IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 49 OF 2015 (ASCJ)

IN THE MATTER OF THE Y TRUST NO. 1

AND IN THE MATTER OF THE TRUSTS LAW (2011 REVISION)

BETWEEN

(1) PETER BLACK
(2) RICHARD BROWN
(3) SAMUEL GREEN
(4) TREVOR BLUE

(Acting trustees of the Y Trust No. 1)

PLAINTIFFS

AND

(1) FIONA SMITH
(2) FREDERICK SMITH
(3) SIMON SMITH
(4) STEPHANY SMITH
(5) GREGORY SMITH

(Beneficiaries of the Y Trust No. 1)

(6) WILLIAM WHITE

(An original trustee of the Y Trust No. 1)

DEFENDANTS

IN CHAMBERS AND IN PRIVATE
BEFORE THE HON. ANTHONY SMELLIE
THE 19TH AND 20TH NOVEMBER 2015

APPEARANCES: **Mr. Frank Hinks QC instructed by Mr. Simon Hurry of Collas Crill, Attorneys-at-Law for the Plaintiffs**

Mr. Colin McKie QC and Mr. Christian La-Roda Thomas, Attorneys-at-Law of Maples and Calder, for the 1st Defendant.

Ms. Rachael Reynolds of Ogier, Attorneys-at-Law for the 2nd Defendant

Mrs. Shân Warnock-Smith QC, instructed by Mr. Robert Lindley of Appleby (Cayman) Limited, Attorneys-at-Law for the Third to Fifth Defendants;

Sixth Defendant not appearing

Deed of voluntary family settlement – Identity of protector named in the Deed doubtful – Whether Deed of Settlement should be rectified – Deed of Retirement of Trustees – Whether consent of protector required to the exercise by trustees of the right or power of retirement expressed in the Deed of Settlement – Whether rectification of the Deed of Settlement to confirm the true identity of the protector essential to the validity of the Deed of Retirement.

JUDGMENT (ANONYMIZED FOR PUBLICATION)

1. By their Originating Summons, the Plaintiffs being the acting trustees of the Y Trust No. 1 ("the Trustees" and the "Settlement" respectively) seek, among other forms of relief, an order rectifying the Settlement so as to reflect the identity of its intended first protector. The first protector is proposed to have been a Panamanian company named Fern S.A., ("Fern"), in substitution for the Settlor of the Settlement, Y Trust Inc. (a Liberian company), which was identified, it is contended erroneously, in Clause 20(a) of the Deed of the Settlement as the first protector at the time of the constitution of the Settlement.

2. As an alternative form of relief, the Trustees would seek orders declaratory of the validity of the 1984 Deed of Retirement by which Rory Yellow (now deceased) and the Sixth Defendant William White (Mr. Yellow and Mr. White respectively) on 29 March 1984 retired (or purported to retire) from their positions as original trustees of the Settlement (the "1984 Deed of Retirement"). The need for a declaration of the validity of the 1984 Deed of Retirement arises because, on one view of the

circumstances, the consent of the protector to the retirement of trustees was required and as explained briefly above and more fully below, the identity of the protector is doubted. And so the concern is that if consent was required and the true protector did not consent, the Deed of Retirement could not have been valid. Of course, if the consent of the protector was not required, then the Deed of Retirement was valid. Accordingly, by way of further alternative forms of relief sought, if on a proper construction of the Deed of Settlement or the relevant provisions of the Trusts Law, the protector's consent was not required, then the 1984 Deed of Retirement should be declared valid on these separate bases.

Background

3. The Settlement was constituted by deed dated a day ("the Execution Day") in December 1982 with its settlor, Y Trust Inc. ("the Settlor") being named in Clause 20(a) as the first protector. Felicity Daphne Smith ("FDS") was the controlling mind of the Settlor and caused the Settlor to enter into the Deed of Settlement with the original trustees[1] for the establishment of the Settlement.

4. This application arises from the discovery by the attorneys of the First Defendant Fiona Smith ("Fiona") in November 2012, that the purported appointment of Fern as protector by the original trustees in place of the Settlor by deed also dated the Execution Day December 1982, was invalid because under Clause 20(e) of the Deed of Settlement, the original trustees' power to appoint a protector only arose if there

[1]These were the Second Plaintiff Richard Brown, Harold Purple, Henry Beige, Rory Yellow and the Sixth Defendant, William White.

had not been a protector for one month. The Settlor, also described by Clause 20(a) of the Deed of Settlement as the first protector, was not dissolved until October 1985 and so at the time of the purported appointment of Fern as protector would, unless rectification were granted, have been in place as protector and was, prima facie, the first protector. Thus, it is said a mistake was made requiring of rectification because no power to appoint a new protector arose until one month after the original named protector ceased to be the protector and the Deed of Settlement should be rectified to show Fern as the first protector as intended.

5. On the basis that the consent of the protector was required and not obtained[2], the invalidity of the Deed of Appointment dated the Execution Day December 1982 also puts in issue the validity of the 1984 Deed of Retirement whereby Mr. White and Mr. Yellow retired (or purported to retire) as trustees. (Messrs. Yellow and White were also partners in the London firm of solicitors which served as legal advisers for the establishment of the Y Trust Settlements, with Mr. White playing the primary role.)

6. If, as the result of the uncertainty over the identity of the protector, the 1984 Deed of Retirement was not effective, every act of trust administration (including each appointment of new trustees) in the subsequent 31 years will be invalid because Mr. White and Mr. Yellow (the latter until his death in 2010) did not join in the same and/or because operative decisions were made by their successors and so by persons who were not validly appointed trustees. (This is apart from the Second Plaintiff, Mr. Brown who, as an original trustee, has at all times been a validly appointed trustee.)

[2] There are further alternative arguments that the consent of the protector, whether Fern or the Settlor, should be deemed to have been obtained. These will be examined and analyzed below.

The consequences, spelt out more specifically, would be that payments made to trustees (or supposed trustees), payments to or for the benefit of beneficiaries, investments made and assets administered (assets bought, financing agreements entered into, assets operated) would all have been without authority.

7. Such an outcome would obviously be an unacceptable state of affairs for a settlement as complex, dynamic and valuable as Y Trust No. 1, which has entered into numerous administrative arrangements and dispositions to beneficiaries over the years. If the present application fails on all of its four different bases, the Plaintiffs would therefore be compelled to seek the Court's ratification of each of those numerous but as yet unidentified arrangements or dispositions and this would be a dauntingly onerous and costly proposition.

8. The Plaintiffs have indicated a willingness to retire as trustees as required by Fiona and her brother Frederick Smith (the Second Defendant) ("Frederick"), both being the primary beneficiaries of Y Trust No. 1, but subject to its affairs first being put on a sound and valid basis. Retirement of the Plaintiffs has not been a contentious issue but without the affairs of the Settlement being put on a sound valid basis, the lingering uncertainty over the validity of steps taken, would extend even to the validity of the releases and indemnities to which they would be entitled as retiring trustees.

9. Accordingly, the purpose of the present proceedings is to put the affairs of Y Trust No. 1 on a clearly valid basis either by:

(a) establishing on one or more of the four bases set out in Head of Relief No. 2 of the Originating Summons (the "OS") – as mentioned above and to be more

fully described below – that the 1984 Deed of Retirement was valid and effective and in consequence the trust administration during the period 1984 to 2015 has been valid and effective, or

(b) (as a fall back and very much, from the Plaintiffs' point of view, last resort position) obtaining the Court's ratification of each of the numerous (and at present not wholly identified) invalid acts of trust administration during the period 1984 to 2015.

10. Further, and subject to validity being established on one or more of the four bases, the Plaintiffs also seek to obtain the Court's approval of the retirement of the Plaintiffs in due course, in favour of two Cayman Islands private trust companies established respectively by Fiona and Frederick.

The parties, the beneficiary family and other relevant history

11. The Smith family is a business family and its patriarch and the founder of its business was James Michael Smith ("JMS").

12. Although steps were taken to settle the family fortune on trusts constituted during the lifetime of JMS, he died before they could be completed. After his death, his widow FDS, as the controlling mind of the Settlor, took steps with the assistance of her sons Matthew and Mark to establish four trusts, Y Trust Nos. 1-4.

13. Y Trusts Nos. 1 and 2 were intended to be primarily for the benefit of Matthew's children and remoter issue (the principal trust for their benefit being the Settlement, Y Trust No. 1) and Y Trusts Nos. 3 and 4 primarily for the benefit of Mark's children and remoter issue.

14. The brothers Matthew and Mark (Matthew died in 1992) were the only children of JMS and FDS.

15. Frederick and Fiona are the children of Matthew and his wife Francesca Smith(née Black). In these proceedings each of Frederick and Fiona has been appointed to represent the interests of their own issue (of which there are none presently).

16. It will be appreciated from the foregoing history that only Matthew's side of the family was intended to benefit immediately from Y Trust No. 1 and a declaration of exclusion of benefit to Mark's side of the family was, in fact, executed on 31 May 1994 (the "Declaration of Exclusion"). However, given the present uncertainty about the authority of those acting as trustees in the signing of that declaration at that time, Mark's children and remoter issue could still arguably assert a current beneficial interest under Y Trust No. 1 as this settlement in the Second Schedule defined the beneficiaries as "All the issue and remoter issue of" FDS.

17. For that reason, the Third, Fourth and Fifth Defendants, who are Mark's children, have been joined in these proceedings and the Third Defendant Simon ("D3") was appointed by the Court to be representative of that class of persons who would be beneficially interested under Y Trust No. 1 if the Declaration of Exclusion were invalid.

18. The role of D3 in his representative capacity is to ensure not only that the interests of his class are articulated but also to put forward any meritorious arguments against the relief sought by the Trustees, on the footing that they are the only parties who have a theoretical interest in objecting to the grant of that relief because the Declaration of Exclusion might not have been effective.

19. D3 has presented his arguments through learned Queen's Counsel Mrs. Warnock-Smith who presented the arguments with her usual skill and care, even while making it clear that D3 and his brother and sister as the only living members of the class they represent, fully support the Trustees' application.

20. It is, they assert through Mrs. Warnock-Smith, manifestly in the interests of the entire beneficial class to put an end to doubt about the trusteeship of Y Trust No. 1, whatever may be their status as beneficiaries. The present position is obviously unsatisfactory since a trust where doubts have been raised as to the identity of the current Trustees cannot function effectively.

21. Indeed, the actual identity of the individual Trustees is unlikely to be of any particular interest to D3's class, other than for the purposes of clarifying who they were at any particular time.

22. Moreover, the interests of D3 and the rest of his class (including D4 and D5 who are living) are in any event, remote. They are currently excluded from benefit under Y Trust No. 1 while Fiona and Frederick and their issue are living, it being recognized by all, as Mrs. Warnock-Smith expressly noted, that Y Trust No. 1 is a trust designed for the primary benefit of Matthew's children and remoter issue.

23. In fact, the Third, Fourth and Fifth Defendants have stated in evidence that if their exclusion were found to have been formally invalid, they would wish to be effectively excluded on the same terms or to take steps to disclaim their interests.

24. The First to Fifth Defendants comprise all living or contingent beneficiaries of Y Trust No. 1 – the third generation not yet having any children. Thus, with

representation orders having been made by this Court, all beneficiaries living, past and future are represented.

25. The foregoing being the situation, these are in no sense contentious proceedings and the Trustees' application is supported by all parties including Fiona and Frederick who are represented respectively by Mr. Colin McKie QC and Ms. Rachael Reynolds.

26. Of the parties, I think I need only make further mention of Mr. White (the Sixth Defendant) who, along with the applicant Trustees themselves, comprise all persons who could possibly be trustees at this point in time: the original trustees other than Richard Brown and Mr. White himself, are deceased. Mr. White, for his part, supports the Trustees' application and has a direct interest in doing so in that the release and indemnity he was granted (along with those granted to his law partner Mr. Yellow when they retired as trustees in 1984) would otherwise be of the same doubted validity as their deed of retirement – the 1984 Deed of Retirement – itself. The First Plaintiff Peter Black ("Dr. Black") has been appointed as representative of all persons who have been appointed trustees of Y Trust No. 1 (and all those interested in the estates of those who have died) other than his co-Plaintiffs and Mr. White.

The events leading up to the 8th December 1982 transactions

27. I accept (with appropriate adaptations) Mr. Hinks' careful summary of these events, as follows.

28. At the time, Conrad Grey was the senior partner of the accountancy firm Gold & Co. which still acts for Y Trust No. 1. In his affidavit, Conrad Grey describes how he and

Jeffrey Pink (a senior Smith family employee) would have frequent informal discussions in Switzerland with FDS, Matthew and Mark leading up to the pivotal events in 1982. Jeffrey Pink subsequently became a Y Trust No. 1 trustee (he died in 2004). Those discussions centred on how the family's interests were to be allocated between Matthew and Mark. Their mother was keen that her sons should come to some agreement in this respect as she was, as JMS's widow, in ultimate control of the family's wealth after JMS's death. Conrad Grey makes clear that Matthew and Mark would have taken no action whatever without their mother's approval and, for her part, she would not have approved anything on which her sons had not earlier agreed. He goes on to recall one such meeting at which Matthew indicated that he did not wish the Y Trusts intended for his family (Nos. 1 and 2) to have the same protector as those for Mark's family (Nos. 3 and 4). As a result JMS, Matthew and Mark agreed that a company with bearer shares controlled by Matthew should act as the protector of Y Trusts Nos. 1 and 2 (with a like company controlled by Mark acting as protector of Y Trusts Nos. 3 and 4). In the event, Fern was the company used to act as protector of Y Trusts Nos. 1 and 2, but it could have been any other company controlled by Matthew through bearer shares selected from a list of available companies. As Conrad Grey makes clear, this agreement rendered the Settlor totally unsuitable to act as protector because it was a company controlled by FDS. This, it can be noted here, is also a strong indication that Fern was intended by FDS, Matthew and Mark to be the protector of Y Trust No. 1 from the time of settlement, Fern having been established for that purpose.

29. The lawyer who played the principal role in relation to the constitution of the Y Trust Settlements was Mr. White, as already noted – an English solicitor and partner in the firm of Brookes and Rivers. In light of the agreement made between FDS, Matthew and Mark it is, as Mr. Hinks observes, a puzzle as to why Mr. White ever came to produce a settlement which named the Settlor as protector in Clause 20(a) and a separate Deed of Appointment, whereby the trustees appointed Fern as protector by appointment made in exercise of the power conferred by Clause 20(e) (which in reality only became exercisable one month after there had ceased to be a protector).

30. There are circumstances which, inferentially, offer an answer to this puzzle. The earliest surviving deeds or draft deeds (for the December 1982 transactions) are copies of deeds produced (it is to be inferred) by Mr. White for a meeting which took place in Divonne, France on 19 November 1982. It was then intended that Y Trusts Nos. 1 – 4 would be constituted at that meeting. Apart from manuscript additions as part of the execution process, the deeds executed on the Execution Day December 1982 are identical in all respects to the deeds produced for the Divonne meeting (which were discovered in the files of Richard Brown) save that Y Trust No. 1 as executed on the Execution Day December 1982, had an additional Clause 27 which confers power on the protector to remove trustees.

31. The deeds drafted for the Divonne meeting appear to have been drafted on the following basis.

    (1) Initially the Settlor would be protector of Y Trust No. 1 by being named as such in Clause 20(a) of the Settlement. (See the Divonne draft of Y Trust No. 1.)

(2) At some point after the constitution of Y Trust No. 1 the Settlor would be wound up: there are references to its intended liquidation in the documentary evidence.

(3) Not less than one month after such liquidation (and thus after there had ceased to be a protector for at least one month) the trustees would appoint Fern as protector by the 1982 Deed of Appointment being dated and brought into effect: see Clause 20(e) which confers power of appointment on the trustees where there has ceased to be a protector for at least one month.

32. No reason has been identified for not simply naming Fern as protector from the outset in Clause 20(a) of the Settlement. It may be that earlier when the drafts were initially prepared, Fern had not yet been incorporated and identified as the protector. See quote in letter from Slaughter and May (as set out in paragraph 33 below) which shows uncertainty as to whether the protector was to be a Panamanian or Liberian company. However, by the time of the Divonne meeting, there appears to have been no reason why consistent with the agreement reached between Matthew, Mark and FDS, Mr. White should not have simply substituted Fern for the Settlor in Clause 20(a) and torn up the draft Deed of Appointment which came to be executed on the Execution Day December 1982 along with the Deed of Settlement and a deed of declaration acknowledging the transfer of shares in Sun Investment Limited ("Sun") (Sun being the underlying trust company established to hold Y Trust No. 1 assets.)

33. The London law firm of Slaughter and May also played some unidentified role in relation to the settlement of the Smith family fortune. They sent a letter to Mark in December 1982 in apparent ignorance that Fern had been identified as protector and

that the three deeds had been executed and dated two days before. There is a statement in paragraph 26 of their letter as follows:

> *"I understand that initially [Y Trust Inc.] will be the Protector but once it is liquidated, steps will be taken to appoint separate companies in either Liberia or Panama as the Protectors of the various trusts."*

34. I accept from this that Slaughter and May no doubt understood that the deeds executed on the Execution Day December 1982 were intended to operate as set out in paragraph 31 above. It follows that in seeing to the execution of the three deeds on the Execution Day December 1982, it seems unlikely notwithstanding his primary role, that Mr. White properly understood how they were intended to operate.

35. The Divonne meeting was an unusual meeting which seems to have stuck in the memories of those witnesses who attended it when memories of other less eventful meetings have no doubt faded. First hand evidence of the meeting is to be found in the affidavits of Conrad Grey [paragraphs. 23 to 26] .Richard Brown [paragraphs 20 to 22] and Mr. White [paragraphs 6 to 7].

36. The persons present included at least FDS, Matthew, Mark, Conrad Grey, Richard Brown, Mr. White and Jeffrey Pink. The meeting appeared to have proceeded well until, to Mr. White's surprise and without any prior warning, Jeffrey Pink made a request on behalf of Mark and Matthew (but in the presence of FDS and hence with her evident approval) that they would like him and his partner Mr. Yellow to sign undated letters of resignation as trustees before they completed the constitution of the Y Trust Settlements. In effect, Matthew wanted to be able to get rid of the trustees of the settlements to be constituted for the benefit of his family (Y Trusts Nos. 1 and 2)

whenever he wished and Mark wanted to be able to get rid of the trustees of the settlements to be constituted for the benefit of his family (Y Trusts Nos. 3 and 4) whenever he wished. Mr. White telephoned Mr. Yellow and having explained the situation to him, both of them refused to sign the undated letters of resignation. The meeting was aborted. It was aborted not with a view to abandoning the proposed settlement of the Smith fortune, but with a view to finding an alternative solution acceptable both to Matthew and Mark and to Mr. Yellow and Mr. White: see Mr. White's affidavit (at the last sentence of paragraph 7) and Mr. Grey's affidavit (at paragraph 26).

37. As appears from a letter sent by Mr. White to Matthew and Mark dated 30th November 1982, they had spoken on the phone in the week leading up to 30th November 1982 and prior to that letter. Matthew and Mark requested that an additional clause (in the event that which became Clause 27) be added to each of the settlements giving the protector the right to remove any one or more of the trustees. It is to be inferred that Matthew and Mark thought that they could get themselves into a position equivalent to having the undated letters of resignation they demanded in Divonne (that is of being able to secure the retirement of Mr. White and Mr. Yellow as trustees at any time after the constitution of the settlements) simply by adding the power of removal in Clause 27 and causing the Y Trust Settlements and appointments of their respective companies as protectors, to be executed and to come into effect simultaneously (as in the event happened). Unfortunately, they do not appear to have been aware of the limitations on the trustees' power to appoint protectors, and of the fact that to effect what they (and it is to be inferred their mother FDS and hence the

Settlor) wanted, they needed to make two changes to the draft settlements not one: first, the inclusion of the new power of removal later expressed in Clause 27 and, second, the naming of their respective protector companies as first protector in Clause 20(a) of the respective Settlements. They requested Mr. White to add the new power of removal in Clause 27. But it appears that they failed to request him to change Clause 20(a), and Mr. White did nothing to bring the need to their attention (it is to be inferred because he was himself unaware).

38. In his letter dated 30th November 1982, Mr. White gave detailed directions as to execution. Unfortunately, he did not explain that the appointments of protectors would be ineffective unless dated and brought into effect one month after the liquidation of the Settlor. Nonetheless, it is on the basis that it clearly was the intention of FDS (and through her, the Settlor), Matthew and Mark, that the appointments of their companies as protectors would be immediately effective, that the primary argument for rectification and the first basis of validity of the Deed of Retirement is now said to be made out.

39. The final meetings preparatory to the constitution of the Y Trust Settlements were held in St Gingolph, France on 7 December 1982 and I have seen the cumulative minutes of those meetings.

40. These, as the minutes show, were crucial meetings for the constitution of the Y Trust Settlements as they dealt, among other things, with authorisation for the transfer of the shares in Sun and Moon Investment Ltd. (the latter being the underlying asset-holding entity for Y Trusts Nos. 3 and 4) to the respective trustees of the Settlements, to be held upon the trusts of the Settlements.

41. On the Execution Day in December 1982 (shortly after the St. Gingolph meetings) Robert Hill ("RH") (another employee of Gold & Co. assisting with the establishment of the Y Trust Settlements) dated the Deed of the Settlement Y Trust No. 1; the Deed of Declaration (which relates to Sun, the company through which Y Trust No. 1 trust assets are held) and the 1982 Deed of Appointment. As recorded in paragraph 3 of the note of RH's evidence ("the RH Note") filed in these proceedings, at Exhibit MDW 1 *"he (RH) went down to meet Richard Brown at the Airport Hotel in Nice where he witnessed Richard Brown's signature as appropriate. RH then dated all three documents. RH cannot remember whether Richard Brown was present whilst he did so"*. In paragraph 5 of the RH Note RH states that his role was one of implementation, that what he was doing was following a series of detailed instructions: he remembers that "*there was a document setting out the process and everybody bought into it*". As recorded in paragraph 6 of the RH Note, he indicates that at all times he acted strictly in accordance with his instructions. In dating the three deeds on the same day one after another, he would have been acting in accordance with his instructions with a view (he believed) to all three deeds coming into effect simultaneously.

42. The statements contained in the RH Note are supported by the evidence contained in paragraphs 33 and 34 of Conrad Grey's affidavit, in particular paragraph 34:

> *"[Robert Hill] states his role was simply to follow his detailed instructions. This is correct. He was a conscientious employee who could be relied upon to follow his instructions. After this period of time I cannot remember (if I ever knew) how and by whom his detailed*

instructions as to execution came to be drawn up, but in dating the three [Y Trust No. 1] deeds on the same day one after another I have no doubt that he acted in accordance with his instructions with a view to all three deeds coming into effect simultaneously: such dating accorded with the then common intention of [Matthew], [Mark] and [FDS] (and through [FDS] of the settlor [Y Trust Inc.]) that [Fern] should be the Protector of [Y Trust No. 1] and through [Fern] [Matthew] should have the power to remove the trustees from the outset."

43. I will return to analyse and assess the meaning and effect of this evidence.

Retirement of Mr. White and Mr. Yellow and the 1984 Deed of Retirement

44. Subsequently, it is believed sometime in early 1984, Matthew again asked Mr. White and Mr. Yellow to resign as trustees. Mr. White states in his affidavit [paragraph 10]:

"I do recollect being asked by [Matthew] to resign as trustee along with Mr. [Yellow] at that time [i.e. in or around 1984] and considering that, as he ultimately controlled [Fern], this was something [Fern] wished to see take place."

45. From this recollection it appears that prior to the execution of the 1984 Deed of Retirement, Mr. White regarded Fern as the validly appointed protector and considered the need for its approval to the proposed retirements. If (which it seems is unlikely) he ever understood the need to wait one month from the dissolution of the Settlor before the deed appointing Fern was dated and brought into effect, it is clear

that by this time he had forgotten. Having addressed his mind to the need for Fern's approval the overwhelming likelihood, submits Mr. Hinks, is that in actuality Mr. White went on to get Fern's written consent to the retirement in accordance with Y Trust No. 1 Deed of Settlement, Clause 21. I will come to express my final views specifically on this proposed inference below.

46. On the face of it, the Settlor (Y Trust Inc) joined in the 1984 Deed of Retirement as settlor, not as protector. Indeed, admits Mr. Hinks, there is nothing in any of the documentation to indicate that the Settlor was ever treated as the protector. In contrast, it is clear that Fern came to be treated by Mr. Yellow and Mr. White as the protector. This is apparent in particular from:

(i) consent of Fern to a later Deed of Retirement and Appointment dated 22nd February 1990. By this deed Richard Brown (executing as continuing trustee), Harold Purple and Henry Beige retired (or purported to retire) and were succeeded (or purportedly succeeded) by Arthur Orange and Julian Burgundy. This thus purported to be both a deed of retirement and of appointment of trustees;

(ii) consent of Fern to another Deed of Retirement and Appointment dated 20th June 1991. By this Deed, Arthur Orange and Julian Burgundy retired (or purported to retire) as trustees and were succeeded (or purportedly succeeded) by Jeffrey Pink and Dr. Black (the first Plaintiff and brother-in-law of Matthew).

On the face of these two deeds, executed in 1990 and 1991, I note with emphasis that Fern's consent as protector appears to have been required and given only in relation to the new appointments, not in relation to the retirements.

(iii) notice issued by Fern to the trustees of Y Trust No.1 on 11 May 1992 exercising the power under Clause 22(a) of the Deed of Settlement to dispense with the requirement to obtain protector consent for actions which would have otherwise required such consent under the terms of the Deed of Settlement.

47. By the 1984 Deed of Retirement, Mr. White and Mr. Yellow expressly retired or purported to retire as trustees. The written consent of Fern to that retirement (if it ever existed) has not survived. But, for the reasons set out in his argument discussed below, Mr. Hinks submits that on a balance of probabilities Fern, acting as protector, gave its written consent to the 1984 Deed of Retirement in accordance with the terms of Y Trust No. 1.

The Arguments for validity

48. As mentioned above, the validity of the 1984 Deed of Retirement is contended for by the Trustees on alternative bases.

(i) First, that on the basis the consent of the protector of the Settlement was required, that Fern was intended by all the executing parties to be the protector at the material time and gave its prior or simultaneous written consent. The Settlement should therefore be rectified to reflect the fact that the Settlor was mistakenly named as protector. As over the ensuing 31 years, any written consent can no longer be found, the Plaintiffs also therefore rely upon a

presumption of due execution of consent by Fern on the basis of the legal maxim: o*mnia praesumuntur rite et solemniter esse acta* (all [official] acts are presumed to have been done rightly and regularly).

(ii) Second, that upon the true construction of the Deed of Settlement, the consent of the protector was not necessary to the exercise by Mr. Yellow and Mr. White of their rights to retire under clause 16(b), which rights were effectively exercised by them in the 1984 Deed of Retirement, even if the protector (whether the Settlor or Fern) did not give its prior or simultaneous written consent to the same;

(iii) Third, that the 1984 Deed of Retirement was effective under the statutory power of retirement contained in and vested by section 8 of the Trusts Law (1976 Revision) (as amended) (now section 8 of the Trusts Law (2011 Revision); the consent of the protector not being necessary to the exercise of such statutory power or right of retirement.

(iv) Fourth, and in the further alternative, a declaration that on the basis that no rectification order is granted pursuant to the first argument for validity relief identified above, the Settlor was therefore also the protector of the Settlement at the material time and gave its simultaneous written consent to the 1984 Deed of Retirement by executing the same (albeit it was identified only as Settlor and not as protector when doing so).

This, the fourth argument for validity, is obviously inconsistent with the first argument on the basis of which Fern would be regarded as having been the

protector from the time of the execution of the Deed of Appointment dated the Execution Day December 1982 (see paragraphs 3 – 5 above).

49. On the basis that declaratory relief is granted in the form of one or other of the foregoing alternatives, a declaration is also sought that all subsequent deeds of retirement and/or appointment of trustees of the Y Trust No. 1 Settlement took effect in accordance with their terms and this so that the Plaintiff Trustees are currently and validly appointed trustees of Y Trust No. 1.

***(i)* The first Basis of Validity:**
Fern was protector and gave its consent to the 1984 Deed of Retirement

50. There are three distinct issues to be resolved before this basis of validity could be confirmed.

51. First, (a) whether Fern was intended from the moment of its constitution, to be the protector of the Settlement and so the Deed of Settlement should be rectified to reflect this intention. Second, (b) whether Fern's consent to the 1984 Deed of Retirement was in fact obtained. Third, (c) a matter to be addressed in the exercise of the court's inherent equitable discretion to grant rectification: whether there was undue delay by the Trustees in bringing this application for rectification.

(a) Fern intended to be protector

52. As to this, I can be very brief as I am satisfied that the only reasonable inference to be taken is that it was the common intention of Matthew, Mark and FDS and through FDS the Settlor, that Fern should be the protector of Y Trust No. 1 and that among

other things through Fern, Matthew should have the power to remove trustees from the outset.

53. As mentioned above, Robert Hill makes clear in his statement that his role was one of implementation, that what he did was done by following a series of detailed instructions, that at all times he acted strictly in accordance with his instructions with a view (he believed) to all three Deeds dated the Execution Day December 1982 coming into effect simultaneously.

54. For his part, Mr. White in his affidavit states his belief that the simultaneous execution and dating of Y Trust No 1 Settlement and the 1982 Deed of Appointment of Fern, was a manifestation of the continuing intention of Mark, Matthew, FDS and (through FDS) the Settlor, which was first manifested at the meeting in Divonne that, from the moment of constitution of Y Trust No. 1, Matthew should be able to remove Mr. Yellow and Mr. White as trustees of Y Trust No. 1. This was to be given effect by Matthew acting through Fern as protector.

55. This is all borne out of course, among other things, by the form and dates of the Deeds themselves dated the Execution Day December 1982. Giving Y Trust No. 1 Deed of Settlement and the 1982 Deed of Appointment the same date leads, as Mr. Hinks submits, to the natural inference that their execution was part of a single transaction and that Fern's appointment as protector was intended by the Settlor to take effect from the time of constitution of Y Trust No. 1.

(b) Whether consent of Fern obtained

56. This is rather more difficult to find. The evidence cited by Mr. Hinks (and acknowledged by Mrs. Warnock-Smith while noting the difficulties it presents) is as

follows in relation to the issue of whether Fern gave its written consent to the 1984 Deed of Retirement in accordance with the provisions of Y Trust No. 1.

- Dr. Black (the only family member who is also one of the Trustees) in his first affidavit (paragraphs 6 to 9, 74 to 75 and 80) describes the state of trust records when the investigation leading to this case began in December 2012 – how various documents were missing, including two consents from Fern; how a copy of the missing 1990 consent to the Deed of Retirement and Appointment dated 22 February 1990 (both discussed above at paragraph 46) was eventually located (records from 1990 having survived). By contrast, how the missing 1984 consent was not found (not a single document relating to the preparation and execution of the 1984 Deed of Retirement having survived); how there is nothing surprising in it having proved impossible to locate a consent given over 30 years ago, the natural inference being that the 1984 consent was destroyed along with the other documents relating to the preparation and execution of the 1984 Deed of Retirement.
- Dr. Black in his first affidavit (paragraphs 76 to 79 and 81) also sets out the evidence which supports the conclusion that from the outset, Mr. Yellow and Mr. White treated Fern, not the Settlor, as protector, and their practice of obtaining consents from Fern on a document separate from the document to which the consent was being given, but again referring mainly to the transactions in 1990 and 1991 reference at paragraph 46 above.
- As to the form of the surviving consents relating to the 1990 and 1991 transactions: these are two-page documents (or one page without the title page)

separate from the deed to which Fern was consenting; very easy to go missing is the inference invited by Dr. Black.

- The advice of Benjamin Stone of Gold & Co. given to Richard Brown in a fax on 16 December 1992. This advice is exhibited also to Dr. Black's first affidavit. Despite being a non-lawyer, Mr. Stone shows a good grasp of the trust documentation and problem recognizing as he did back then in 1992, that the purported appointment of Fern as protector was of doubtful validity because the Settlor was prima facie the first protector and had not yet been dissolved. He also recognized that the subsequent appointments of new trustees were of doubtful validity because they required the consent of the protector which, having been given by Fern, were also of doubtful validity. But it is also noted that Mr. Stone deals with the 1984 Deed of Retirement not on the basis that Fern had not given its consent in accordance with the terms of Y Trust No. 1, but on the basis that Fern's consent was ineffective because Fern had not been properly appointed as protector. In other words, submits Mr. Hinks, nothing from the circumstances observed even by Mr. Stone, suggests that Fern did not give its consent.
- Mr. White in his affidavit at paragraph 10 in particular, records his recollection of being asked by Matthew prior to the execution of the 1984 Deed of Retirement to resign as trustee along with Mr. Yellow and his considering that as Matthew ultimately controlled Fern, this was something Fern wished to see take place. From this recollection, it is clear that at the time the 1984 Deed of Retirement was prepared and executed, Mr. White believed that Fern was the protector and Fern's

consent to the retirement was needed: the overwhelming likelihood, submits Mr. Hinks, is that he went on and got the consent in proper form.

- Mr. White in his affidavit at paragraphs 11 to 13 where he asserts, among other things, that given the importance of the 1984 Deed of Retirement to himself and Mr. Yellow in particular, and that "*its due execution would have been a matter of more than ordinary importance to us*", they would more probably than not have obtained Fern's consent. I accept that a solicitor can hardly be expected to depose positively that he obtained a written consent over 30 years ago, and so in these paragraphs Mr. White sets out the factors which lead him to conclude that consent was likely to have been obtained – including and in particular by reference to and by reason of Mr. Yellow's long experience dealing with offshore trusts containing provisions for the role of protector, the importance of the transaction to him and Mr. White and the survival of subsequent separate consents from Fern when they were necessary.

57. All that said, the matter does remain one of inference or presumption of regularity for me and any cogent inference to the contrary cannot be overlooked. Here, I emphasize in particular, the fact that Fern did not purport to exercise a right or power of consent to the subsequent deeds as they purported to serve as deeds of retirement in February 1990 and June 1991, as described above at paragraph 46.

58. By contrast, Fern expressly consented only to the respective appointments contained in those Deeds.

59. This is a strong indication to my mind that Fern's consent to the retirements was not regarded by the parties to the 1990 and 1991 Deeds as a requirement, leading to the

inference that if not sought or obtained for the purposes of the retirements in 1990 and 1991, it would not have been sought or obtained for the purposes of the 1984 Deed of Retirement either, there being no apparent basis for treating the acts of retirement differently in this respect.

(c) Whether the Trustees had sufficient knowledge to make time run prior to end of 2012

60. In light of the conclusion at which I have arrived on the question of Fern's consent in particular, I will proceed to a conclusive analysis of the First Basis of relief (rectification) only for the sake of completeness and in deference to the full and careful arguments presented.

61. And so I bear in mind also that, rectification being a discretionary remedy, laches and delay must be considered. In relation to the issue of whether at any time before 7th December 2012 (the date when knowledge of the present problem is finally attributable to them), the Trustees had sufficient knowledge to put them on notice of the need to seek rectification, the affidavit evidence helpfully summarized by Mr. Hinks is as follows.

- Dr. Black's first affidavit paragraphs 22 to 53 in particular paragraph 52, in which he deposes to the fact that prior to Maples and Calder in December 2012 identifying the current problem, he cannot remember feeling any doubt about the validity of his appointment as trustee; and his conclusion at the end of paragraph 53, that the first time any trustee of Y Trust No. 1 knew that there was a mistake which needed rectifying, was after such identification.

Here I note that after Mr. Stone first identified the problem in 1992, the advice of Mr. Leolin Price QC was obtained on 30th November 1993. He advised, ineffectively as it turns out, that all that was required was that Mr. Brown, as the sole continuing trustee post the 1984 Deed of Retirement, should ratify the appointments of the successive trustees. Ineffective though that advice was, (ratification by the continuing trustees could not have cured the absence of protector consent if such was required) until the full gravamen of the problem was again recognized by Maples and Calder in December 2012, I accept that the continuing trustees, including Mr. Brown, would not have recognized the need to seek rectification.

- Mr. Grey's affidavit paragraph 41 – 48 in particular paragraph 48, where he gives grounds for his separate recollection, confirming Dr. Black's belief, that the issue of rectification was never raised whilst he was a trustee.
- Mr. Brown's affidavit paragraphs 29 – 31 in particular paragraph 31, where he states that after executing the confirmatory appointment as advised by Mr. Price QC, he was not conscious of feeling any uncertainty as to the validity of his co-trustees' appointment nor of any need to take action in relation to the issues raised by Benjamin Stone and that indeed, he did not have the slightest idea that there was or might be an ongoing problem until Maples and Calder identified the current problem.

62. When this evidence is considered along with the supporting documentation (viz: Mr. Stone's fax sent to Mr. Brown on 16 December 1992, Mr. Price's opinion of 30 November 1993 and the confirmatory appointment of trustee dated and executed by Mr. Brown on 31 May 1994) there is ample evidence to support a legal analysis now,

leading to the conclusion that relief by way of rectification has not been precluded either by laches or delay.

63. The legal principles supporting this conclusion can conveniently be summarized as follows.

64. As an equitable remedy, rectification is subject to equitable defences and that of laches has been identified here by both Mr. Hinks and Mrs. Warnock-Smith in fulfilment of their duties owed to the Court. As rectification is an equitable discretionary form of relief, the question also arises whether this Court should take delay into account in the exercise of discretion.

65. The maxim that delay defeats equities is dealt with in Snell's Equity, 33rd ed. at para 5-011. The particular question is whether the fact that the problem about Fern's appointment as protector was spotted as long ago as 1992 by Mr. Stone and advised upon by leading counsel Mr. Price QC in 1993, presents a barrier to relief by way of rectification being granted now.

66. I accept Mr. Hinks' submissions as an accurate summary of the principles summarized from *Snell (supra)* as follows:

> "*Mere delay even very long delay is not sufficient of itself to bar the claim. There must be something that renders it inequitable to grant the relief. See Weld v Petre [1929] 1 Ch. 33 – a case in which 26 years delay was not in itself sufficient to disentitle a mortgagor from redeeming his shares which he had pledged to secure a loan which he had repaid, there being no prejudice to the Mortgagee.*"

67. At page 51 of the case report of *Weld v Petre* (cited by Mr. Hinks) Lawrence LJ quotes from the judgment of the Privy Council in *Lindsay Petroleum Co. v Hurd* [1874] LR 5 P.C. 221 at 239. He cites the following passage (per Sir Barnes Peacock) as the principle applicable to a case where long delay is set up as a defence to equitable relief:

> *"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."*

68. A further principle recognized in *Snell* (supra, ibid) and developed in the case law is that:

"There can be no abandonment of a right without full knowledge, legal capacity, and free will, so that ignorance or disability or undue influence will be a satisfactory explanation of delay."

69. See also *Beale v Kyte* [1907] 1 Ch. 564 and a case recently decided by this Court: *AB Jnr. V MB* [2013](1) CILR 1, at 56-62.

70. As further stated in *Snell* (supra. ibid):

"Laches is also a personal disqualification and will not bind successors in title."

For this last principle, See *Nwakobi v Nzekwu* [1964] 1 WLR 1019 at 1024, per Viscount Radcliffe.

71. In the present case where the remedy of rectification is sought in the interests of all interested in Y Trust No. 1, including beneficiaries present and future (beneficiaries who are themselves entirely innocent of laches or delay, and whose interests will be damaged if relief is not granted) I accept, as Mr. Hinks submits, that it is plainly not inequitable to grant the relief, concerns about laches and delay notwithstanding.

72. And even if Richard Brown (or even Dr. Black) were barred from seeking rectification because of having been put on notice of the problem by Mr. Stone in his advice given to Richard Brown in December 1992, there is nothing, on the foregoing principles, to prevent either Samuel Green or Trevor Blue subsequently appointed as trustees, from seeking rectification.

73. But does this mean that rectification is otherwise an appropriate remedy here? As already explained, rectification will not assist the Trustees unless they are able to satisfy the Court on a balance of probabilities, that Fern gave written consent to the

retirement of Mr. Yellow and Mr. White in accordance with Clause 21 of Y Trust No.1 and the consequences of the concerns I have identified above about this, must now be examined in the context of the law of rectification.

The law on rectification

74. Mr. Hinks (in agreement with Mrs. Warnock-Smith) correctly identifies the elements required to establish a claim for rectification:

(a) a mistake, by reason of which the document in question fails to give effect to the intention of its maker(s) and (b) that, if rectified as sought, the document will give effect to the intention of the maker(s).

75. In the present case, what is proposed by way of rectification (to give effect to the common intentions on the Execution Day December 1982 of FDS (and through her the Settlor), Matthew and Mark) to put matters right, is the simple substitution of Fern's name for that of the Settlor as the named protector in the Deed of Settlement of Y Trust No. 1 but as already explained, that will not assist unless Fern is shown to have subsequently consented to the 1984 Deed of Retirement.

76. Rectification – as an equitable discretionary remedy which enables an instrument to be corrected where there is a discrepancy between the wording and effect of the instrument as drafted and the intention of the relevant parties – is a remedy well established in Cayman Islands law. See in particular, *Megerisi v Scotiabank Trust (Cayman) Limited* [2004-05] CILR 456 and *Megerisi v Protec Trust Management Establishment* [2012](2) CILR 355.

77. In the latter case, the Cayman Islands law is summarized as follows:

"...this court will rectify a document, "putting the record straight" (adopting also those words of Mummery LJ from the case of *Allnutt v Wilding* (1) [2007] EWCA Civ 412, at para. 11), *where it is satisfied that the document did not carry out the common intention of the parties, or, in the case of a voluntary settlement, the intention of the settlor. Rectification is available not merely in respect of words wrongly added, omitted or wrongly written, but also used in the mistaken belief that they bear a meaning different from their correct meaning as a matter of true construction."*

78. The courts of these Islands have long been sensitive to the needs of those who establish trusts under Cayman Islands law, granting relief by way of rectification when appropriate for the sake of vouchsafing those intentions. A striking series of rectification cases are those six consolidated applications in which settlements on their face were void because they contained a fixed period of years as the perpetuity period (at a time when lives in being plus 21 years was the only permissible period under Cayman Islands law) were rendered valid by this Court granting rectification orders by inserting a Royal-lives clause; viz by: *"amending the text of each instrument in regard to those provisions which establish a perpetuity period which would have been valid had current English law applied or had sections 77 to 79 (inclusive of the Trusts Law) applied"* per Collett CJ in *B v Trust Management,* consolidated applications in Causes 40, 41, 58, 59, 66 and 67 of 1988, (written ruling delivered 10 March 1988 and noted at [1988-89] CILR Note 22).

79. As a matter of general principle, convincing proof that the document in question does not reflect the true intention of the parties is required before rectification may be granted. See *Megarisi v Protec Trust Management* (supra) at paragraph 27.

80. Here, as already explained, that proof is established to my satisfaction in relation to the Deed of Settlement of Y Trust No. 1.

81. But also as already explained, it is the question of Fern's consent to the 1984 Deed of Retirement that proves more difficult.

82. It is the case that nothing in the records searched either directly establishes or negatives the giving of such consent: there is a total lack of surviving documents relating to the preparation and execution of the 1984 Deed of Retirement.

83. And so it is in this connection that the Plaintiffs seek to rely on the maxim "*omnia praesumuntur vite esse acta*".

84. As the case law shows, this maxim is of broad application and is capable of application in a case such as the present. See generally *Broom: A Selection of Legal Maxims,* 10th ed. Sweet and Maxwell/Pakistan Law House, pp 640 – 648 (from which it appears that the maxim applies to private rights as well as public matters); and the cases discussed there, including *Gibson v Doeg* (1857) 2 H&N 615 and *Harris v Knight* (1890) 15 PD 170.

85. Relying on the maxim courts have shown a willingness to presume the existence of requisite consents to acts whose legitimacy requires them. *Halsbury's Laws* 5th Ed. expresses the maxim (after discussion of the case law) as follows (Volume 11 on Civil Procedure at paragraph 1103):

"In accordance with the common law maxim that everything has been done according to due form, formal requisites to judicial, official or public acts, or to titles to property which are good in substance, will be presumed."

86. But for the circumstance that Fern's consent was apparently not thought to be required and so was not given to the retirements of trustees subsequent to the 1984 Deed of Retirement when they occurred in 1990 and 1991 (as discussed above), I would have been prepared to apply the maxim here so as to deem its consent to have been given to the 1984 Deed of Retirement.

87. As discussed above, the available documentation (and those several examples from 1990 and subsequently which have survived), show that even where a single deed evidenced both the retirement of trustees as well as the appointment of new trustees, Fern's consent was sought and given in respect of the new appointments but not in respect of the retirements.

88. This was so in 1990 and 1991. It changed after 11 May 1992, the date of formal notice issued by Fern declaring that its consent would no longer be required "*for any act or acts or for the exercise of any power or powers referred to in the ([Y Trust No. 1]) Settlement, (as vested in the trustees).*"

89. Thus, we see for instance, that in the subsequent deed of addition of beneficiary (the charity known as the Research Trust) executed on 8 July 1992, that charity was added as a beneficiary (although subsequently removed). That deed of 8 July 1992 expressly refers to the consent of Fern having been declared by Fern to be not required.

90. So too, for the purposes of the Declaration of Exclusion dated 31 May 1994 (already mentioned), by which all beneficiaries excepting the issue of the late Matthew were excluded from future benefit under the Settlement.

91. Further in this regard, we see from the deed also dated 31 May 1994, that Fern's consent was expressly not required to the appointment by Richard Brown (as continuing trustee) of Dr. Black and Conrad Grey as new trustees.

92. There were subsequent retirements and/or appointments of trustees in February 1999 and January 2002, when Fern's consent was either not referenced at all or mentioned only formally to note that Fern had earlier dispensed with the need for it.

93. Fern had in fact been dissolved in October 1992, and subsequently, as there was no protector, powers conferred by the Deed of Y Trust No. 1 Settlement as exercisable with the consent of the protector, were regarded as exercisable without the need for any consent.

94. It must also be noted here that the Settlor, Y Trust Inc., was dissolved in October 1985 and so, if the Settlor had been the protector, thereafter there ceased to be a need for protector consent. This is relevant because absent rectification, the Settlor will be deemed to have been the protector and so its consent would not have been thereafter required.

95. The crucial issue would then become whether in the period between the Execution Day December 1982 (the date of the simultaneous execution of the Settlement and Deeds of Appointment and Declaration) and October 1985, when the Settlor was dissolved any powers or discretions vested in the trustees were exercised which

required protector consent under Clause 21 of the Settlement. As already mentioned, the 1984 Deed of Retirement was executed on 29 March 1984.

96. I am assured by Mr. Hinks that the only instance which the Trustees and their legal advisors have been able to identify is the 1984 Deed of Retirement itself. I am told that as a result of these proceedings, there has been an exhaustive search of early trust records as confirmed by Dr. Black in his first affidavit and no other instance has been identified.

97. Accordingly, the conclusion to be drawn is that the only possible exercise of trustee powers or discretions in the period prior to October 1985 in respect of which an order for rectification would be needed and which might be affected in practical terms by the making of such an order is the 1984 Deed of Retirement. But rectification is not an end in itself.

98. As discussed above, in order to establish the First Basis of the Validity of the 1984 Deed of Retirement by way of rectification, I would need to be satisfied not only that Fern was intended to be protector (and so the Settlement may be rectified as there was an operative mistake) but also that Fern consented to the 1984 Deed of Retirement and did so in proper written form.

99. If Fern was intended to be the Settlor but not found to have applied its mind to the issue nor consented to the 1984 Deed of Retirement, rectification would be a useless remedy.

100. If – as it turns out to be the case for the reasons already explained – I am not satisfied that Fern consented, Mr. Hinks therefore acknowledges that no purpose would be served by making an order for rectification and advises that no such order should be

made. I accept this: without its consent being also found to have been given, the confirmation by rectification of Fern's position as protector would not by itself validate the 1984 Deed of Retirement.

101. I therefore decline to make an order for rectification on the basis that:

(i) Rectification is a discretionary remedy. The Court will not make an order for rectification if there is an alternative remedy which is convenient and practical. Equally, the Court will not make an order for rectification if it serves no practical purpose.

(ii) The Trustees only seek rectification to assist the due administration of the trust. If I am not satisfied that rectification would assist the due administration of the trust, the order should not be made in the circumstances of this case. That is the conclusion at which I arrive as I am not persuaded either that Fern's consent was given (all other elements for rectification being established) or that it was required.

Indeed, it is on the basis of a positive conclusion that protector consent was not required (whether that was the Settlor's or Fern's) that I ultimately refuse to make an order for rectification but accept the second and third bases for validity, as will be more fully explained below.

(iii) Mrs. Warnock-Smith also very helpfully underscored the difference in principle between a mistake in recording the Settlor's intention in the Settlement which is a document which could be the subject of rectification and a mistake in the process by which Fern's appointment was to be achieved in accordance with the Settlor's intention.

The remedy of rectification is available where a document fails to express the relevant intention. It is not available to rectify directly a transaction which has gone wrong.

As discussed above, it has never been explained why Mr. White as the draftsman of the Settlement, simply had not identified Fern as protector from the outset in the deed of Y Trust No. 1 Settlement. And while, as also explained above, it is clear that that was in all probability the practical intention, another process was in fact adopted by the employment of the separate Deed of Appointment also executed on the same day, the Execution Day December 1982.

The point therefore, is that a certain process to which the mistake may be attributable was adopted and while the Settlor (per FDS) and the other parties at the time may not have cared exactly how their intention to appoint Fern was carried out, those responsible for the execution of the appointment did consider that a different, albeit now recognized as erroneous course, was to be preferred.

102. Having noted the foregoing, I should also explain that this last distinction of principle (viz: a mistake in the document vis-à-vis one of process) would not have precluded relief by way of rectification in the absence of other practical remedy. As Mrs. Warnock-Smith also submitted, the absence of other practical remedy in relation to the process mistakenly adopted, could take the Court back to the attractive and simple course of rectifying the settlement itself. As authority for this proposition, I was referred to *Re IFM Corporate Trustees* [2015] JRC 160, where an application for

rectification of a retirement benefit scheme to add children and spouses to the classes of beneficiaries, was granted on the basis that the court was satisfied "*that there was a genuine mistake in that the trust instrument does not reflect the intentions of the Settlor and the trustee, and that there is no practical remedy other than rectification*". Thus rectification was granted although the mistake was one of omission arising from a breakdown in communication, not one attributable to any provision in the deed itself.

103. I acknowledge the persuasive force of this case authority but in the end the distinction in principle is rendered moot: there is persuasive evidence such that I am compelled to conclude that even if Fern was intended from the outset to be the protector, its consent was neither sought nor given and so rectification would not be an effective remedy.

104. I now turn to bases 2 and 3 of the arguments for validity and which present the other more practical remedies which also point away from the need for rectification.

(ii) Second Basis of validity: Consent of Protector not needed

105. Clause 16(b) – that provision of the deed of Y Trust No. 1 Settlement which was invoked by Messrs. White and Yellow in the 1984 Deed of Retirement (executed by them, the Settlor and the continuing trustees Messrs. Brown, Purple and Beige) – provides as follows:

> *"If any Trustee hereof shall at any time desire to withdraw and be discharged from the trusts hereof he or it may (subject to any*

exclusion or provisions if any specified in the said Fourth Schedule)[3] *so do by notice in writing signed by himself or in the case of a corporate trustee by any of its officers given to the person having for the time being power to appoint new or additional trustees hereof and upon the posting or personal delivery of such notice the trustee so doing shall cease to be trustee hereof for all intents and purposes except as to acts and deeds necessary for the proper vesting of the Trust Fund in the continuing or new trustee or trustees or otherwise as the case may require."*

106. Thus, on its face, Clause 16(b) conferred a unilateral right on a trustee to withdraw (retire) and be discharged upon giving notice to his co-trustees (who would continue and had power to appoint new trustees). Such a unilateral right to retire would have been negated if made subject to protector consent. Rather, I agree with Mr. Hinks (and Mrs. Warnock-Smith who expressed the same opinion) that on the true construction of the relevant provisions of Y Trust No. 1, the consent of the protector was not necessary to the exercise by Mr. White and Mr. Yellow of their right to retire and be discharged under Clause 16(b).

107. Most to the point, the right to retire and be discharged was not a "power and discretion" exercisable only with protector consent within the meaning of Clause 21 ("Protector Consent") which provides in relevant part that:

"...every power and discretion vested in the trustees by such provisions of the Settlement as are specified in the Sixth Schedule

[3] The Fourth Schedule simply identifies who the trustees may be and excludes FDS and the protector.

hereto shall only be exercisable by them with the prior or simultaneous written consent of the Protector."

108. While Clause 16 (in its entirety) is indeed listed within the provisions of the Sixth Schedule (which lists the powers of the trustees the exercise of which requires Protector Consent), Clause 16(b) itself does not fall within a "*power or discretion vested in the trustees*" covered by Clause 21 because Clause 16(b) on its face confers an unfettered and personal right to retire upon each individual trustee.

109. Clause 16(b) therefore in my view, bestows a right the exercise of which did not come within Clause 21 or the Sixth Schedule and did not require Protector Consent.

110. I hold to the view that Clause 16(b) merely vested a personal right notwithstanding that, as Mr. Hinks also helpfully advised, it is conventional to refer to trustees when retiring as doing so under powers which are conferred by statute or by the trust instrument – citing for example *Thomas & Hudson, The Law of Trusts,* 2nd ed. (2010) at paragraph 22.06 where the authors state:

"A trustee may retire from office under an express power conferred by the trust instrument or a similar power which is necessarily implied[4]*; under an order of the court; with the informed consent of all the beneficiaries, all of whom must have attained the age of majority and have full legal capacity*[5]*; and under statutory powers contained in the Trustee Act 1925."*

[4]Citing *Davis v Richards and Wellington Industries Ltd.* [1990] 1 WLR 1511 (which the text describes as having involved inter alia, an implied exercise of a power to remove a trustee).
[5] Citing *Wilkinson v Parry* (1828) 4 Russ. 272.

111. The crucial and well recognized difference in principle between a personal right and a power in this context, being of course, that a mere right connotes no fiduciary duty owed to the beneficiaries when it is exercised whereas a power, vested in the context of a trust, usually connotes such duties owed to beneficiaries, to exercise the power with their best interests in mind.

112. It is the latter arrangement – the existence of a fiduciary power - that would thus connote the need for Protector Consent (itself to be given by the protector in the exercise of a power that is fiduciary; see *In re Circle Trust* 2006 CILR 323).

113. In this regard, I understand Mr. Hinks' concern to be that the draftsman of the Y Trust No. 1 Settlement could be regarded as having had the conventional practice in mind by including Clause 16 seemingly in its entirety, to be within the powers covered by Clause 21 and so therefore also within the Sixth Schedule as requiring Protector Consent in writing.

114. While I appreciate the force of that point, it remains trite principle that the provisions of a settlement must be construed according to its terms – a point made with equal force and clarity by the authors of Thomas & Hudson themselves (op. cit.) in para 22-07 where they note under the heading "*Retirement under an express power*", the following:

> *"It is standard practice to include in trust instruments a power enabling a trustee to retire. Such a power must be construed and applied according to its terms, which may vary from case to case...."*

115. I am satisfied that construed properly in its context, Clause 16(b) connotes a personal right, not a fiduciary power. The subsequent treatment of the subject of retirement in

1990 and 1991 as a right not requiring of consent by Fern (by which time it was clear that all regarded Fern as the protector) is only confirmatory of this. No agreement of co-trustees[6] or Protector Consent was required for the valid exercise of the right to retire either on the face of the Settlement or when exercised in those later instances. I conclude that the 1984 Deed of Retirement was a valid exercise of the right in Messrs. White and Yellow to retire and be discharged from their offices as trustees of Y Trust No. 1 and I so declare.

(iii) Third Basis of validity: statutory power

116. Section 8(1) of the Trusts Law (2011 Revision), in terms the same as in the 1975 Revision in effect in 1984, provides:

"*Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid, by deed, declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed, consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Law without any new trustee being appointed in his place.*"

117. Messrs. White and Yellow were joined in the execution of the 1984 Deed of Retirement by the Settlor and the continuing trustees.

[6] As to which see further below.

118. The continuing trustees thus implicitly (if not expressly) consented to the retirement and discharge of Messrs. White and Yellow as the retiring trustees as set out in the 1984 Deed of Retirement in the following terms:

> *"Now this Deed witnesseth as follows:*
>
> *1. In exercise of the power given to them by the [Y Trust] Number 1 Settlement and of every other power them enabling the Settlor and the Continuing Trustees HEREBY JOINTLY AND SEVERALLY DISCHARGE the Retiring Trustees from all or any liability as Trustees of the [Y Trust] Number 1 Settlement and HEREBY JOINTLY AND SEVERALLY indemnify the Retiring Trustees and their respective estates against all liability in relation to the trusts created by the [Y Trust] Number 1 Settlement.*
>
> *2. The Retiring Trustees hereby resign as Trustees of the [Y Trust] Number 1 Settlement and jointly and severally covenant with the Continuing Trustees to do all acts and things within their power necessary to transfer the assets of the said Settlement into the names of the Continuing Trustees."*

119. I accept, as Mr. Hinks submits, that the 1984 Deed of Retirement satisfies the conditions set out in Section 8(1) of the Trusts Law (above).

120. And so, even if – contrary to my finding of validity on the second basis (above) – the 1984 Deed of Retirement was not effective to discharge Messrs. White and Yellow

under the provisions in Clause 16(b) of the Y Trust No. 1 Settlement, it was effective under section 8(1) to do so in circumstances where:

(a) the terms of Y Trust No. 1 do not expressly or implicitly exclude the statutory power of retirement; and

(b) the terms of Y Trust No. 1 do not expressly or implicitly make the exercise of the statutory power of retirement subject to Protector Consent

even while requiring the consent of the continuing trustees which was given.

121. In the event it were to be said (and no one present so contends) that the statutory power of retirement has been excluded by the provisions of Clause 16(b) being expressed within the Y Trust No. 1 Settlement, it is to be noted that section 110(2) of the Trusts Law (section 83(2) of the 1975 Revision in effect in 1984) (and in terms essentially the same as section 59(2) of the Trustee Act 1925 (UK)) provides as follows:

> *"The powers conferred by this Law on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."*

122. On its face, this section recognizes the efficacy of the power of retirement vested by section 8(1) (above) unless excluded by a provision expressed within the Deed of Settlement itself.

123. I am grateful to Mr. Hinks for the following analysis (which I adopt) of the inter-relationship between the statutory powers conferred on trustees and those powers (or rights) conferred by the trust instrument.

124. The general view of the English (hence Cayman Islands) law, is that section 39 of the Trustee Act (UK) (like section 8 of the Trusts Law) is capable of being modified or excluded by the trust instrument by operation of section 59(2) Trustee Act (UK) (section 110(2) of the Trusts Law). Leading practitioners' texts support this proposition: see *Thomas & Hudson* (op. cit.) at paragraph 22.24; *Lewin on Trusts,* 19th ed. (2015) at paragraph 13.07 and f.n. 15; *Underhill & Hayton: The Law of Trusts and Trustees,* 18th ed. (2010) at paragraph 70.13.

125. In *IRC v Bernstein* [1961] Ch 399, a case involving a trust for accumulation of income during the settlor's life, with distributions to be made to his wife (or her children if any) only after his death; the Crown contended that as by virtue of the statutory power of advancement conferred on trustees under section 32 of the Trustee Act 1925, one-half of the property comprised in the settlement might become payable to or applicable for the benefit of the wife within the meaning of section 405(2) of the Income Tax Act 1952, that one-half of the income should therefore be liable to tax as being the settlor's income, the trust for accumulation of income notwithstanding.

126. A central question for the Court thus became whether the operation of section 32 of the Trustee Act 1925 was excluded by the provision of the trust instrument for the accumulation of income and how those provisions should be construed in light of section 59(2) of the Trustee Act 1925 (the equivalent of section 110(2) of the Trusts Law as set out above).

127. It was held (per Lord Evershed MR) and as taken from the head note, that the trust for accumulation of income during the settlor's life showed an intention in conflict with the power of advancement conferred by section 32(1); that section 59(2) did not require that the power of advancement conferred on trustees by section 32(1) should be expressly excluded, but that the power was inapplicable if, on a fair reading of the instrument in question, it could be said that the application of the power would be inconsistent with the purport of the instrument; that the object of the instrument was plainly to build up a capital sum which would be paid out to the wife or her children, if any on the settlor's death, and that therefore, section 32(1) was inapplicable. Accordingly, the Crown's claim for tax failed.

128. I accept that this case is authority for the proposition that a statutory power will be excluded under section 59(2) of the Trustee Act 1925 (UK) (section 110(2) of the Trusts Law) if, on a fair reading of the instrument in question, the application of the statutory power would be inconsistent with the clear purport of the instrument.

129. But the contrary is apparent from the instrument in question here. In Y Trust No. 1 there is no express exclusion of the power conferred upon trustees by section 8(1) of the Trusts Law, to retire with the consent of his co-trustees. Nor is there any indication that the extensive description of the powers of the trustees set out in Y Trust No. 1 is intended to exclude powers conferred by statute.

130. In particular and to the contrary, the concluding words of Clause 3(a) and 13 of Y Trust No. 1 Settlement expressly envisage that powers and discretion may be or have been "*by this Settlement or by law (conferred on) or vested in the Trustees.*"

131. Further, section 110(2) states that the powers conferred by the Trusts Law "*are in addition to the powers conferred by the instrument*". And clause 16(b) of Y Trust No. 1 and section 8(1) of the Trusts Law are in significantly different terms. Clause 16(b) confers a right on each trustee to retire without the consent of co-trustees. Thus, the conferring of the right or power under Clause 16(b) may not be read as *inconsistent* with the availability of the statutory power of retirement.

132. Nor does Clause 21 or the Sixth Schedule of Y Trust No. 1 expressly make the statutory power vested by section 8(1) of the Trusts Law subject to Protector Consent. In circumstances where (as discussed above) the right or power under Clause 16(b) and the statutory power are different in nature, there are no grounds for implying that the statutory power should be subject to Protector Consent (even if I am wrong in construing Clause 16(b) itself as not subject to Protector Consent).

133. *Cecil v Langdon* (1885) 28 Ch. D. 1 is cited by Mr. Hinks as authority for the foregoing proposition as it shows that the existence in a settlement of an express power, similar to that conferred by statute but subject to a requirement of consent, does not itself indicate that the statutory power is restricted in the same way when it is to be exercised in circumstances in which the terms of the settlement could not apply.

134. The circumstances of the case were described by Baggallay LJ as "*singular*" and perhaps as rendering the judgment one of narrow application but Lindley LJ and Fry LJ in coming to the same conclusion that the statutory power of appointment of trustees was not subject to a "contrary intention" to be found in the settlement and so requiring of beneficiary consent, were more fulsome in their approach.

135. They concluded that the statute in question (section 31 of the Conveyancing and Law of Property Act, 1881) which conferred the power to appoint new trustees, was one which was unfettered by a requirement of beneficiary consent even while having regard to subsection 7 of section 31 (which made the operation of the Act subject to any indication of a "contrary intention" appearing in the settlement). As per Lindley LJ:

> *"...I do not know whether our construction is to be considered narrow or not, but it appears to me that section 31 authorizes the continuing trustee to appoint new trustees without any consent unless a contrary intention is expressed by the instrument. Now we have to deal with a case to which the power of the Settlement does not apply, and therefore with a state of circumstances as to which no intention is expressed one way or the other."*

136. And per Fry LJ:

> *"I am of the same opinion. By the settlement a fetter is imposed on the exercise of the power of appointing new trustees therein contained. I do not think that this can be construed as an expression of intention that the same fetter should be imposed on an appointment not made under that power, but under a state of circumstances to which the power does not refer. It appears to me that sub-section 7 does not affect the case."*

137. Applying that same approach to the present case; if one regards the 1984 Deed of Retirement as having been entered into by the exercise of the power vested by section

8(1) of the Trusts Law, then the provisions of Clause 16(b) would be inapplicable (whether or not itself subject to Protector Consent) because it conveys no contrary intention.

138. Hence the 1984 Deed of Retirement was effective to discharge Messrs. White and Yellow by operation of the statutory power given in Section 8(1), even if not effective under Clause 16(b) (on the basis, contrary to my conclusion, that Clause 16(b) was a power expressed as subject to Protector Consent, rather than a right). I so declare.

(iv) Fourth Basis of Validity: the consent of the Settlor to the 1984 Deed of Retirement was given qua protector

139. In light of the reasons for my conclusion on the rectification claim and the conclusions reached on the second and third bases of validity, the fourth basis is rendered moot and in my view, in any event, an unsafe basis on which to declare the validity of the 1984 Deed of Retirement. If, as I have found, Protector Consent was neither required nor, in the case of Fern, on a balance of probabilities given qua protector, it would be unsafe to proceed on the basis that the Settlor had separately turned its mind qua protector (per FDS), to the same question.

140. And while I accept that the principles of inferred/imputed exercise of powers apply to both non-fiduciary and fiduciary powers (*Davis v Richards et al* [1990] 1 WLR 1511 and *Re Epona Trustees Ltd.* [2009] WTLR 87); it would first be necessary for me to find that the power could properly have been exercised before concluding on a balance of probabilities as a matter of inference or imputation, that it was in fact properly exercised.

141. Given the clear evidence pointing to a deliberate conclusion by those involved that Protector Consent was not required for the subsequent retirements in 1990 and 1991 of trustees, it would be unsafe to infer or impute FDS's consent as given on behalf of the Settlor qua protector, to the 1984 Deed of Retirement. This view arises *a fortiori* on the basis, as I have found, that it was the common intention from the outset that Fern should be protector as, in that scenario the Settlor could not properly have been regarded as being vested with the power to give or refuse Protector Consent.

142. Furthermore, the Settlor joining in the 1984 Deed of Retirement was just as consistent with an inference that it did so qua Settlor. This is because Y Trust No. 1 had been constituted for the very purpose of enabling Matthew to secure the removal of Messrs. Yellow and White as trustees when he wished to do so.

143. Y Trust Inc's consent as Settlor, in those circumstances, should not be equated with consent given after the proper and deliberate exercise of fiduciary power, acting as protector. And so, given my conclusion above that all involved had intended Fern to be the protector, that conclusion renders an inference or imputation that the Settlor gave consent as protector, unsafe.

144. Having stated those reservations, I would not have been prepared to accept the fourth argued basis of validity.

Declaratory relief

145. However, on the basis that I have granted declaratory relief as to the validity of the 1984 Deed of Retirement on the basis of my acceptance of the second and third bases for validity, I also declare that all subsequent deeds of retirement and/or appointments of trustees of the Y Trust No. 1 Settlement took effect in accordance with their terms

and this so that the Plaintiff Trustees are currently and validly appointed trustees of Y Trust No. 1.

Retirement of the Trustees

146. As mentioned above, at a meeting on 7th December 2012, the position of the Trustees and the desire on the part of Fiona and Frederick that they should retire was discussed.

147. The primary requirement was the obtaining of a Court order granting the Trustees the relief they seek in these proceedings; that is: the Trustees succeeding in establishing the validity of the 1984 Deed of Retirement on one or more of the four bases of validity and so allowing for the past 30 years of trust administration of the trust to be regarded as conforming to the terms of the Settlement.

148. A further requirement was that the Court approves the appointment of the private trust companies ("PTCs") established by Fiona and Frederick, as trustees.

149. The Trustees, Fiona, Frederick and the PTCs have all executed in counterparts the necessary Deeds of Appointment and Retirement, Release and Indemnity and Charge (the latter to charge a part of the Trust Fund to secure the indemnity given to the Trustees upon retirement by Clause 2(b) of the Deeds of Appointment and Retirement (reflecting the terms of the release originally provided for under Clauses 17 and 18 of Y Trust No. 1 Settlement)).

150. Dr. Black explains the reasons for appointing the PTCs as trustees in paragraphs 9 – 13 of his third affidavit. The present proposal is unusual in that it is proposed that the Trustees will retire in favour of two PTCs, not one. And this is also explained. Fiona

and Frederick are currently the beneficiaries who have the primary claim on the bounty of Y Trust No. 1 and their personal circumstances and characteristic needs are different. Fiona is non-UK resident whilst Frederick is UK resident: in consequence their tax planning considerations are different. They have different views in relation to trust investment. Both want a trusteeship which is responsive to and influenced by their individual needs and views. Having two PTCs as trustees of Y Trust No. 1 will ensure that proper regard is paid to their differing interests and views. If Y Trust No.1 is later divided (see Dr. Black's third affidavit at paragraphs 14 and 15) it is believed that Fiona's PTC will act as trustee of the fund of which Fiona and her issue will be the primary beneficiaries and Frederick's PTC will act as trustee of the fund of which Frederick and his issue will be the primary beneficiaries.

151. However, as Dr. Black also states in paragraph 12 of his third affidavit – maintaining a proper balance between the interests of Fiona and Frederick is not the only or even the principal reason for appointing PTCs as opposed to individuals or an institutional trust corporation. He goes on to set out the following additional factors relevant to the conclusion that the appointment of PTCs is appropriate in the present case.

152. The assets comprised in Y Trust No. 1 extend beyond those found in normal trusts administered by institutional trust corporations. A substantial part of trust assets is invested in a business which is a high-risk cyclical business. Institutional trust corporations are not best suited to administer a trust with assets like those of Y Trust No. 1.

153. In the present era of litigation and increased exposure to personal liability, it has become more difficult to attract persons of caliber to act as individual trustees of

trusts, in particular trusts like Y Trust No. 1 with high-risk assets. Such persons are more likely to be prepared to act as directors of a PTC.

154. The current proposal to appoint PTCs in place of the Trustees is being advanced by Fiona and Frederick. However, over the past 8 years the Trustees have wholly independently of Fiona and Frederick considered with their legal advisers the advantages of changing to a PTC structure.

155. Until the death of Matthew – the father of Fiona and Frederick – Y Trust No. 1 was subject to family influence through Matthew's control of the bearer shares of the protector (or intended protector) Fern. Matthew died at a comparatively young age when Fiona and Frederick were still children. Paragraph 39 of Conrad Grey's affidavit describes how (at a time when Matthew was terminally ill) Conrad Grey told Matthew that he was only willing to act as trustee if there was no protector: Matthew agreed to bring an end to the role of Fern, not wishing its bearer shares to come under the control of a third party after his death. As a result Fern dispensed with the need for Protector Consent on 11th May 1992 and was itself liquidated later that year.

156. As explained in Dr. Black's first affidavit at paragraph 22, the current problem was discovered as a result of Fiona becoming dissatisfied with the way in which the Trustees were administering Y Trust No. 1. Now that both Fiona and Frederick are mature adults, the Trustees accept that there is merit in restoring family influence over Y Trust No. 1 and formalizing the links between Fiona and Frederick and the trustees of Y Trust No. 1 in the future with a view to minimizing the risk of future conflict and possible breakdown in relations.

157. Whatever may have been the position in the past, in the modern world, having family influence over a trust through the vehicle of bearer shares is neither safe nor appropriate.

158. PTCs, on the other hand, provide a vehicle for custom made structures providing for family influence over the administration of Y Trust No. 1. In the case of Fiona's proposed PTC structure, such influence will be exerted principally through Stowetrust SA (a company controlled by her Swiss attorneys) acting as protector of the purpose trust. In the case of Frederick's proposed PTC structure, such influence will be exerted through Frederick acting as enforcer of the purpose trust.

159. The proposals have been sanctioned on behalf of the Third, Fourth and Fifth Defendants and as I am advised by Mrs. Warnock-Smith, they have no particular concerns. On behalf of D3's class, D3 takes the view that nothing in the proposed new arrangements is likely to affect their interests should the time ever come when they might benefit from the trusts of Y Trust No. 1. The involvement of a highly reputable trust company as the administrator of the PTCs, even while Fiona and Frederick will be involved as enforcers of the respective purpose trusts, provides comfort, not only that the interests of Fiona and Frederick will be safeguarded and respected, but also that the interests of the Third, Fourth and Fifth Defendants and D3's class will be properly considered and protected as far as may be appropriate.

160. For these reasons, I approve (so as to bind any person whether in being or as yet unborn and who may be prospectively or actually interested under Y Trust No. 1) the appointment by the Plaintiffs of the PTCs to act as trustees of Y Trust No. 1 in place of the Plaintiffs.

161. I also grant an order in terms of paragraph 6 of the Originating Summons directing that the releases to be given to the Plaintiffs in the terms of Clause 17 of Y Trust No. 1 and the indemnities to be given to the Plaintiffs, upon retirement, are to cover the entire respective periods during which they have acted as trustees.

162. The judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the parties must be strictly preserved.

Hon. Anthony Smellie
Chief Justice

January 19, 2016

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