COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2018/CLE/gen/00474

IN THE MATTER OF THE WINTER TRUST, THE SUMMER TRUST AND SPRING TRUST

BETWEEN

MATTEO VOLPI

Plaintiff

AND

(1) DELANSON SERVICES LIMITED
(2) GABRIELE VOLPI

Defendants

Before Hon. Mr. Justice Ian R. Winder

Appearances: Fenner Moran QC with Leif Farquharson and Michaela Ellis for the plaintiff

Brian Simms QC with Marco Turnquest for the first defendant

Stephen Smith QC with Wynsome Carey for the second defendant

9, 11, and 16 July 2018

JUDGMENT

WINDER J

These are the applications of Delanson Services Limited (Delanson) and Gabriele Volpi (Gabriele) for the setting aside of an injunction and or service of the Writ of Summons in this action and alternatively for stay of proceedings.

[1.] Gabriele is an Italian born businessman who established a substantial business enterprise in Nigeria and eventually became a citizen of Nigeria. Gabriele's business involved the provision of services to the Oil and Gas Industry since the 1980's. The Plaintiff, Matteo Volpi (Matteo) is one of Gabriele's two children. At some point Gabriele had sought to integrate both of his children into his businesses. Matteo says that he worked in the business for the past two decades.

[2.] In October 2006 Gabriele settled the Winter and Summer Trust and appointed Delanson, then a Panamanian Company, as Trustee for both trusts. In March 2012 Gabriele settled the Spring Trust and again appointed Delanson, which at that time had re-domiciled to The Bahamas. The objects of discretionary powers in the three trusts included Gabriele his children and descendants. The three trusts are settled in remarkable similar terms and for convenience, in this ruling, are collectively referred to as "the Trusts".

[3.] Matteo says that was aware of the establishment of trusts for the benefit of the family in the late 2000's and was unaware of what was held in the Trusts but assumed it held all of Gabriele's assets, since it was established for tax purposes. Matteo says that he became aware of the Trusts in 2013 and says that all of Gabriele's assets had been transferred into them. Matteo estimates that the Trusts held several billion dollars' worth of assets, including Orlean Invest Holding Group (the group through which the Nigerian businesses were structured), other significant business holdings, real estate and yachts. Notwithstanding the Trusts, Gabriele nonetheless continued to control the

companies. All the relevant business decisions were made by Gabrielle who was treated as the majority shareholder in the businesses.

[4.] Delanson had been first incorporated as a Panamanian company on 27 October 2006 under the name Delanson Service Inc. The name was then changed to Delanson Services PTC Limited and was re-domiciled to The Bahamas on 29 September 2010. Delanson, it is said for tax advantages, re-domiciled, a second time, to Auckland, New Zealand in August 2016 where its offices are located. The corporate name was again changed on 16 January 2017 to its present name, Delanson Services Limited.

[5.] Gabriele says that, in March 2016, Matteo fell out with him and left the businesses following differences of opinion as to the future direction of the businesses. Matteo says that the falling out took place in mid-2017 around the same time as the breakdown of his parent's marriage. Notwithstanding Matteo's leaving the companies, Gabriele continued to financially support him. Matteo continued to receive a US$35,000 a month salary; he received lump sum payments totaling US$700,000 (in July and August 2016); and received US$50,000 per month from July 2016 onwards.

[6.] On or about 6 October 2016 Delanson made a distribution of all (or the majority) of the assets of the Trust to Gabriele. Delanson subsequently executed a Termination of the Trusts on 17 January 2017.

[7.] Matteo's complaint in this action, which was brought by specially endorsed Writ of Summons on 25 April 2018, was that Delanson had, in breach of trust, improperly distributed the entirety of the assets of the Winter Trust, the Summer Trust and the Spring Trust to Gabriele. He asserts that Gabriele was liable to account for the assets received from the distribution. Matteo's extensive Statement of Claim seeks the following relief:

(1) Declarations that the purported distributions ("the Distributions") on 6 October 2016 of all (or the majority) of the assets of the Trusts by

Delanson to Gabriele was a breach of trust or a fraud on the power and was in any event void;

(2) An order setting aside the Distributions and subsequent Termination of the Trusts dated 17 January 2017 and executed by Delanson;

(3) An order that, insofar as Gabriele is not able to fully reconstitute the Trusts, that he pay damages or equitable compensation to the trusts for knowingly receiving trust property and/or dishonestly assisting in a breach of trust;

(4) An order requiring Delanson to account for the whereabouts of the assets of the Trusts

(5) Replacement of Delanson as trustee of the Trusts by a suitably qualified, independent professional trustee.

[8.] On 3 May 2018, upon the application of Matteo, I granted a worldwide freezing injunction against Delanson and Gabriele in respect of certain trust assets which had purportedly been distributed by Delanson to Gabrielle. The Order provided, inter alia, for:

(a) A worldwide proprietary freezing order preventing Gabriele, Delanson or any third party notified of the order from dealing with or disposing of Trusts' assets;

(b) An Order that Delanson and Gabriele give disclosure of the details, value, current location and holders(s) of all of Trusts assets, including details of any transfers of the Trusts' assets; and

(c) An Order permitting Matteo to serve Gabriele with the Freezing Order and the Writ of Summons (along with other documents) by substituted means, including by email.

[9.] Gabriele applied by Summons dated 12 June 2018, for:

(a) Declarations that the Courts of The Bahamas have no jurisdiction to hear the claims and that Matteo has no standing to bring them

(b) Orders:

(i) setting aside the service of the Writ of Summons on him;

(ii) Staying the proceedings;

(iii) Discharging the injunction;

(c) Alternatively, variation of the terms of the injunction.

[10.] Delanson applied by Summons also dated 12 June 2018, for Orders:

(a) Setting aside the Writ of Summons;

(b) Staying the proceedings.

Issues

[11.] The three principal issues which will be determinative of this application are the following:

a) Whether this court has jurisdiction by virtue of section 79A of the Trustee Act 1998 (as amended).

b) Whether the matter ought to proceed to arbitration and therefore this action stayed.

c) Whether the terms of the Trusts provide an exclusive jurisdiction clause in favor of New Zealand and therefore this action ought to be stayed.

Jurisdiction and Section 79A of the Trustee Act

[12.] The central attack of both of the defendants is the question of jurisdiction.

[13.] At the ex patre hearing, and during the course of this application, Matteo asserted that, as the Trust is governed by Bahamian law, the Bahamian Court plainly has jurisdiction in accordance with the provisions of section 79A of the Trustee Act 1998 (as amended). Section 79A provides:-

> 1. The Court has jurisdiction to hear and determine any claim concerning a trust where –
>   a) the governing law of the trust is the law of The Bahamas;
>   b) a trustee of the trust is ordinary resident incorporated or registered in The Bahamas;
>   c) any of the trust property is situate in The Bahamas (but only in respect of that property);
>   d) the administration of the trust is carried on in The Bahamas;

e) the Court is otherwise the natural forum for the litigation; or

f) the trust instrument confers jurisdiction (but only to the extent of the jurisdiction so conferred).

2. Subsection (1) shall apply

a) to claims against persons whether within or outside the territorial jurisdiction of the Court; and

b) in addition to any other circumstance in which the Court has jurisdiction.

3. In this section, "claim" includes any application or other reference that may be made to the Court under this Act, the Purpose Trust Act and the Perpetuities Act.

[14.] It is common ground that if Section 79A 1(a) applies, the court has jurisdiction and no leave for service out of the jurisdiction is required pursuant to Order 11 rule 1(2) of the Rules of the Supreme Court. Order 11 rule 1(2) provides:

> (2) Service of notice of a writ in any place out of the jurisdiction, is permissible without the leave of the Court if every claim made in the action begun by the writ is one which by virtue of an enactment the Supreme Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.

[15.] Matteo's case is that this is a claim concerning a trust and that the governing law of the trust is the law of The Bahamas. He says that clauses 1 and 26 of the Trust Deed makes it clear that the Trust are governed by Bahamian law. He says that whilst this may be amended under clause 26 there is no suggestion that any such amendment took place. Clause 1 of the Trust provides:

> 1. ESTABLISHMENT, DENOMINATION, IRREVOCABILITY
>
> On this day, 28 October 2006 Mr Gabriele VOLPI, born on 28 June 1943
>
> ESTABLISHES

an irrevocable Trust named "THE SUMMER TRUST", governed by the laws of the Commonwealth of The Bahamas, such as *The Trust (Choice of Governing Law) Act 1989, and The Trustee Act 1998*, as subsequently amended.

In this deed, the words "the Settlor" will refer exclusively to the aforementioned person. The term "Trust" refers to this specific deed of Trust.

The Trust will be effective from the date on which this deed is signed.

Clause 26 of the Trusts provides:

26. GOVERNING LAW

[1] The Trust is governed by the Law of the Island of the Bahamas, known as "*The Trust (Choice of Governing Law) Act 1989" and "The Trustee Act 1998"*, as subsequently amended and supplemented.

[2] The Trustee will have the right to modify the governing law of the Trust if this is allowed by the governing law.

[3] Any dispute relating to the validity of the Trust will be decided by the above Governing law.

[16.] Delanson says, inter alia, that the Courts of The Bahamas do not have jurisdiction under section 79A or Order 11 r 1(2) or otherwise, because the governing law of the Trusts is New Zealand law and no other factors connect the Trust to this jurisdiction.

[17.] Gabriele says that, contrary to the submissions made by Matteo at the *ex parte* hearing, section 79A does not confer jurisdiction on the Bahamian courts. They say that this is because the governing law of the Trusts is New Zealand law and that Matteo did not identify any other basis on which the Bahamian courts should have jurisdiction. Gabriele also contends that the claim against him is not a claim "concerning a trust".

[18.] The defendants contend that the law of New Zealand is the governing law because:

(1) Delanson, which began it corporate existence as a Panamanian company and subsequently a Bahamian company was re-domiciled as a New Zealand company in August 2016. By Clause 3 of the Trust Deeds, the registered office of the Trust is the registered office of the trustee, viz., Auckland, New Zealand.

(2) When each of the Winter and Summer Trusts was settled in 2006, the governing law was stated to be that of The Bahamas (see clauses 1 and 26) and this was so even though Delanson was a Panamanian company. However, when the registered office of the trustee was changed, the governing law of the Trusts changed with it.

(3) Clause 27 ties the governing law of the trust to the place of the registered office of the trust. That would be consistent with clause 12, which provides that if there are no trustees in place "*the Court having jurisdiction over the place where the Trust has its registered office will be responsible for appointing a trustee who will then extinguish the trust.*"

(4) There are good reasons for the governing law of the Trusts to be the same as the law at the place of the Trusts' registered office, such as the avoidance of dépeçage – where the trust is governed by more than one system of law – is not to be lightly inferred, and the courts should seek an interpretation by which the trust is governed by a single law.

(5) Whilst the Trust Deeds envisaged the possibility that the law of the place of the registered office of the Trusts may be different from the law governing the Trusts themselves, that is explicable on the basis that, at least when the Trusts were initially established, there was a difference between the default governing law (Bahamas) and the law applicable at the office of the Trustee (Panama).

(6) The fact that Bahamian law governed the trusts at the outset in circumstances in which Delanson was a Panamanian company suggests that the seat of the trustee and the governing law are not inextricably linked. However, this does not follow as the draftsman

chose Bahamian law as the original law to govern the trusts – it was a default system of law that would apply (sensibly, given that Panama is a civil law jurisdiction), but it would be displaced if the trustee moved elsewhere.

[19.] Clause 27, although separately entitled "Arbitration", it is clearly to be read in conjunction with Clause 26. Clause 27 reads:

27. ARBITRATION CLAUSE

> [1] "Any other dispute relating to the establishment or effects of the Trust, or between the Settlor and Trustee or between Protectors, or between the parties to the Trust, will have to be submitted to an arbitration board for assessment, with this board consisting of three members, one appointed by each party and the third as President of the Board by the two others. The Board will decide according to a standard procedure within 180 days.
>
> [2] Any dispute concerning rights or ownership in other Countries around the world, will be dealt with on a case-by-case basis, and regulated in consideration of International Agreements, where applicable.
>
> [3] Any proceedings that aim to have Trustees or Protectors appointed by the court, or directives be given to the Trustee, must be brought exclusively under the law of the Bahamas as long as the registered office of the trust is located there.
>
> [4] For any matters that cannot be brought to arbitration, the Court having exclusive jurisdiction is the court at the registered office of the Trust, currently the Court of Appeal of the Commonwealth of The Bahamas."

[20.] Germaine to the defendants' position is a construction which interprets Clause 27 as a governing law clause. It would seem that the appropriate starting point is the determination of the term "registered office of the trust". This term is referred to in clauses 1, 3, 12, and 27 of the Trusts. It is an important term utilized in the Trusts as it is often determinative of appropriate law or legal system for the Trusts to look to make decisions. The term *registered office of the trust* is not a term of art in The Bahamas and none of the parties before me have been able to identify its usage elsewhere as a term of art. Clause 3 of the Trusts provide that:

3. **REGISTERED AND ADMINISTRATIVE OFFICES**

> The registered office and administrative headquarters of the Trust are established at the registered office of the Trustee. This seat may also be changed subsequently at the Trustee's discretion in line with its own requirements, and may also be transferred at the Trustee's discretion. All documents and financial accounts of the Trust must be kept on file at the offices specified above.

Clause 3 specifically declares on its face that the registered office of the Trust is established at the registered office of the Trustee. The confusion is created because subsequent clauses (27[3]) also declared the registered office to be located in The Bahamas when factually at that time the Trustee's registered officer was located in Panama when initial trusts were settled in 2006. This confusion is easily resolved when we consider that although the registered office and administrative seat of the Trustee was physically in Panama, Panama being a Civil Law jurisdiction it was manifestly unsuited as the initial registered office for the purpose of 27[3]. Panama was unsuitable since several issues such relative to dispute resolution was determined by the location of the registered office. The Bahamas was therefore designated or deemed to be the location of the registered office of the Trusts for the purposes of section 27[3]. By the terms of the Trusts, it clearly contemplated the eventual relocation of the administration and operation of the trust to the Bahamas. Evidentially this proved to be true as shortly after the settling the trust Delanson redomiciled in the Bahamas.

[21.] Whilst the registered office of the Trust is not a term of art for trusts it is a term of art with respect to corporate entities. A Trust unlike a company is not a juridical entity but a relationship. It is the Trustee which is the juridical entity and has the legal recognition. It appears to me, quite logically, that in the context of this matter, where the original trustee was a corporate entity that the registered office of the Trust is the registered Office of the Trustee, as is plain from clause 3. No other reasonable construction makes sense.

[22.] It is not disputed that Delanson, which began as a Panamanian company relocated to the Bahamas and subsequently, in 2016, relocated its incorporation and administrative offices to New Zealand for tax advantages. When Delanson was a Bahamian company it unified the terms of the Trust with the factual reality. The relocation of the Trustee's office and place of administration to New Zealand undoubtedly moved the registered office of the Trust. The registered office of Delanson, the Trustee, would therefore be New Zealand and consequently also the registered office of the Trust. I so find.

[23.] Whilst I accept that New Zealand is the Registered Office of the Trusts, I am not satisfied that this finding results in the law of New Zealand being the governing law of the Trusts. I am constrained to find that Clause 27 is a forum and dispute resolution clause, not a governing law clause.

[24.] Clause 26 [1] is clear and unequivocal that the Trusts are to be governed by the laws of The Bahamas and it specifically identifies the relevant aspects of Bahamian Trust law. This repeats the opening clause of the Trusts at clause 1 which provides the Trusts are "governed by the laws of the Commonwealth of The Bahamas, such as *The Trust (Choice of Governing Law) Act 1989, and The Trustee Act 1998*, as subsequently amended."

[25.] Clause 26 [2] provides for the change of the governing law of the Trust but there is no evidence of any such modification. Instead the defendants argue that the transition of the governing law from The Bahamas to New Zealand occurred as a result of the operation of the terms of the Trusts. The defendants argue that the exercise of the power need not have been formally advanced but may be inferred. Mr Simms QC relied on an extract from the learned authors of ***Lewin on Trust*** paragraphs 29-297 which reads,

> **29-197** There may be a good exercise of a power without any reference to the power, even in general terms, or to the property (if any) subject to it and without taking the least notice of it. When, in the case of a dispositive power, the intention to pass the property can be collected then it will pass under the power, if the exercise of the power is necessary for the disposition to take effect; an intention to dispose of the property is enough and there is no need to show also an intention to dispose of it means of the power. Similarly when, in the case of some other power, the intention to effect a given transaction can be collected then the power will be taken as having been exercised, if the exercise is necessary for that transaction to take effect. ...

I am unable to accept this submission as the extract from ***Lewin*** deals with circumstances where the law may imply the exercise of a power as a result of necessity, or in context, as a result of some conduct of the power holder. In this case the power to transfer the governing law cannot be inferred to have been exercised from the relocation of the registered office. This is simply because you do not need to exercise the power to change the governing law to effect the relocation of the registered office. Clause 26(2) gives the Trustee the power to change the governing law without changing its registered office and administrative headquarters, a power separately contained in clause 3. I do accept, however, that the fact of an actual relocation/re-domicile to Delanson's offices to New Zealand and the absence of any legal authority to operate as a trust company in The Bahamas implies that the power to change the registered office was exercised.

[26.] It can hardly be disputed clause 26[3] requires all questions as to the validity of the Trusts to be decided by Bahamian law. This provision does not change regardless of the location of the Trustee, unless specifically changed. There is no evidence of this governing law being changed nor could it be implied that such a power was exercised. This is a provision unaffected by anything in clause 27. If another law is to govern other aspects of the relationship, as contended by the defendants, there emerges

the risk of dèpeçage. An interpretation which leads to a trust being governed by more than one system of law is not to be lightly inferred, and the courts should seek an interpretation by which the trust is governed by a single law. This is the effect of the Privy Council decision in ***Crociani v. Crociani* [2014] UKPC 40**. In ***Crociani*** at paragraph 23, ***Lord Neuberger***, delivering the decision of the Board indicated that it preferred an interpretation of an exclusive jurisdiction clause which had the effect of avoiding dèpeçage. He stated,

> ... the respondents contend that, properly construed in its context, the exclusive stipulation has a very different purpose, namely to ensure that all issues concerning the Grand Trust are to be governed by the same law, thereby avoiding the risk of dèpeçage - ie that different aspects of the Grand Trust were subject to different proper law. In the Board's view, the respondents' argument is to be preferred.

[27.] Clause 27[3] of the Trusts requires that *"[a]ny proceedings that aim to have Trustees or Protectors appointed by the court, or directives be given to the Trustee, must be brought* ***exclusively*** *under the law of the Bahamas* ***as long as the registered office of the trust is located there."*** What is readily apparent here is that the clause speaks to the bringing of proceedings which suggest a reference to forum rather than governing law. Additionally, the reference to exclusivity likewise suggests a reference to forum as one generally speaks of an exclusive forum more so than an exclusive governing law.

[28.] Clause 27[4] of the trusts provides that, *"for any matters that cannot be brought to arbitration, the Court having* ***exclusive jurisdiction*** *is the court at the registered office of the Trust,* ***currently*** *the Court of Appeal of the Commonwealth of The Bahamas*". As in clause 27[3], the reference here is to the Court having exclusive jurisdiction being the court at the registered office of the Trust. This is clearly speaking to appropriate forum and the reference to exclusivity is unlikely to be a reference to governing law

especially where clause 26 has already expressed the governing law of the trust to be that of The Bahamas. As was discussed in ***Crociani***, the reference to the courts of the country is a clear indication that the draftsman intended the establishment of an exclusive jurisdiction clause. At paragraph 20 in ***Crociani*** it was stated:

> "…if the stipulation was intended to indicate the country whose courts were to determine disputes, rather than the country in which the trust was to be managed, one would have expected the draftsman to refer to the courts of the country, as opposed to the country simpliciter, as being the forum."

[29.] Gabriele argues, quite forcefully, that even if The Bahamas is the governing law, the claim against him is not a claim "concerning the trust" as required by Section 79A to found jurisdiction the Bahamas. Gabriele describes the claim against him as, "a proprietary claim to account for receipt of assets transferred in breach of trust" and, a claim "*to account to the Trusts as a knowing recipient, as well as on the basis of dishonest assistance*". Gabriele says that is not a claim "*concerning a trust*" within the meaning of section 79A as the section should be narrowly construed.

[30.] Gabriele further says

> "If the provision was widely construed it would confer jurisdiction upon the Bahamian courts in a variety of circumstances and in respect of claims which may have no connection to the jurisdiction or with Bahamian law."

[31.] As attractive as Gabriele's arguments sounds, I am not satisfied that such a narrow interpretation would suffice. The claims sought by Matteo in relation to him are:

(1) setting aside the distributions (received by him)

(2) reconstituting the Trusts; and

(3) that he pays damages or equitable compensation to the trusts for knowingly receiving trust property and/or dishonestly assisting in a breach of trust;

As its base the claim by Matteo is a claim arising from allegations for breach of trust as well as allegations of Gabriele's improper receipt of a distribution as a beneficiary of the Trusts. Gabrielle is being sued in the capacity of a beneficiary and clearly both of these claims arise out of the Trust relationship and the allegations of Gabriele's receipt of an improper distribution. In the circumstances therefore, I am satisfied that the claim against Gabriele is indeed a claim concerning the Trust and Section 79A applied both in relation to the claim against him as well as Delanson. I am satisfied that the governing law is Bahamian law and the Bahamian court has jurisdiction to hear the dispute.

Arbitration

[32.] The defendants contend that if the governing law of the Trusts are not Bahamian law as they have contended, the Trusts are nonetheless subject to mandatory arbitration provisions and this action ought to be stayed in favor of arbitration. Matteo disputes this and says, inter alia, that the matter is not subject any arbitration process.

[33.] Clause 27 of the Trusts, entitled "Arbitration", requires by 27 [1] that, any dispute [other that a dispute relative to the validity of the Trust]:

a) which relates to the establishment or effects of the Trust, or
b) between the Settlor and Trustee or
c) between Protectors, or
d) between the parties to the Trust

to be determined by arbitration. The Clause is settled in mandatory language and the clause requires that the dispute *will have to be* submitted

to an arbitration board for assessment. The clause goes on to provide particulars for the conduct of the arbitration.

[34.] Courts in The Bahamas are expected to give effect to arbitration clauses found in trust instruments. The Trustee Act 1998 and its amendments, which the Trusts specifically declare as their governing law, provides for a mechanism to enable disputes and questions in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument. Section 91A (2) of the Trustee Act provides:

> (2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration ("a trust arbitration"), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

By Section 91A(2) a written trust instrument which provides for arbitration is deemed to be an arbitration agreement. Notwithstanding the parties indicated are not parties to an agreement or even technically privy to the transaction they are nonetheless deemed to be parties to an arbitration agreement as a result of Section 91A (2) and the Arbitration Act applies.

[35.] Section 9 of the Arbitration Act, 2009 provides:

> 9. Stay of legal proceedings.
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On application under this section the court **shall grant a stay** unless satisfied that the arbitration agreement is null and void. inoperative, or incapable of being performed.

(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings. (emphasis added)

In ***Harcourt Development (Bahamas) Limited v. Steel H. Q. (Bahamas) Limited - [2013] 2 BHS J. No. 100*** the Supreme Court also invoked the power to stay legal proceedings in favor of an arbitration provision under Order 31A of the Rules of the Supreme Court.

[36.] Matteo says that a trust is plainly not a contract. He says that the beneficiaries are not businessmen who entered into any agreement and their relationship with the Trustee, or the settlor, or the other beneficiaries, or the protectors, is not a commercial one. His specific complaints are that:

(1) the claims against the defendants are not within the arbitration provisions of clause 27;

(2) Matteo is not bound by the provisions of Clause 27;

(3) the Arbitration Act 2009 does not apply because section 91A was inserted into the Trustee Act after the Trusts were already settled prior to the enactment of section 91A;

[37.] Matteo says that clause 27 does not apply because the dispute does not relate to the establishment of the Trust or between "parties to the Trust". He argues that, as a discretionary beneficiary, he is simply not a party to the Trust having not executed or contracted for its terms. Respectfully, such a submission ignores both the terms of the Trust Deed and the clear intention and purport of the introduction of Section 91C of the Trustee Act.

[38.] Firstly, a plain reading of clause 27[1] lends to an interpretation that the beneficiary, the object of the Trustee's discretion is captured by the terms

"effects of the Trust" and "parties to the Trust". Having identified the trustee, the settlor and the protector there are no other classes of persons who could properly fit within the definition of "parties to the Trust". There are limited actors in a trust relationship and without beneficiaries or other object of the trust there could be no trust. In its purest form, there could be no valid trust without such an object. The clause did not say parties to the Trust Deed. In my view, Trust here is used in the context of a trust relationship not in the sense of a contract or the trust deed.

[39.] It is difficult to conceive, practically, how the term "parties to the trust" in 27[1] could include any other claim or have any real meaning in the absence of intending to include a claim against the trustee by the beneficiary. Respectfully, I agree with Mr. Smith QC, that such a claim is the paradigm trust claim and ordinarily by far the most popular type of trust claim. In my view the clause was intended to be interpreted widely and any construction otherwise is untenable as the entirety of clause 27[1] would hardly bite at all.

[40.] Secondly, Matteo's case is built upon the Trust being governed by Bahamian law and specifically the Trustee Act 1998 as subsequently amended. It is a difficult argument to contend, as Matteo does, that where a trust instrument declares its proper law to be the law of The Bahamas, that the relevant Bahamian law is fixed at the date of the commencement of the Trust. The law governing the Trust must be taken to include sections 91A-91C which was inserted into the Trustee Act by the Trustee Amendment Act, 2011. Incidentally, this 2011 amendment also introduced section 79A, the basis upon which this court assumed jurisdiction over this dispute without the need for a leave application. It is therefore difficult for Matteo to assert that the Arbitration Act 2009 does not apply as section 91A was inserted into the Trustee Act after the Trusts were already settled. There is nothing in section 91A which suggests that the written trust deed must come into existence after the coming into force of the Trustee

(Amendment) Act 2011. It should be pointed out that this argument is ineffective as against the Spring Trust, which was established in 2012 after the insertion of Section 91C into the Trustee Act.

[41.] By the insertion, Section 91C provided a definition of parties in relation to a trust at Section 91C as follows:

> the parties in relation to the trust means any trustee, beneficiary or power holder of or under the trust, in their capacity as such.

The section also defines beneficiaries, to include a discretionary beneficiary, it says:

> "beneficiary" includes an object of a power, whether or not ascertained or in existence and a charity;

It is evident therefore that Matteo, Gabriele and Delanson are all to be included in the defined term, parties in relation to the trust. I fully accept the submission that Section 91C is now a part of the statutory scheme by which the beneficiaries of a trust are parties to, and bound by an arbitration clause in a trust instrument which compels them to arbitrate.

[42.] The fact that the Spring Trust was executed using strikingly similar language to the earlier deeds, in circumstances where Section 91C would undoubtedly be the relevant law, is suggestive of an intent that the earlier deeds did in fact intend the term "parties" in 27[4] to include beneficiaries. The draftsman's continuing to use the word "parties", in Clause 27[4], notwithstanding the definition now given to "parties", in Section 91C is indicative that the term is to be embraced.

[43.] Matteo also argues that the provisions of section 103(2) of the Arbitration Act was not extended to relate to trusts by the Second Schedule. Section 91A (3) of the Trustee Act provides:

> (3) The Arbitration Act shall apply to a trust arbitration in accordance with the provisions of the Second Schedule to this Act.

The Second Schedule did not include a reference to section 103(2) of the Arbitration Act. Section 103 provides:

> 103. Transitional Provisions.
>
> (1) The provisions of this Act do not apply to arbitral proceedings commenced before the date on which this Act comes into operation.
>
> (2) The apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.

Respectfully, the relevant marker is the commencement of arbitration proceedings and the position here is moot as no arbitration proceedings have been launched, to date. The law is fixed at the date proceedings commence. Section 103 is a transitional provision and its purpose it to express that the law being introduced was not retroactive with respect to ongoing proceedings. Section 103(1) in particular is only relevant to proceedings which are in progress at the time the Arbitration Act came into force. As no proceedings have been commenced the presence or absence of Section 103 is irrelevant. Taking Matteo's argument to its conclusion sections 91A-91C would be wholly ineffective in every case.

[44.] Specifically, in relation to Delanson, Matteo says that his claims against it are not within the arbitration provisions in clause 27. Matteo argues that the claim against Delanson in respect to its removal and replacement, although between parties to the Trust, may not covered by that part of clause 27 which requires mandatory arbitration but is directed to a court action. He relies on clause 27[3] which speaks to *"any proceedings that aim to have Trustees or Protectors appointed by the court, or directives be given to the Trustee"* and which requires such proceedings to be *"brought exclusively under the law of the Bahamas as long as the registered office of the trust is located there."*

[45.] Clause 27[3], in my view, seems to relate to the types of claims raised in clauses 8 and 12[5] of the Trusts, which provide:

> *"8. This does not effect or impair the Trustee's right to turn to the competent judicial authority to obtain orders or directives."*
>
> *"12. [5] If there are no more Trustees that wish or are able to accept the position, if the single Trustee has not appointed a successor within three months of its resignation, the Court having jurisdiction over the place where the Trust has its registered office will be responsible for appointing a Trustee who will then extinguish the Trust."*

My reading of clauses 8 and 12 is that this is limited to circumstances which arise in the context of the replacement of a Trustee, not its removal. Clause 12[5] speaks directly to circumstances where a Trustee has resigned and not appointed a successor. It places the obligation on the Courts of New Zealand to appoint a successor for the purposes of terminating the Trusts. That however, is not what is contended for in this action by Matteo, he seeks the removal of the Trustee following allegations of breach of trust. Clause 27[3] does speak to applications for directives to Trustees, which would include administrative issues or directions, but does not speak to removal of the Trustee.

[46.] Section 91B(2) provides:

> (2) The arbitral tribunal (hereinafter referred to as "the tribunal") may, in addition to all other powers of the tribunal, at any stage in a trust arbitration, exercise all the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust.

Section 91B expressly confers on the arbitration tribunal all of the powers of the court, which must include the inherent jurisdiction of the Court to remove trustees. I am satisfied therefore that this claim, for the removal and appointment of a Trustee is covered under the arbitration provisions.

[47.] As regards the balance of the claim against Delanson, to account for the Trusts' assets, these too fall squarely within the ambit of the arbitration clause as it is not only a dispute as to the effect of the Trust but it is also a dispute between the parties to the Trust. As discussed above I find that this includes Matteo, who brings the action as beneficiary against the Trustee, Delanson.

[48.] Specifically, in relation to Gabrielle, Matteo says that his claims against Gabrielle is not in Gabriele's capacity as a beneficiary or settlor and are therefore not within the arbitration provisions of clause 27, even if a beneficiary was to be considered a party to a Trust. The claims are framed as:

(1) setting aside the distributions (received by Gabriele)

(2) requiring Gabrielle to reconst the Trusts; and

(3) requiring Gabriele pay damages or equitable compensation to the trusts for knowingly receiving trust property and/or dishonestly assisting in a breach of trust;

Matteo's claim in this regard is, in my view, unsustainable. This is a claim about allegedly improper distributions made by a Trustee to a beneficiary. Gabrielle is being sued in the capacity of a beneficiary and clearly both of these claims arise out of the Trust relationship and the allegations of Gabriele's receipt of an improper distribution. The case of ***Gomez v Gomez-Monche Vives*** **[2009] Ch 245, 291** provides a useful discussion on this very issue. At paragraph 79-80 ***Lawrence Collins LJ*** states:

> 79 I accept the submission that the first defendant is not being sued as a beneficiary of the resulting trust which the claimants allege. Nor is it relevant that the first defendant is claimed to be a constructive trustee of the overpaid amounts. The claim of constructive trust goes to remedy and not to the question whether the first defendant is sued as a beneficiary of the written trust. Article 5(6) does not apply to a constructive trust: Schlosser Report, para 117; Chellaram v Chellaram (No 2) [2002] 3 All ER 17, paras 138 and 162; Dicey, Morris & Collins,

The Conflict of Laws , 14th ed (2006), paras 11-316, 29-061; Briggs & Rees, Civil Jurisdiction and Judgments , 4th ed (2005), para 2.170 and Underhill & Hayton, Law of Trusts and Trustees , 17th ed (2007), para 102.229.

80 Consequently the only trust relevant for present purposes is the declaration of trust, and the question is whether the first defendant is sued as beneficiary of that trust.

81 The claimants say that their primary complaint is that the first defendant has been paid both income and capital from the trust to an extent which the terms of the trust do not allow, and that they, who are beneficiaries of the trust, primarily complain that the first defendant has been overpaid as a beneficiary.

82 I have come to the conclusion that in the light of the claim, the correspondence and the evidence, the claimants are suing the first defendant as beneficiary because it is accepted that she was a beneficiary and the claimants are suing her for sums which she received by way of overpayment of her entitlement. The relief claims an account of all moneys which she has received, including those to which it is conceded she is entitled, and this is a necessary preliminary to identifying the moneys to which she is entitled.

[49.] In respect of his Section 79A argument, that the case against Gabriele was concerning the Trust, Mr Moran QC, argued that, any claim for knowing receipt or dishonest assistance is fundamentally predicated on a breach of trust. Matteo cannot have it both ways. The claim cannot be a claim concerning a trust in relation to Gabrielle to invoke Section 79A, yet it is not a suit against him in his capacity as a beneficiary. If it is not a claim against him in his capacity as neither settlor nor beneficiary, then I was wrong in my earlier assessment that this was a matter concerning a Trustee and therefore section 79A did not apply so as to ground jurisdiction in this court without an application for leave.

[50.] I am satisfied therefore that the Arbitration Act 2009 applies to these claims. save for the remedy seeking for a removal and replacement of Delanson. In such a case the court is constrained, in accordance with the provisions

of section 9 to order that the action be stayed whilst the matter proceeds to arbitration. I am satisfied that the trust is not null and void, inoperative, or incapable of being performed.

Exclusive Jurisdiction

[51.] The defendants contend that clause 27 created an exclusive jurisdiction clause in the Court of New Zealand and that these proceedings, in so far as any claim may not be the subject of arbitration, must be litigated there. This it seems would apply even if I am wrong as to application of the Arbitration Act, 2009.

[52.] The leading case on the issue of exclusive jurisdiction clauses in trust deeds is ***Crociani and others v Crociani and others.*** In ***Crociani*** the Judicial Committee of the Privy Council was called upon to determine whether a clause in a 1987 Trust Deed whose original jurisdiction was The Bahamas conferred an exclusive jurisdiction to the Courts of the successor jurisdiction, Mauritius. The governing jurisdiction had been changed from The Bahamas to Jersey and then to Mauritius. The Appellant, Mme Crociani had settled a Trust in favor of two daughters. Under Clause 15 the Trust Deed was to be governed by the law of [Mauritius] "which shall be the forum for the administration thereof". Clause 12(6) of the Trust Deed provided that:

> "thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the said country which shall become the forum for the administration of the trusts hereunder"

[53.] In February 2012 the then Jersey Trustees resigned and appointed a Mauritian company. "Appleby", as sole trustee. One the daughters Cristiana and other claimants brought proceedings in the Jersey Royal Court against the Jersey Trustees and Appleby in January 2013 challenging appointments and other payments out of the Trust made by the Jersey

Trustees to the Settlor. The Appellants made an application to stay the proceedings in Jersey on the basis that the effect of clause 12 is to confer exclusive jurisdiction upon the Mauritius courts. The Royal Court of Jersey rejected the application, which was upheld on appeal. The Board had to decide (1) whether clause 12(6) confers exclusive jurisdiction upon the Mauritius courts and (2) if so, whether the proceedings in Jersey should be stayed.

[54.] In dismissing the Appeal, the Board found against an exclusive jurisdiction and found that no part of clause 12(6) of the 1987 Deed was concerned with identifying which country's courts should have jurisdiction to determine disputes relating to the Trust. They rejected the argument that the terms "the forum for the administration of the trusts" is a reference to the courts, which resolve disputes and give directions in relation to the Trust. The Board nonetheless accepted that the expression could have this meaning; in context these words indicate the place where the trust is administered in the sense of its affairs being organized. The Board indicated that a provision identifying the country whose courts were to determine disputes would be expected to refer to the courts of a country rather than simply the country as being the "forum".

[55.] The Privy Council also rejected the argument that the words "shall be subject to the exclusive jurisdiction" confer exclusive jurisdiction upon the Mauritius courts. The Board found that, properly construed in context, these words have the effect of ensuring that all issues concerning the Grand Trust are to be governed by the same law. On the facts of the instant case however it could not seriously be disputed that the clause in question is framed in much clearer terms so as to leave little doubt that the Trust refers to the courts of country which has territorial jurisdiction over the Trustee.

[56.] Clause 27[3] may be considered ambivalent as to whether it was an exclusive jurisdiction clause or whether it merely maintained exclusivity as long as the Registered office of the Trust is located in The Bahamas. Clause 27[3] also confusingly speaks to the registered office of the Trust being the Bahamas at the commencement of the Trust which, on the evidence, could not have been the case. This is explained away on the basis that a contemplated move to The Bahamas was eventually to take place and Panama, being a civil law country, the deed deemed the registered office to be in The Bahamas for the purpose of Clause 27[3]. Clause 27[4] however, is not so ambiguous as to the intent to vest an exclusive jurisdiction in the Courts of The Bahamas appears clear. It provides that "for any matters that cannot be brought to arbitration, the Court having **exclusive jurisdiction** is the court at the registered office of the Trust, ...". There is a reference to the courts, unlike the language of the clause under review in Crociani's case. It is therefore not a question of forum for administration of the Trust but exclusive jurisdiction.

[57.] In the circumstances it would appear that, in the event I was wrong in my determination that the claims fell to be determined by arbitration, the claims would therefore be caught by the exclusive jurisdiction clause in 27[4]. In ***Crociani*** the Board provides useful guidance as to how treat these exclusion clauses in trust deeds at paragraphs 35-39:

> 35. The question of principle which arises in this case is whether the same test applies to an exclusive jurisdiction clause in a deed of trust. Contrary to the appellants' argument, the Board is of the opinion that it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract. The Board is of the opinion that in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause is less than the weight to be given to such a clause in a contract. Given that a balancing exercise is involved, this could also be expressed by saying that the strength of the case that

needs to be made out to avoid the enforcement of such a clause is less great where the clause is in a trust deed.

36. In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where, as here (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced. In the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust – see eg Schmidt v Rosewood Trust Ltd [2003] UKPC 26, [2003] 2 AC 709 para 51, where Lord Walker of Gestingthorpe referred to "the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts". This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts.

37. Accordingly, the Board considers that, while it is right to confirm that a trustee is prima facie entitled to insist on and enforce an exclusive jurisdiction clause in a trust deed, the weight to be given to the existence of the clause is less (or the strength of the arguments needed to outweigh the effect of the clause is less) than where one contracting party is seeking to enforce a contractual exclusive jurisdiction clause against another contracting party. It is right to mention that counsel referred to some cases (including some of those identified in para 31 above) in which it seems to have been assumed that the weight was the same, but it does not appear to the Board that the issue was fully discussed or considered in any of those cases, which are in any event not binding on the Board.

...

39. ... In a trust case, as in a contract case, it is appropriate to start with the exclusive jurisdiction clause and ask whether arguments of the party seeking to avoid it (after taking into account the arguments in support of enforcing it) outweigh the simple point that prima facie Page 13 effect should be given to such a clause.

[58.] The admonition therefore is that the while it is right to confirm that Delanson is prima facie entitled to insist on and enforce an exclusive jurisdiction clause in a trust deed, the weight to be given to the existence of the clause "is less than if it was one contracting party is seeking to enforce a contractual exclusive jurisdiction clause against another contracting party." The onus is still upon Matteo to make out a case to avoid the enforcement of such a clause,albeit less onerous as it is contained in a trust deed.

[59.] Weighing the factors in the balance, I am not satisfied that a case has been made out, even in the lesser weight class suggested by ***Lord Neuberger***, to deny the enforcement of the exclusive jurisdiction clause which is found in the Trusts. The only connection to this jurisdiction is the designation of Bahamian law as the proper law of the Trust. The Trusts are not administered here and none of the Trusts' assets is or were located here. None of the acts complained of took place in The Bahamas and none of the parties or relevant witnesses is located here.

[60.] By contrast, the administrative headquarters is in New Zealand, the registered office of Delanson and by extension the Trusts is in Auckland, New Zealand. Delanson is incorporated in New Zealand. One of its directors is in New Zealand. New Zealand has territorial jurisdiction over Delanson. Finally, New Zealand is a developed common law jurisdiction with a history of trust law and its courts are quite capable of applying Bahamian law where necessary.

[61.] In the circumstances therefore, if these claims (or any part of them) do not fall to be considered by arbitration, I would have ordered that they be stayed in favor of proceedings in New Zealand.

[62.] Having stayed the action I order that the injunction granted on 3 May 2018 be set aside. I will hear the parties if there is a view that costs ought not to follow in the usual course.

[63.] Having regard to the decision which I have reached, it was not necessary for me to deal with a number of other issues which were raised by the defendants. Lastly, I wish to commend counsel for their industry and to thank them for their very well researched oral and written submissions.

Dated the 27nd day of November 2018

Ian Winder
Justice