise orders…
> Rule 19.10 lays down a general rule that trustees are the proper claimants in proceedings against third parties based on causes of action arising in respect of the trust in question. "

60. Mr Tager argued that these provisions were not applicable in the current case because, on the Claimants' own case, the Replacement Beneficiaries are not beneficiaries.

61. However, I did not consider this argument to be one that I could accept. There is no good reason in logic, common sense, practicality or policy to interpret these rules so as not to apply in the current case. As a matter of logic, if the Replacement Beneficiaries were not beneficiaries, then they have no rights to protect in relation to the Trust. If they are beneficiaries, then these provisions apply. As a matter of common sense, if a trustee is ultimately responsible for the decision as to whether someone should become a beneficiary, it is the trustee that should defend that decision – the putative beneficiary has no rights to defend if the trustee's decision was made wrongfully. As a matter of practicality, it is difficult to see what further arguments or evidence that the beneficiaries could bring in such circumstances where the matter turned on the motives and propriety of the trustee's decision.

62. There are clear policy objectives behind these rules. The trustee in question (who has access to an indemnity from the trust fund) is the necessary party to actions against the trust in question. A requirement for a claimant also to join in beneficiaries, would complicate the action and also potentially make beneficiaries directly liable for costs.

63. I agree, therefore, with the Claimants that the Replacement Beneficiaries are not necessary parties to the Claimants' claims against the Trustee. It would not be impossible or improper or unjust for the claim to proceed without their involvement. However, because these are trust proceedings, it would be permissible for them to be joined as defendants to the proceedings. In other words, they are proper parties to an action against the Trustee where their interests or putative interests might be affected but not necessary parties.

7. IS THE SECOND DEFENDANT A NECESSARY DEFENDANT?

64. The position is less clear in relation to the Second Defendant, Monika, as she is not a beneficiary: she is the Settlor.

65. Under the Trust Deed relating to the Trust, the Settlor has rights, privileges or powers:

I) to nominate new beneficiaries who would become beneficiaries of the Trust if this nomination is accepted in writing by the Trustee; and

II) to appoint new trustees: the power of appointing trustees is exercisable by the Settlor during her life and by will.

66. The First Defendant argues that the Second Defendant is affected by this claim, even in its amended form as set out in the Re-Amended Claim Form. This is because the claim attempts to render void her exercise of her right, privilege or power as Settlor to nominate new beneficiaries and subverts her right to be involved in the selection of a new Trustee. I will refer to each such right, privilege or power as a "**Settlor's Interest**"). These direct attacks on her Settlor's Interests may make her a necessary party to the action.

67. As to the first point, in my view the claim as put in the Re-amended Claim Form now removes the previous attack on her nomination of new beneficiaries as itself being void (or voidable), and so does not directly impugn her Settlor's Interests in this regard. The claim will only succeed if the Claimants are successful in showing that the Trustee's acceptance of that nomination was so improper as to render void (or voidable) this acceptance. This can hardly be considered an attack on the Settlor's Interests.

68. As to the second point, it is undoubtedly true that if the court were to intervene to appoint a new trustee, this would override the Settlor's Interest in the appointment of a trustee.

69. The Claimants argue in this regard that the court has always had a broad inherent jurisdiction to replace trustees where it considers that there has been wrongdoing on behalf of trustee. That jurisdiction is not limited by the express power of appointment given to the Settlor by the Trust deed. In support of this proposition, Mr Holden cited *Re C Foundation* [2011] JRC 231, in which the Royal Court of Jersey explicitly rejected that contention in respect of that court's equivalent supervisory jurisdiction over trusts.

70. I do not think there is any doubt that the court has inherent power in appropriate cases to replace a trustee. This applies even where some other person such as a protector or a settlor has a right, power or privilege to nominate a new trustee under the relevant trust deed. However that is not the whole question here. There remains the question whether it would be improper for the court to make use of its power to impose a new trustee against the wishes of someone who had a right to appoint the new trustee without hearing from the holder of that right. That question did not arise in *Re C Foundation*. Whilst the trust deed in that case made provision for a protector to have rights to nominate a new trustee, there was no protector in place at that time who could have been a party to that action and so the court was obliged to make its determination without the participation of such a party.

71. If the answer to this remaining question is "no", then a person who does have such a right is arguably a necessary party to the action.

72. I have considered an argument that the provisions quoted above in CPR rules 19.10 and 64.4(1) apply here also. It is just possible to construe the reference in CPR rule 19.10 to persons who have a "beneficial interest" to include those who

benefit from a right, power or privilege relating to the administration of the trust, such as a protector or a settlor. However, the term "beneficial interest" is a term of art when applying to trusts. I do not think the framers of CPR rule 19.10 would have considered it to be read in this way. CPR rule 64.4(1) is drafted more broadly, referring to an "interest under the trust", but I consider that the draughtsman still had in mind there someone with a beneficial interest in the trust, not someone with rights of appointment. These provisions, therefore, do not assist the Claimants as against the Second Defendant in the same way as they do against the Replacement Beneficiaries.

73. As I have mentioned, there is a policy underlying these provisions that the beneficiaries are not a necessary party in relation to a claim relating to a trust; the only necessary party is the trustee. It may be argued that the same policy should apply where the question relates to the rights, privileges or powers of a settlor or a protector, but I have not been taken to any example of a case where this matter has been found, and I fear it may be judicial overreach for me to impose such a policy outside the terms where it clearly applies.

74. In my view, therefore, there is nothing to dislodge the natural conclusion that, as the Second Defendant will be affected by the claim if it proceeds in relation to her Settlor's Interest to decide who should be trustee, as such, she should be regarded as a necessary party to the claim if it is to continue in relation to this element of the relief sought.

75. To conclude on this question:

I) I do not think that the Replacement Beneficiaries are necessary parties in the sense I have explained above.

II) I do not think that the case as set out in the Re-amended Claim Form involves any vitiation of the Second Defendant's Settlor's Interest as regards her nomination of new beneficiaries and therefore she is not a necessary party on these grounds.

III) However, I do consider that the relief claimed in relation to the appointment of a new trustee does cut across her Settlor's Interest as regards the appointment of a new trustee and as such makes her a necessary party if this claim is to be maintained. I will discuss further below the consequences of this.

8. ABUSE OF PROCESS

76. Another strand of the First Defendant's argument was that the Claimants' conduct, particularly in not serving the claim on the Second to Sixth Defendants amounted to an abuse of process, of itself warranting the dismissal of the claim. The effect of this failure to serve has been to keep the proceedings in limbo for over a year. The First Defendant argues that this is unacceptable, particularly where it is subject to injunctions over this period.

77. This is said by the First Defendant to amount to "warehousing" of the claim which is a particular form of abuse of process, that applies where a claimant is deliberately sitting on a claim which he has no intention of prosecuting but I think the point should be considered with or without this epithet in mind.

78. The First Defendant refers the court to *Asturion Foundation v Alibrahim* 1 WLR 2767 and Arnold LJ's analysis of the authorities from [47], where he states:

> "... the starting point is that it is well established that mere delay in pursuing a claim, however inordinate and inexcusable, does not without more constitute an abuse of process: see *Iceberg Limited v Winegardner* [2009] UKPC 24 at [7]."

79. The First Defendant enumerates four factors in this case which it says satisfy the "*without more*" requirement:

I) The Claimants' decision not to serve the Amended Claim Form on the Second to Sixth Defendants during the relevant six months and not to apply for an extension of time during or after the relevant period for the service of the Amended Claim Form.

II) The breach of the duty to prosecute the claim diligently, after obtaining an interlocutory injunction – and here the First Defendant refers to the decision in *Havering London Borough Council v Persons Unknown [2021]* 4 WLR 135 per Nicklin J [86]-[93].

III) the drafting of a false certificate of service and the purported service of Notice of Discontinuance on the First Defendant (without the Court's prior permission)

IV) The genuine explanation for the Claimants' decision not to serve the Amended Claim Form during the relevant period on or before 12 July 2022 or to apply for an extension of time. I take this to be a reference to the First Defendant's suspicion that this was a deliberate tactic designed to obtain an advantage.

80. As regards points (i) and (iv) I have already stated my finding that the failure to serve the Amended Claim Form within the relevant six months should be regarded as a mistake rather than any deliberate action by the Claimants, and as such, I do not think that they aggravate the delay.

81. As regards point (iii), the inclusion in a Notice of Discontinuance of a false certificate of service, that was wrong: Mr Garson should have qualified the statement that he made and, as he could not complete a Notice of Discontinuance without obtaining the court's permission to serve out, and could not present a Re-amended Claim Form without the court's permission, he should have taken those steps first. However, I can understand that the steps to bring about a discontinuance may not have been clear in these special circumstances, and that having been ambushed with an application for striking out with no prior warning the Claimants may have acted precipitously without proper

consideration of what the due process would be in these circumstances. I do not see this issue as being a sufficiently aggravating factor to elevate the delay into an abuse of process.

82. As regards point (ii), I agree that the fact that injunctions were in place potentially compounds the seriousness of the delay.

83. The First Defendant argues that the Claimants' delays are compounded by the fact that under the terms of the orders obtained from Fancourt and Bacon JJ, they were obliged to get on with the prosecution of their claim.

84. The precise terms of these orders and whether there was any breach of an undertaking was not discussed during the hearing and is not dealt with in the skeleton arguments. However, I note that under the original order made by Fancourt J, the Claimants were obliged to issue and serve a claim form "*as soon as practicable*". They were specifically required to serve the claim form and certain other documents to the respondents to the original application for injunctive relief, that is, the Trustee and F&M. I believe there is no complaint about their lack of expedition in that regard. As far as I can see, this undertaking was not varied when the orders were extended by Bacon J or when the order of Deputy Master Linwood was made.

85. The Claimants can be criticised for taking between 27 October 2021 and 12 January 2022 to get their claim form sealed, although there was some reasonable delay in that they were looking to amend the claim form with details of the Replacement Beneficiaries, and the Amended Claim Form was not finalised until 10 November 2021. Nevertheless the delay from then until 12 January 2022 to get this sealed was unwarranted.

86. It is arguable whether this conduct amounted to a breach of the undertakings given to the court but this was not argued in detail before me, and I will not make a finding on this. Nevertheless, I accept the thrust of the First Defendant's argument that the Claimants have not met the usual expectations of a claimant who is benefiting from injunctions to pursue its case expeditiously. I do not consider however that this conduct was so egregious to warrant striking out their claim entirely.

87. I have already discussed, to some extent, above the reasons given by the Claimants for delay in serving the claim form on the Second to Sixth Defendants during the relevant period. Broadly the Claimants say that settlement negotiations were being actively pursued by the parties between December 2021 and April 2022 (resuming again between September 2022 and January 2023) and they delayed doing this in the hopes of reaching a settlement. From about May when a settlement seemed unlikely, they were distracted by dealing with emerging events in relation to the Petition. Between April 2022 and mid-August 2022 the Claimants' overwhelming focus was on mounting an emergency response to oppose the Petition on a derivative basis and even once the work on dealing with this had subsided took their eyes off the ball.

88. As I have concluded above, this is no excuse that would allow the court to consider extending the time for service, however neither in my view does this level of delay, even paying full regard to the fact that injunctions were in place, amount to an abuse of process. Neither was it "warehousing", which carries with it the connotation that they had no genuine interest in pursuing the claim but were keeping it on foot, without prosecuting it, in pursuit of some other illegitimate objective.

89. Whilst the Trustee's case is that after April 2022, the Claimant had less to do in relation to the Petition, having been taken on a whistle-stop tour by Mr Holden of what events were happening during this period, I accept the Claimants' argument that, in light of the Claimants' active participation in the Petition proceedings, and the close linkage between the Petition proceedings (which if left unchallenged could have led to the winding up of the Trust's principal asset, and so amounted to an existential threat to the Trust) and this claim, the court can conclude that there can be no doubt as to the Claimants' subjective intention to progress this litigation. It is understandable that during most of the relevant period the Claimants' focus was on defending the Petition proceedings.

90. Insofar as any delay was occasioned by the Claimants' pursuit of a settlement, this also militates against a finding of an abuse of process on their part, even if it does not explain the failure to serve or to seek an extension of time.

91. Taking everything into account, I do not see that the elements of the delay that were not explained by the fact that settlement negotiations were in place, were such as to amount to warehousing or an abuse of process meriting striking out the action rather than other interventions to get the process back on track. I accept that it would be wrong to characterise the Claimants' conduct as an intent to 'warehouse' their claim and that it would be wrong to conclude from their actions that the Claimants were not pursuing/would not pursue their claims against the Trustee if they were unable to reach an overall negotiated settlement.

92. I can, however, understand why the First Defendant may have thought that the Claimants' conduct from the middle of July 2022 amounted to an abuse of process, in that it has been the First Defendant's case that from this point the Claimants were no longer able to pursue any claim at all since they were no longer able to serve any claim on the Replacement Beneficiaries and these Defendants were necessary parties to the action. However, I have found otherwise, except to a small extent which, as I set out below, I believe to be manageable without dismissing the entirety of the claim.

93. Furthermore, even to the extent that there was anything in the Claimants' actions that could be considered a form of abuse of process or a form of warehousing, I agree that this action does not warrant the striking out of the entire action against the Claimants.

94. Mr Holden drew my attention to the recent review by Eyre J of the authorities relating to abuse of process by way of warehousing in *Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd and another* [2023] EWHC 166 (TCC). At [14]-[16] in that

judgment he helpfully distilled, amongst others, the following propositions from the authorities:

I) It may be an abuse of process for the claimant to 'warehouse' a claim by taking a decision not to pursue it for a substantial period of time, even if the claimant subsequently decides to pursue it:

"a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question".

II) But mere delay in pursuing a claim, however inordinate and inexcusable, does not, without more, constitute an abuse of process: as was said by Arnold LJ in *Asturion Foundation v Alibrahim* [2020] EWCA (Civ) 32:

III) In deciding whether to strike out a claim for 'warehousing' as an abuse of the court's process, it is necessary for the court to undertake a two-stage analysis, considering first whether the conduct is an abuse of process and secondly whether, if it is, it is proportionate to strike out on that basis.

IV) The striking out of a claim is a remedy of last resort: as was held in *Quaradeghini v Mishcon de Reya* [2019] EWHC 3523:

"under the present procedural regime, it will be a relatively rare case in which the court will strike out proceedings for abuse of process based on delay in the first instance. The much more likely remedy, is relief of a lesser form proportionate to the default. Cases of striking out are more likely to follow only after an "unless" order has been sought and obtained and breached. Although "warehousing" of claims or the bringing of proceedings without an intention to prosecute will constitute an abuse of process that may warrant the striking out of a claim, it seems to me likely that in many cases the court will wish to test the lack of any intention to prosecute by, for example, making a peremptory order or imposing conditions rather than proceeding to rely on inferences drawn from an absence of activity."

95. I do not find that the Claimants' actions constitute 'warehousing' or any other default that is serious enough to be labelled an abuse of court process. Even if they could be, I think it is clear that the proper course that should be taken is to impose conditions on the Claimants which will have the effect of recommencing progress in the action and of otherwise dealing, as best can be, with consequences of the delay.

96. In my view the correct approach in this case is to follow the suggestion of Judge Pearce in *Ali Fozan Alfozan v Quastel Midgen LLP* [2022] EWHC 66 (Comm) at [54]) and to consider

> "Whether the creative use of other case management powers could provide an adequate test of the Claimant's true willingness to mitigate."

9. NOTICE OF DISCONTINUANCE

97. In fact, the Claimants themselves have already attempted to take steps to remedy the position caused by delay. This is through their having filed the Notice of Discontinuance of the claim so far as it pertains to the parties on whom it has failed to serve a notice of claim. This follows the indication given in *Aktas v Adepta* (at [18]) that this is the appropriate course of action where time for service of the claim form has expired.

98. The First Defendant resists the Claimants' application to be allowed to serve its Notice of Discontinuance out of the jurisdiction. It has advanced various grounds for this.

99. One such ground is the suggestion that the Claimants intend to continue a claim against the Replacement Beneficiaries in that the Claimants' case is that the Replacement Beneficiaries have not been duly appointed as additional beneficiaries of the trust. I agree with the Claimants' analysis on this point that this is a claim against the Trustee and not against the Replacement Beneficiaries. This is apparent from my analysis at paragraphs [56.] to [63.] above.

100. However, as will also be apparent from my analysis at [64.] to [74.] above I consider that (even if one assumes that the claim form has been amended in the manner set out in the Re-amended Claim Form) the Claimants' claim to remove and replace the Trustee challenges the Second Defendant's power of appointing new trustees, and as such renders the Second Defendant a necessary participant in this action. I consider that the discontinuance against the Second Defendant is not compatible with the relief requested by the Claimants of appointing a new trustee, for reasons I have given above. As a result, on the basis of the Re-amended Claim Form, the Second Defendant remains a necessary party and the Claimants' inability to serve on her would be grounds for striking out the claim.

101. This can be remedied, however, if the Claimants further amend the Claim Form to delete that head of claim entirely or perhaps instead to amend its claim in a way that respects the Settlor's Interest as to the choice of future trustees (for example by the court, if it sees fit, ordering the Trustee to retire as such, but leaving the choice of the new trustee to the Second Defendant). The court would need to receive an application to amend the Amended Claim form in accordance with CPR rule 17.1 and hear further argument on that point.

102. The First Defendant has also raised an objection to discontinuance based on CPR rule 38.2. This provides, insofar as relevant, that:

> "(1) At any time, a claimant may discontinue all or part of a claim at any time.
> (2) However –

> (a) a claimant must obtain the permission of the court if they wish to discontinue all or part of a claim in relation to which –
> (i) the court has granted an interim injunction; or
> (ii) any party has given an undertaking to the court..."

103. There have been interim injunctions in this case. The First Defendant argues that this is a reason for not accepting the Notice of Discontinuance.

104. The White Book guidance at [38.2.2] explains that permission pursuant to CPR rule 38.2(a)(i) is only required where discontinuance is sought in relation to a party against whom an interim injunction has been obtained, and does not apply in relation to other parties to the action against whom injunctive relief has not been granted. No injunction has been granted against the Second to Sixth Defendants, and I agree with the Claimants that they are therefore entitled to discontinue the claim against these Defendants.

105. Subject to the point made above concerning the need for permission to amend the Amended Claim Form and to do so in a way that does not ask the court to override the Settlor's Interest as regards the appointment of trustees, I see no objection to the Notice of Discontinuance being served on the Defendants and consider that the court should assist this.

106. CPR rule 38.3 provides that in order to discontinue a claimant must (a) file a notice of discontinuance and (b) serve a copy of it on every other party to the proceedings. Pursuant to CPR r.38.5(1), discontinuance against any defendant takes effect on the date when notice of discontinuance is served on them.

107. Permission is required to serve documents out of the jurisdiction except under the two exceptions listed in CPR r.6.38 (which do not apply here). The court however retains jurisdiction to permit service of a document other than the claim form out of the jurisdiction: CPR r.6.37(5)(b)(ii) provides that:

> "[w]here the court gives permission to serve a claim form out of the jurisdiction… it may… give permission for other documents in the proceedings to be served out of the jurisdiction."

108. The court also has a general power to dispense with service of a document to be served in the proceedings pursuant to CPR r.6.28(1). This is an unfettered discretion, see White Book guidance [6.28.1].

109. The Claimants have requested that the court either (a) grant permission to serve the Notice of Discontinuance out of the jurisdiction; or (b) dispense with the need for service and direct that the discontinuance takes effect from the date of the court's order.

110. I consider that, subject to the court receiving an appropriate application to amend the Amended Claim Form, and if the court sees fit granting such application, the court should assist in allowing the Notice of Continuance to be served out of the jurisdiction. This is a more just and proportionate solution to

the predicament that the Claimants find themselves in than striking out the action.

111. If the Claimants are not willing to make the amendment that I suggest to the Re-amended Claim Form, then it is difficult to see how the action could continue, and I consider that the court would then need to proceed to a striking out.

10. CONCLUSION AND NEXT STEPS

112. I have concluded that the Claimants should be allowed to proceed with their claim provided that they amend their claim and serve Notices of Discontinuance on the Second to Sixth Defendants within a reasonable time frame to be fixed in an order of the court. This depends, however, on the Claimants obtaining the court's permission for a further amendment to the claim form that would avoid petitioning the court to interfere with the Second Defendant's Settlor's Interest in relation to the appointment of a replacement trustee, without her being represented.

113. I consider that the Second to Sixth Defendants are proper Defendants, even if they are not necessary Defendants in the sense I have discussed above. Accordingly, I consider that these Defendants should be given an opportunity, if they wish, to join in the action at their own request. Similarly the Trustee, may have its own reasons to wish to join in these Defendants, and it should have an opportunity to do so. I consider therefore that the court should order that at the same time as serving Notices of Discontinuance on the Replacement Beneficiaries the Claimants should provide them with:

I) A copy of the claim form in its finally re-amended form;

II) an explanation of the history of the action so far (that is, that they were originally joined as parties but as a result of the Claimants' failure to serve a notice of claim on them the Claimant has been obliged to discontinue its action against them);

III) explanation that they have the right, but not an obligation to become parties to the action if they wish;

IV) advice that they should take legal advice; and

V) information concerning their rights to costs as the court will order below.

114. The Claimants should also be required (either by way of an order or by way of a separate undertaking to the court) not to obstruct any such application by any of these Defendants to rejoin the action.

115. Furthermore, in recognition of the failures of the Claimants in serving notice on them, the Claimants should pay on an indemnity basis any costs that the Second to Sixth Defendants may already have expended in relation to this claim (to be agreed or in the absence of agreement assessed by the court) and should also pay the reasonable and necessary costs incurred by the Second to Sixth

Defendants in making application to rejoin the action should they choose to do so, and that this information also should be given to those Defendants.

116. Otherwise as to costs, the court should hear further from the parties concerning liability to costs, but I note that two points may be salient in the court's consideration. These are (i) that the Claimants would (in the circumstances described above) have successfully resisted the striking out application and have obtained leave to serve notice of discontinuation out of the jurisdiction but (ii) this hearing has been caused by the Claimants' conduct in failing to serve notice of claim, for which they have no excuse and which may be regarded as conduct out of the norm.

117. An order on the terms set out above would apply if the Claimants are willing to apply to amend their Amended Claim Form as required above and the court grants that application. If the Claimants are not so willing, then the present action would need to be struck out as it would be impossible to proceed without the participation of a party that I have found to be a necessary party in such circumstances and it would not be possible for the Claimants to serve notice on that party. In that case, the court should make an appropriate order for costs reflecting the fact that the First Defendant will have been successful in its case for striking out the claim.

118. In this event, I understand that the Claimants (not being out of time) consider, following *Aktas v Adepta* [2011] QB 894, and in particular the judgment of Rix LJ at [71] – [72] and [90] – [92] that they would not be estopped from starting anew with their claim and so would be able to renew their claim (that cause of action not being subject to any expired limitation period) and that such a renewal would not be an abuse of process *per se*. These points were not fully argued before me and I will not express an opinion on them.

119. In either case, I consider that a further hearing will be needed to deal with the consequences of this judgment, I suggest that it should be heard by me if available. At that hearing the court shall:

I) consider the Claimants' application to amend their claim form, if such an application is made;

II) approve a final order; and,

III) if the Claimants have chosen to follow the procedure set out in paragraphs [112.] to [116.], give directions for the next steps in the action and approve documentation to be sent to the Second to Sixth Defendants;

IV) deal with costs and any other consequential matters. Such consequential matters may include any application made to this court for permission to appeal.

120. I direct for the purposes of CPR rule 52.12(2)(a) that the time for any party to seek permission to appeal from the Court of Appeal (if such permission shall be sought and denied by this court) shall be 21 days after the date of that hearing.