IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD 7 OF 2014 (ASCJ)

IN THE MATTER OF A SETTLEMENT KNOWN AS THE HEXAGON SETTLEMENT DATED 18TH OCTOBER 2004 AND A SETTLEMENT KNOWN AS THE HOPE TRUST DATED 10TH JULY 2009

BETWEEN	**(1) J.F.** **(2) M.F.**	**PLAINTIFF**
AND	**(1) Hexagon Investments Limited** **(2) New Zealand Trust Corporation Ltd.** **(3) B.F.** **(4) K.F.** **(5) T.F.** **(6) R.F.**	**DEFENDANTS**

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 6TH – 7TH AND 24TH OCTOBER 2014

Appearances: Mr. Richard Wilson instructed by Ms. Andrea Dunsby of Turners, Attorneys-at-Law for the Plaintiffs

Mr. Andrew Child (appearing via videolink) instructed by Mr. Steven Barrie of Nelson & Company, Attorneys-at-Law for the 1st Defendant ("HIL");

Mr. Edward Hewitt (appearing via videolink) instructed by Mr. Colm Flanagan of Nelson & Company, Attorneys-at-Law for the 3rd, 4th, 5th and 6th Defendants

The 2nd Defendant, New Zealand Trust Corporation Limited ("NZTCL") unrepresented.

Family relocated from United Kingdom to New Zealand – formation of Cayman Islands company for protection of assets – whether assets transferred to Cayman company as beneficial owner, as trustee or whether assets held on resulting trust – possible United Kingdom tax consequences.

JUDGMENT

1. In 2001, the plaintiffs J.F. and M.F. with their then four minor daughters, the 3rd to 6th Defendants – relocated from the United Kingdom to live in New Zealand.

2. J.F. attests that the family was in search of a beautiful and safe environment in which the children would thrive and which would allow them as a family to pursue their love of activities in the great outdoors. A number of friends and relatives had already moved or were to be moving to New Zealand and nearby Australia in search of similar ideals and as J.F. explains, the prospect of being with them in that part of the world, heightened the family's expectations for their change of circumstances.

3. The family did indeed become happily settled in New Zealand and fully engaged in their antipodean way of life for about eight (8) years, when an unfortunate turn of events meant that J.F. and M.F. had to return to Europe – first to France for about six months, and then to resettle in the United Kingdom in September 2009.

4. As would have been expected, arrangements had to be put in place for the financial security of the family, both in respect of their move to New Zealand and the subsequent return of J.F. and M.F. to the United Kingdom ("U.K.").

5. This application arises out of a number of transactions that J.F. and M.F. entered into in anticipation of their changed circumstances and with financial security in mind, in relation to their investments. They were entered into on the advice of G.C., their lawyer in New Zealand but have proven in different ways, to be unclear and uncertain as to their meaning and effect, such that J.F. and M.F. (and their now adult daughters and subsequent beneficiaries) are themselves (or could become) uncertain about the true entitlement to assets which represent the bulk of the family's assets.

6. The transactions were as follows:

(i) the creation of the Hexagon Settlement on or about 18 October 2004. The First Defendant HIL is, and has at all material times been, the trustee of the Hexagon Settlement;

(ii) the transfer between 1st December 2004 and the end of February 2005 of a substantial portfolio of investments by the London Office of Rathbone Brothers Plc (the "Rathbone Portfolio");

(iii) the transfer in February 2005 and/or September 2005 of another substantial portfolio of investments by the London Office of Merrill Lynch (the "Merrills Portfolio") based on a Client Investment Management Agreement of 16 February 2005 signed by J.F. and M.F.;

(iv) the creation of the Hope Trust on 10 July 2009 by NZTCL, which is and has been at all material times, the trustee of the Hope Trust and a purported transfer on 3rd September 2009 of the Rathbone Portfolio, to be held upon the trusts of the Hope Trust.

7. The evidence as to J.F.'s and M.F.'s states of mind and their intentions in entering into those transactions is of fundamental importance to this application. In his extensive affidavit filed in support of this application on behalf of M.F. and himself, J.F. attests that they entered into the transactions on the basis of advice given by G.C. without forming any real understanding of the substance of the transactions or their tax implications, and without having formed the intention to settle their assets upon a trust. As a result, they say it is now unclear whether HIL received the Rathbone Portfolio and the Merrills Portfolio (together "the Portfolios"): (i) as legal or as

beneficial owner; (ii) as trustee of the Hexagon Settlement, or (iii) on resulting trust for them.

8. They therefore seek the Court's determination of this issue and a declaration as to the true ownership of the Portfolios, accordingly.

9. Depending on the terms of the declaration, they may wish to pursue a further remedial application by reliance on the doctrine of mistake, as that doctrine has been recently and most authoritatively explained by the U.K. Supreme Court in ***Pitt v Holt*** [2013] UKSC 26.

10. As noted above, the tax implications are a matter of significant concern for J.F. and M.F.. Having gone to live permanently in New Zealand and having lived there for eight years before returning to Europe, they believed that they had become domiciled in New Zealand. They have, however, been advised that on the footing that they were domiciled or deemed to be domiciled in the UK upon their return there in September 2009, an effective transfer by HIL of the Rathbone Portfolio to the Hope Trust on 3rd September 2009, would have triggered a charge to inheritance tax of some £461,111.50. They have reported this potential charge to Her Majesty's Revenue and Customs ("HMRC") and have paid that amount to HMRC to protect against the possibility that the outcome of this application proves to be unfavourable.

11. They insist that had they known that these were the tax effects of the purported 3rd September transfer, they would never have authorised it. It simply would not have made sense to do so especially if, as may be determined to have been the case, the Rathbone Portfolio was vested in HIL beneficially or held by HIL as nominee for them. As they were and remain the ultimate beneficial owners and directors of HIL,

they would have been advised most strongly by their U.K. lawyers not to enter into the purported 3rd September 2009 transfer.

12. Their U.K. lawyers, Withers LLP, have been communicating with HMRC and with G.C. concerning these issues. The open correspondence between them has been put before this Court and it appears from it, that HMRC are on notice of this application but have chosen not to become a party to it. HMRC are expressed in the correspondence as wishing to reserve their position, depending among other things, upon being satisfied in the end that this Court is the proper forum for the resolution of the issues. The question of the proper forum thus is a primary issue about which this Court is obliged to express its determination.

Proper Forum

13. The central party to all the transactions arising for examination and determination by the Court is HIL, a Cayman Islands company. Whether HIL came into possession of the Portfolios beneficially, as nominee or as trustee of the Hexagon Settlement, HIL was in fact incorporated in and did purport to accept the transfer of title to the Portfolios in the Cayman Islands, in 2004 to 2005.

14. From HIL's perspective, those transactions could therefore be deemed to have taken place in the Cayman Islands, in whatever manner they may be declared to have been effected.

15. Similarly, the subsequent purported transfer of the Rathbone Portfolio from HIL on 3rd September 2009 to the Hope Trust, if indeed that transaction ever did take place. The investigation and resolution of those questions would therefore *prima facie* be a

matter for this Court, as the transactions are said to have involved a Cayman entity engaging in them from its corporate offices in the Cayman Islands.

16. Cayman being regarded in this way as the proper forum may well be correct, notwithstanding that the custodianship of the assets comprised in the Portfolios has remained throughout respectively with Rathbone and Merrills at their London offices and notwithstanding that both the Hexagon Settlement and the Hope Trust are stated to be governed by New Zealand law[1].

17. Neither Rathbone nor Merrills disputes that it holds the assets of the respective Portfolios on account for HIL and this is a factor that is also germane to the question of the proper forum as will be discussed below.

18. Furthermore, as to the factual background, no question of U.K. tax arises for determination so as to point to the U.K. as the proper forum. My task, ultimately, will be to arrive at the correct determination of the nature of the interests in the Portfolios held to the account and in the name of HIL, a Cayman Islands company. An incidence of U.K. tax may or may not arise as a consequence, depending on the determination of that issue.

19. In summary then, the question of the proper forum that arises on the facts of the case, is which law governs the relationships between HIL, J.F., M.F., Rathbone and Merrills respectively, as the relevant counter-parties to the transactions by which the Portfolios came to be transferred to HIL, as a company resident in and governed by the laws of the Cayman Islands.

[1] I recognize that there is strong commentary to the effect that "it makes sense that the law governing an expressed trust and any failure thereof should determine the effect of such failure as giving rise to a resulting trust": Underhill and Hayton, Law of Trusts and Trustees 17th Ed. Chp 102.67, citing R. Stevens "Resulting Trusts in the Conflict of Laws". Here, however, no one contends for New Zealand as the proper forum.

20. It is also important to emphasize that there is no question raised by any party over whether or not the legal titles in the assets of the Portfolios were transferred to HIL. The question is whether beneficial title has passed and therefore turns on whether the conscience of HIL was affected in such a way that it must be declared as holding the Portfolios on trust (either for J.F. and M.F. beneficially, or on the trusts of the Hexagon Settlement) or for itself beneficially. In determining this question, this Court will be exercising its equitable jurisdiction *in personam* over HIL and so the law that should be applied is the law of HIL's residence. The *lex situs* of the property, the subject matter of the dispute (which are in any event not immovables but personalty and choses in action) does not apply.

21. As authority for this proposition – that the lex situs of the property in question does not apply – see *Lightning and Another v Lightning Electrical Contractors Limited and Others* 1998 WL 1044250 (in the English Court of Appeal).

22. There (at page 2), the longstanding dictum of the Earl of Selborne L.C. in *Ewing v Orr Ewing* (1883) L.R. 9 H.L. 34 at page 40 was affirmed by Peter Gibson LJ on behalf of the Court of Appeal:

> *"The Courts of Equity in England are, and have always been, courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or ratione domicilii within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries: Penn v Baltimore [(1750)]1 Ves Sen 444".*

23. In *Deschamps v Miller* [1908] 1 Ch 856, 863, Parker J. had further explained the principle, recognising that the obligations that the court will enforce are not easily brought under one definite head: *"I think it will be found"* he said, *"they all depend upon the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of the Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property."*

24. This dictum would apply *a fortiori* where the subject-matter of the dispute located abroad and in respect of which the *"conscience* of a party should be bound" is personalty, such as are the Portfolios in this case.

25. In summary, the subject of the personal jurisdiction of the court here being HIL, the foregoing considerations are, in my view, determinative of this Court being the proper forum for the resolution of the issues as defined at paragraph 20 above. The principle is that where the court has jurisdiction over a person (natural or juridical) from presence within its territory or from submission to its jurisdiction, the court has jurisdiction to compel that person to dispose of, or otherwise deal with his/its interest in foreign property so as to give effect to obligations which he/it has incurred with regard to that property.

Representation

26. The 3rd to 6th Defendants ("the daughters"), are now all adults and would share the same beneficial interests, irrespective of the terms of any declaratory order to arise from this application.

27. Depending on the validity of either or both of the Hexagon Settlement and the Hope Trust, they and any remoter issue of J.F. and M.F., could have an expectation of benefit as secondary beneficiaries under those trusts, the primary beneficiaries being J.F. and M.F. themselves.

28. It was therefore appropriate that a representation order be made to allow for the representation of the interests of the daughters and remoter beneficiaries as a single class. In this regard the 3rd Defendant B.F. agreed to be appointed and was accordingly appointed and so Mr. Hewitt presented the arguments on behalf of the daughters and remoter beneficiaries as a single class.

29. Charity, although mentioned as a potential beneficiary in the Hexagon Settlement, was not so appointed in exercise of the trustee's discretionary powers of appointment. No representation order in respect of charity was therefore needed.

30. The first defendant HIL was represented on the instructions of P.F., the brother of J.F.. P.F., according to his affidavit, was appointed an independent director of HIL "*in view of the conflict of interest between my brother and his wife as Plaintiffs and their role of directors of (HIL)*". He attests that he was appointed with the power "*solely to give instructions on behalf (HIL) in relation to these proceedings and to make all decisions to defend and or settle or compromise them*". At paragraph 5 of his affidavit P.F. attests that *"in the absence of any evidence to the contrary I must assume that the Portfolios were gifted to (HIL) and that they are beneficially owned by it. As a result, I have given instructions to the company's attorneys to defend these proceedings on this basis."*

31. With the foregoing being the state of the representations, I was provided with very full and well-articulated arguments by the three different sets of lawyers identified above, with each leader arguing for a different outcome, depending on the respective positions of the party or parties he represented.

32. I will return to deal with those arguments following further background, which I now set out.

33. After the family's applications for residency in New Zealand were approved in May 2001, J.F. and M.F. sold their family home in the U.K. and reinvested some of the proceeds into a house in London as a long-term investment. J.F. states that they took no tax advice on leaving the U.K. because they did not think they would be returning to live in the U.K. and therefore such advice was not needed.

34. They also set about acquiring their home in New Zealand and eventually purchased a property to be held by a New Zealand trust, having taken advice there from a real estate agent and property lawyers, Knapps Solicitors.

35. Because of the advice they then received, the Brave Trust was established to hold the New Zealand home and J.F. attests that he and M.F. became well aware of the nature of their roles as trustees and were conscious that as trustees, they had numerous obligations and were under a duty to administer the Brave Trust properly. This involved annual meetings at Knapps' offices, when, among other things, annual declarations of gifts required to meet New Zealand tax regulations were executed and detailed minutes approved in respect of those meetings.

36. From their experiences acquired as trustees of the Brave Trust, it is submitted by Mr. Wilson on their behalf, that J.F. and M.F. should be regarded as not only being knowledgeable but also conscientious about the fulfilment of their obligations.

37. This he submits, is in stark contra-distinction to the complete lack of minutes or other records of activity by the Hexagon Settlement for the administration of which they were purportedly also responsible through their directorship of HIL.

38. It is simply inconceivable, he submits, that had the Portfolios been actually transferred to and vested upon the Hexagon Settlement and so regarded by J.F. and M.F., there would be, as transpired to have been the case, no record of this or of their administration of the Settlement in keeping with the terms of its trusts. This then must be seen as potent evidence of the purported transfers to the Hexagon Settlement never having taken place and entirely in keeping with their intention never to have alienated the Portfolios to the Hexagon Settlement. Further, that it was only by dint of circumstances then perceived as prevailing and advice given in those circumstances, did J.F. and M.F. direct the transfer of the Rathbone Portfolio from the Hexagon Settlement to the Hope Trust, a transfer which could never have taken effect because the Portfolios had never been transferred to the Hexagon Settlement in the first place.

39. On behalf of J.F. and M.F., I am urged by Mr. Wilson to have such considerations in mind when determining what really happened in relation to the Hexagon Settlement as well as in relation to the Hope Trust.

Events leading up to the execution of the
Hexagon Settlement on or about 20th October 2004

40. In 2004, having lived in New Zealand for the statutory three years, J.F. M.F. and the daughters, all acquired New Zealand citizenship.

41. J.F. soon thereafter was introduced to G.C. at his law offices in Auckland by a mutual acquaintance, someone with whom J.F. had been discussing the management of the family's investments.

42. At that first meeting, G.C. was apprised of the circumstances of the family's arrival there and the plans to make New Zealand their permanent home. J.F. attests that it was explained to G.C. that the Portfolios were their main liquid assets outside of New Zealand and they discussed with him how their investments should be structured in order to be compliant with the New Zealand tax regime. They were concerned that their worldwide assets could become the subject of New Zealand tax. J.F. recalls that G.C., at that initial meeting, commented that it was good the assets were not in New Zealand and that it was possible to create offshore vehicles into which assets neither brought into New Zealand nor originating in New Zealand could be placed, or "ring-fenced," as G.C. is said to have expressed the idea.

43. While G.C. then mentioned the thought of a "vehicle" for the holding of assets offshore New Zealand, J.F. attests that there was no explanation specifically as to whether this would involve a company, trust, or any other structure. J.F.'s impression based on that conversation, was that the idea would be to remove the Portfolios from their direct ownership, while allowing himself and M.F. to retain control over the assets.

44. Although then given no real detail about how the structuring would be achieved, J.F. attests to have left that meeting feeling confident in the abilities of G.C., such that there was no need to question him about the details of what he had in mind. G.C. had given the impression of being quite familiar with international estates and that he was well-connected with lawyers and intermediaries around the world, to call on where necessary.

45. A subsequent meeting with G.C. took place at the home of J.F. and M.F. in October 2004. According to J.F., throughout those discussions, he and M.F. were adamant that they should retain their ownership and control over the Portfolios, a wish they emphasised to G.C. J.F. recalls that G.C. raised the possibility of a trust but he and M.F. rejected the idea, as it was not their intention to alienate their assets in a way that would transfer the ownership to someone else. "*Given our experience with the Brave Trust*", J.F. attests, "*we understood what a trust entailed and did not wish the Portfolios to be held in the same way. We were more relaxed about a company structure as we could/would be shareholders and directors and therefore have, in effect, the same degree of ownership and control. M.F. and I were concerned about the loss of control, but we were reassured by G.C. that as we would be the two directors of the controlling company, we would retain 100% control and would be able to wind up the company at any point in the future with the Portfolios returning to us.*"

46. J.F. has vague recollections that G.C. subsequently confirmed this position in an email to them, but attests that he no longer has access to their pre-2006 emails and

G.C.'s files are reported not to contain an email (or any other communication) corresponding with this particular recollection.

47. J.F. does not recall there being any other written explanation by G.C. of the structure to be employed. It seems that the absence of full written records, typified G.C.'s approach to his work. Their meetings with G.C. are described by J.F. as "*very relaxed; I do not recall that we ever discussed detailed or substantive legal issues or structures and as far as I could see, G.C. would not take notes*".

48. Despite the background of such ill-defined discussions with G.C., it is incontrovertible that the Hexagon Settlement was, nonetheless, drawn up and presented to J.F. and M.F. That came about, according to J.F., in the following further circumstances as described in his affidavit:

> *"I recall that at that time there was much discussion in the media and among our friends about the possibility of the introduction of a capital gains tax and inheritance tax regime in New Zealand, should there be political change. I think, but cannot recall the details of any discussions; that the purpose of setting up the Hexagon Settlement was to have a structure ready in the event that at some future time it became tax-efficient to transfer our offshore assets to the Hexagon Settlement. Although I cannot recall the details of the discussion, this was M.F.'s and my understanding at the time, and [(for other reasons which as he goes on to explain)] I believe that the immediate intention was that the Hexagon Settlement would hold the assets of the WOF*

Trust if this would be practical (though this did not ultimately happen)."

49. It appears that the WOF Trust was intended as a sub-trust of the Hexagon Settlement, to hold an inheritance left for the daughters by his father and their grandfather, WOF. It transpired, however, that there was no need for a WOF sub-trust, as the bequest had already been settled as a trust by WOF's solicitors in London. This then indicated that the only reason for the Hexagon Settlement would be as a vehicle of recourse in the event of unfavourable changes to the New Zealand tax regime.

50. In his continuation of his narrative, J.F. explains that following the meeting with G.C. at their home in New Zealand, they received under cover of a letter dated 19 October 2004 from G.C., a number of documents relating to HIL and the Hexagon Settlement. Copies of these were exhibited in the evidence before me. Among these documents when sent to J.F. and M.F. were two copies of the settlement deed "*for dating and signing*". The covering letter did not however, explain the role of the Hexagon Settlement within any planning structure and, as they trusted G.C. as their advisor, J.F. attests that they did not read through the voluminous documents. They simply did as G.C. asked and signed and returned the documents to him. Even had they read through the documents as provided at that stage, there was nothing in them, J.F. observes, to indicate that the Portfolios would be transferred to the Hexagon Settlement.

51. I note here, for the record, that this appears to be so from my reading of the Hexagon Settlement deed, which is actually dated differently in manuscript "*20/10, 2004*" and "*18 October 2004*".

52. G.C.'s letter also asked J.F. and M.F. to sign contemporaneous board minutes of HIL in their capacity as directors of HIL. In this regard, Mr. Wilson invites me to note also that there is no record in those minutes of HIL – which is named in the trust deed as sole trustee – resolving by way of declaration to create the Hexagon Settlement, as would have been required by the deed to give effect to the Settlement. Certainly, according to J.F., he and M.F. as the directing minds of HIL, never did so resolve to do.

53. J.F. attests in his affidavit that he can recall an agreement with G.C. to create a company in the Cayman Islands but did not have a clear idea of the company's function. He had understood that placing the assets in a company would be more tax-efficient than holding them in their own names, but that was all – the details of how that would be so and what other implications there might be, were never explained, he insists. The perceived "tax efficiency" would derive from the capital gains of the assets not being subject to tax but only such income to M.F. and himself as would be paid to them by way of dividends from the company.

54. J.F. also points to the absence of any resolution to accept the Portfolios as part of the trust fund as is required by clause 1(1)(j)(ii) of the Hexagon Settlement; and so still further formalities required by the trust deed of the Hexagon Settlement were not complied with. In this regard, he notes that the initial trust fund of the Hexagon Settlement is stated on the face of the deed, to consist of nominal capital of US$100.

55. I break from the narrative to note here, that during the hearing, in response to my query, it was explained by Mr. Wilson on instructions from his instructing solicitors,

Withers LLP[2], that no bank account was ever opened in the name of the Hexagon Settlement and that there is no record of the nominal capital of US$100 ever having been actually settled upon the Hexagon Settlement. J.F. reports that as settlors, neither he nor M.F. ever paid over the nominal sum for the account of the Settlement.

56. Thus, there arises yet a further question whether the Hexagon Settlement was ever validly constituted.

57. The incorporation process of HIL itself was not without its fits and starts, the result of confusion over names chosen for the Cayman Islands company which G.C. advised Rothschilds[3] Cayman Islands Office to establish on behalf of J.F. and M.F.

58. Apart from HIL, there were instructions given to Rothschilds for the formation of another company which was meant to be called Hexagon Holdings Limited ("HHL") and which, as that name implies, would have been the holding company for HIL. This, however, may not have accurately reflected J.F.'s and M.F.'s intentions. From other evidence, they may well have been understood as seeking the formation of one company only.

59. At all events, the HHL name was no longer available on the Cayman Corporate Registry and so a company of that name could not be formed for J.F. and M.F. But due to confusion generated as between Rothschild's Cayman Office, Rothschild's Cayman lawyers and G.C.'s office in New Zealand, it was mistakenly thought that HHL had actually been formed and the sole share in HIL was purportedly transferred by Rothschild to HHL.

[2] Who were represented in court by one of their solicitors Ms. Paola Fudakowska.
[3] The well-known international investments firm.

60. When it was eventually realised that the extant Cayman entity bearing the name HHL had no connection to J.F. and M.F., it was even more confusingly thought that a New Zealand entity of that name had been established by G.C., as the holding company. But this too also turned out to be incorrect – an Hexagon Holdings Limited already registered in New Zealand, had no connection with either G.C. or them.

61. And so it eventually came to be recognised that the purported transfer of the one share in HIL to "HHL" on 11 October 2004, by Rothschild's Cayman lawyers, was to a company that did not exist.

62. J.F. has since asked Rothschild's Cayman Office to regularise the position and has been assured that HIL has been returned to his and M.F.'s ownership. This I accept as a concluded fact and my judgment proceeds on this basis.

63. While I have concluded that the confusion over the existence of a company called HHL did not itself fundamentally alter the course of events, the confusion did beset the structure for quite some time. This is shown by the evidence which reveals that within G.C.'s office (as appears from the sparse records which he had kept), there was ongoing reference to HHL as an entity related to his clients J.F. and M.F.

64. This though in the end, as I have concluded, is only illustrative of G.C.'s proneness to error. Other events proved to be more fundamental.

65. They all followed against the background of the Portfolios having been originally created and held respectively, in the case of the Rathbone Portfolio, in the names of J.F. and M.F. jointly and, in the case of the Merrills Portfolio, in the name of J.F. alone.

1. Following what J.F. believed was G.C.'s advice to transfer the Portfolios to "*his company*" offshore New Zealand on 11 November 2004; J.F. attests to having emailed Charles Heaton of Rathbone, to ask him to assign the Rathbone Portfolio to HIL. A copy of that email is produced in the evidence. The email supports J.F.'s asserted belief that he and M.F. would retain control over their assets via the company over which they understood that they had control: *"I have formed a company which is incorporated in the Cayman Islands called Hexagon Investments Ltd. The company is wholly owned by M.F. and I. Please assign my portfolio to Hexagon and send me any relevant forms we need to sign so that the transfer can be made. (G.C.'s firm) have all the necessary documentation and will supply certificates of incorporation if required. Their contact details are as follows...."*

   In response, there is an email from Charles Heaton dated 12 November 2004 to J.F.: *"Thanks for letting me know about Hexagon and I will liaise with (G.C.'s firm) and send you the necessary documents to transfer the Portfolio".*

   And further, as to this transaction, J.F. adamantly asserts in his affidavit that "*...we did not believe that we were transferring the Portfolios into the Hexagon Settlement*".

2. In their capacities as directors of HIL and account holders of the Rathbone Portfolio, J.F. and M.F. executed a Client's Management Agreement in respect to the Rathbone Portfolio, dated 1 December 2004. This Rathbone's document clearly identifies in the handwriting of J.F. (and signed by himself and M.F.), HIL as the account holder of the Rathbone Portfolio.

There is correspondence in the evidence showing that earlier on the instruction of J.F. and M.F., on 26 November 2004, G.C. had conveyed certified copies of the memorandum and articles of association and the certificate of incorporation of HIL to Rathbone, for the purpose of the opening of the account in HIL's name. These documents of incorporation had, of course, even earlier been conveyed by Rothschild's Cayman Office to G.C., on whose instructions HIL had been incorporated for J.F. and M.F. J.F. asserts in his affidavit[4] that the actual transfer of the Rathbone Portfolio to HIL took place internally at Rathbone in February 2005. This is unchallenged, although the actual journal entries by Rathbone were not adduced in evidence. There is, I am told by Counsel, no evidence that the Rathbone Portfolio was ever held in any other name than HIL subsequently, in the records of Rathbone.

3. The position with the Merrills Portfolio was not quite as clear.

The evidence shows that following on earlier exchanges about transferring the Merrills Portfolio, on 16 November 2004 Justin Bramley of Merrills emailed G.C. to request confirmation of whether the "new Merrills account" was for a personal holding company or a trust, and where it was situated.

It appears from the records available from G.C.'s files that he replied as follows (J.F. says without discussing the matter with himself or M.F.):

> *"The company is registered in the Cayman Islands. Mr. and Mrs.(F) are the directors. The company acts as a trustee of a*

[4] At paragraph 1.1.

New Zealand Trust. I am very happy to send you such further information and documentation as you may require."

To this Justin Bramley replied:

"*Could you confirm the following and I will arrange documents to be forwarded to you: "Clients, are they opening a Cayman Islands Corporation A/C or are they opening a New Zealand Trust account where the Cayman Islands company acts as a Trustee?*"

To which G.C. replied:

"*Dear Justin, the company acts as a trustee. I look forward to receiving documents from you. G.C.*"

66. J.F. attests that he was not copied in on those emails nor do they accord with his recollection or understanding of what he and M.F. had decided to do in relation to the transfer of the Portfolios.

67. J.F. acknowledges however, that among the Merrills account opening documentation, there are references to HIL as trustee and which G.C. must have sent to him for signing. As with the Rathbone form, he attests however, that he did not read through the Merrills account opening documentation sent to him by G.C. for signature but simply signed and returned them to G.C. He did not see at the time, copies of the correspondence between G.C. and Merrills.

68. Noting what J.F. attests in this regard and despite those references to the Cayman Islands company "acting as trustee", the documentation discloses a Merrills International Client Management Account opened in the name of HIL in its capacity

as corporate owner, signed by both J.F. and M.F. as authorised signatories on 16th February 2005.

69. There is, moreover, a letter in the evidence bundle from Merrills, which although undated, is addressed to HIL (for the attention of J.F. and M.F. at their New Zealand address) signed by Mickey Finn of Merrills, confirming the creation of the account and describing the investment objectives. And finally in this regard, there are internal account records from Merrills in evidence which show journal entries of the transfers of the Merrills Portfolio assets to the name of HIL and account statements in HIL's name, dated 30 September 2005.

70. As with the Rathbone Portfolio at Rathbone, there is no evidence that the Merrills Portfolio ever became booked or held by Merrills in any other name than HIL's subsequently.

71. J.F., in his affidavit, invites this Court to find that it is apparent from the correspondence between G.C. and Justin Bramley of Merrills, that there was considerable confusion about the purpose of HIL and of the Hexagon Settlement, and about the rationale for the transfers of the Portfolios.

72. The Rathbone account documentation makes no mention of the Hexagon Settlement, or of HIL acting as trustee. In contrast, G.C.'s correspondence with Merrills refers to HIL acting as trustee of the Hexagon Settlement. However, at all subsequent meetings he had with Rathbone and Merrills, J.F. attests that they accepted his and M.F.'s position as directors of HIL, in HIL's capacity as owner of the respective Portfolios and that there were no references to trusts or trustees.

73. Had he and M.F. believed that they had settled the Portfolios upon the Hexagon Settlement, then, insists J.F., having gained experience of the required conduct of trustees in the course of administration of the Brave Trust, he and M.F. would have taken steps to hold trustee meetings, sign appropriate resolutions and record all distributions made out to the trusts of the Settlement. In the event, they took no such steps: they have not entered into any trustee resolutions or deeds of appointment, held no meetings and have created no documents in relation to any transactions from the Rathbone or Merrills Portfolio. This, J.F. insists, is in direct contrast to the deeds of gift which they executed each year in relation to the Bravo Trust.

74. As far as they were concerned, the Hexagon Settlement was a dormant structure, intended to be engaged only if, in future, the concerns over New Zealand capital gains or inheritance tax were to materialize. Nor, as discussed above, was it needed to hold the WOF bequest.

G.C.'s files

75. J.F.'s and M.F.'s current lawyers received their files provided by G.C.'s firm. They reveal a number of pieces of correspondence containing what is said to be confused and misleading information.

76. Having read them myself from the evidence binders, they can fairly be described as revealing an ongoing state of confusion in G.C.'s mind over whether HHL (whether the putative Cayman or New Zealand entity) was ever incorporated; over its relationship with HIL as holding company; over whether HIL itself acted as trustee of the Hexagon Settlement; or acted as legal and/or beneficial owner of the Portfolios. This state of confusion would have no doubt at times influenced the way others

responded. For instance, despite having been advised by the lawyers of Rothschilds Cayman that HHL was not an available name for the registration of the Cayman company but that HIL would be an available name, both G.C. and Mr. Balleine of Rothschilds Cayman in an exchange of correspondence on 21 September and 23rd September 2004, continued to refer to a "holding vehicle HHL" and G.C. for his part replied by reference to the shareholder of the Cayman entity being "Hexagon Holdings Limited (No. 2)" in New Zealand.

77. There is no record of a Hexagon Holdings Limited (No. 2) ever having been incorporated either in New Zealand or Cayman, and J.F. protests his ignorance of any New Zealand company called HHL or HHL ("No. 2"), ever belonging to himself and M.F.

78. To further compound such errors, there was even a reference by G.C. in his exchange with Mr. Balleine, to some of the clients' assets - "GBP100,000" – originating from a company in the Isle of Man; although J.F. attests that neither he nor M.F. ever gave G.C. any such instructions and that no such company or assets ever existed.

79. All in all, I am bound to observe, the picture that emerges is one of abiding confusion and unreliability on the part of G.C.

80. However, this is not a state of confusion of such lasting impact as to prevent me now from arriving at a clear conclusion as to the true ownership of the Portfolios.

81. Further aspects of correspondence should however first be noted, as they may be seen as pointing one way or the other to knowledge on the part of J.F. and M.F. about the existence of the Hexagon Settlement.

82. Notwithstanding J.F.'s clear expression of intention in his email of 11 November 2004 (see paragraph 65.1 above) to vest the Rathbone Portfolio in HIL itself, earlier communication found in G.C.'s files spoke to a trust relationship as follows:

(i) There was the letter, already mentioned, of 19 October 2004, under cover of which G.C. sent to J.F. and M.F. copies of the various incorporation documents relating to HIL as well as two copies of the Hexagon Settlement deed "for dating and signing". By this letter G.C. requested that they return a copy of the executed deed and minutes to him for his records.

(ii) There was an undated email addressed to J.F. and M.F. which appears in G.C.'s files in the date range 8 to 27 October 2004 which states: *"Once all this is completed please return the documents to us and we can begin the process of vesting assets in the trust and trustee, opening bank accounts as required, etc."*

(iii) A further email in the date range 26th to 27th October 2004 from G.C. to J.F. and M.F.: *"Everything is now in place with the trust and the trustee company. We now need to discuss the transmission of assets to the trustee. Given your experience in these matters, I am quite happy to let you deal with the bank accounts but I would appreciate your guidance on this point. If you would like me to correspond with the bank account/fund managers in question I would be very happy to do so."*

83. As to this last email, J.F. attests that although there are references to "*the transmission of assets to the trustee*", by this stage he was focussed on the transfer of assets to the Cayman companies and the significance of the expression used by G.C.

had escaped him, especially since he thought that he and M.F. had been clear about their desire to retain ownership of the Portfolios.

84. So, J.F.'s evidence is that despite the attendant confusion, his and M.F.'s steadfast intentions were to retain the ownership of the Portfolios and to do so through their control of HIL. Not only was this their intention, he insists, this was actually also carried through into how the assets of the respective Portfolios became held and accounted for within Rathbone and Merrills, both of which custodians' records consistently show them as held in the name of HIL as legal owner, without any reference to the Hexagon Settlement and so without reference to HIL holding as trustee of the Hexagon Settlement.

Events leading to the settlement of the Hope Trust on 10 July 2009

85. It seems confusion on the part of G.C. continued to reign in respect of this transaction also. J.F. attests to recall being advised by G.C. that, from a New Zealand perspective, there were tax advantages to resettling the Hexagon Settlement's holdings of foreign assets, such as the Rathbone Portfolio, unto another New Zealand trust with a New Zealand trustee, before the family's move back to the U.K. J.F. states his belief that the main difference between the two trusts would be that the Hexagon Settlement would have a Cayman trustee, whereas the Hope Trust was to have a New Zealand trustee (a company controlled by G.C.), that is: NZTCL.

86. According to J.F., this advice was given by G.C. notwithstanding the certain understanding between them – as expressed and advised earlier on a number of occasions by G.C. – that J.F., M.F. and their daughters had become domiciled in New Zealand.

87. The advice to set up a New Zealand trust – that which was established on 10 July 2009 as the Hope Trust – also proceeded on the basis that the Hexagon Settlement rather than HIL, actually held the Portfolios.

88. J.F. attests to also taking the advice of Mr. Stephen Cooke, a partner at Withers LLP London, in May 2009 in relation to his U.K. tax affairs, to ensure that they would be compliant with U.K. tax law. Stephen Cooke was briefed by G.C. who informed him that J.F.'s and M.F.'s assets were held on the trusts of the Hexagon Settlement. For all the reasons identified in the foregoing chronology of events, this was incorrect. Stephen Cooke proceeded however on the basis of his instructions, to advise and the principal issue was whether, at the time of establishing the Hexagon Settlement, J.F. and M.F. were still domiciled in the U.K. and that accordingly, the establishment and perceived settlement of funds earlier upon the Hexagon Settlement, might have created a charge to inheritance tax.

89. From July through to September 2009, J.F. also consulted G.C. and in reliance on his advice that the Portfolios should be held in a New Zealand discretionary trust with a New Zealand trustee, on 10 July 2009 NZTCL settled another discretionary trust, the Hope Trust, with itself as the sole trustee. A copy of the Hope Trust deed was produced in the evidence. Its terms are very similar to those of the Hexagon Settlement.

90. On 3rd September 2009, J.F. and M.F. instructed Rupert Heggs of Rathbone (London) by letter to transfer "*all the assets of the Hexagon Settlement*" to the Hope Trust. By reliance on this letter, Rathbone caused the nominee holding in the Rathbone Portfolio to be transferred into the name of the Hope Trust.

91. This letter was preceded by an email from Carole Sheridan of Rathbone sent on 3rd September 2009, in which she confirmed that an account at Rathbone had been opened in the name of the Hope Trust.

92. This is a significant email in a number of other respects as well.

93. First, in it Ms. Sheridan goes on to note that "*the next stage is to transfer the assets from Hexagon Investment into the New Zealand trust. Rupert Heggs has requested a letter from Mr. and Mrs. (F), in their capacity as directors of Hexagon to authorise the transfer"*(emphasis added).

94. This is a clear acknowledgement that internally at Rathbone, title to the Rathbone Portfolio was regarded as still held by HIL and that J.F. and M.F. would be acting as the directors of HIL – not in terms as the directing minds of HIL as trustee of the Hexagon Settlement – in the proposed transfer to the Hope Trust.

95. Ms. Sheridan continued:

> "*In the meantime, I am attaching a W8-BEN form which is required by the IRS in the USA for holders of US stocks. Without this form I cannot arrange to transfer the stocks from Hexagon (there are several US stocks)*" (emphasis added).

96. Copies of W8-BEN certificates ("forms") dating back to September 2008 and as recent as April 2011, were produced in the evidence both in relation to the Rathbone and Merrills Portfolios. As these documents are entitled, they are "*Certificate(s) of Foreign Status of Beneficial Owner for United States Tax Withholding*".

97. In each instance, as Ms. Sheridan's email describes, Part 1 – "*Identification of Beneficial Owner*" – lists "*Hexagon Investment Ltd.*" as beneficial owner of the listed stocks.

98. These W8-BEN certificates are signed either by J.F. and M.F. as directors of HIL (in the case of the Rathbone Portfolio) or, in the case of stocks within the Merrills Portfolio, by J.F. alone as "*authorized signatory of HIL*". In each instance, HIL is certified to be the beneficial owner of the listed stocks and a resident of the Cayman Islands for U.S. Withholding Tax purposes.

99. Each W8-BEN certificate is executed under a notification that reads:

> *"Under penalties of perjury, I declare that I have examined the information on this form and to the best of my knowledge and belief it is true, correct and complete...."*

100. Thus, it is clear that what Rathbone purportedly transferred to NZTCL on 3rd September 2009 to be held on the trusts of the Hope Trust, was not as instructed by J.F. and M.F. in their letter of 3rd September 2009 – "*all the assets of Hexagon Settlement*" – but assets in the Rathbone Portfolio which was held by Rathbone as nominee for the account of HIL as beneficial owner.

101. So far as the evidence before me shows, there were not at that time and still are not, any assets held in the name of the Hexagon Settlement, either by Rathbone or by Merrills.

102. Indeed, it is moot whether the Hexagon Settlement ever came into existence at all, either because there is no record of the nominal sum of US$100 having been settled

upon it or because HIL never resolved to bring the Hexagon Settlement into existence, as required by the Settlement Deed, on which more below.

103. I am told that since the purported transfer of 3rd September 2009, no beneficial dispositions have been made out of the Hope Trust. The whole of the Rathbone Portfolio and any accrued income remain held in the accounts of Rathbone by HIL in its name. Indeed NZTCL, as trustee of the Hope Trust, has not taken any active steps to accept or take control of the Rathbone Portfolio (on the purported basis that Rathbone holds it beneficially for the Hope Trust) and has offered to disclaim any transfer of it, as set out in an email from G.C. to Stephen Cooke of Withers dated 22 March 2010 and which is adduced in the evidence before me.

104. This is a very telling email and not surprisingly, is relied upon by J.F. and M.F. now. I excerpt two parts in particular quoting G.C.:

> *"I think it is fair to say that our (and probably your) actions hitherto were based on assurance that Mr.(F) gave us that he had intended to become domiciled in New Zealand when he had his family settled there in 2002 (sic) and had not told us of his reporting himself as domiciled in the U.K. over the time he was in New Zealand. Clearly the Trustee [i.e: NZTCL] was mistaken in understanding or unaware, that the property transferred was not trust property, and that Mr. and Mrs. F were not domiciled in the U.K."*

105. I interject here to note that J.F.'s affidavit dealing with the issue of domicile, as well as all other issues was, I am told, provided to G.C. G.C. has filed an affidavit as director of NZTCL in these proceedings but has not sought to contradict J.F.'s

evidence on this or on any other issue, although at paragraph 7 of G.C.'s affidavit the following is asserted:

> *"On 22nd October 2009, (J.F.) advised that he had in fact been reporting (himself and M.F.) as domiciled in the U.K. at all material times. This had not been told to me or to Withers and in fact was inconsistent with the information we were given at the meeting of 4 June (2009)"*

106. I am not required to resolve whether or not this assertion by G.C. is true.

107. The other telling aspect of G.C.'s email of 22 March 2010 is as follows:

> *"In fact it seems clear that the Hexagon Trust was not funded and the assets were held by Hexagon beneficially.*
>
> ....
>
> *In the end I think it is sufficient to say that the transaction underpinning the disposition, had the correct status of Hexagon been known, would have been quite different and, in fact, may not have taken place at all."*

The proper construction as a matter of Cayman Islands Law: the effect of the December 2004 – February 2005 Rathbone transfers and February 2005 – September 2005 Merrills transfers together "the 2004- 2005 Transfers[5]"

108. The capacity in which HIL received the 2004/2005 Transfers of the Portfolios will depend, it is accepted by all sides, upon what J.F.'s and M.F.'s intentions were when directing those Transfers.

[5] As described at paragraph 66-70 above.

109. It is also accepted that the approach that the Court should adopt in seeking to discern their intentions is as described by Lord Upjohn in ***Vandervell v IRC*** [1967] 2 AC 291 at 312-331 in these terms:

> *"...Where A transfers, or directs a trustee for him to transfer, the legal estate in property to B otherwise than for valuable consideration, it is a question of the intention of A in making the transfer whether B was to take beneficially or on trust, and if the latter, on what trusts. If as a matter of construction of the document transferring the legal estate, it is possible to discern A's intentions, that is an end of the matter and no extraneous evidence is admissible to correct or qualify his intentions so ascertained.*
>
> *But if, as in this case (a common form share transfer), the document is silent, then there is said to arise a resulting trust in favour of A. But this is only a presumption and is easily rebutted. All the relevant facts and circumstances can be considered in order to ascertain A's intentions with a view to rebutting this presumption.*
>
> *As Lindley LJ said in Standing v Bowing*[6]*:*
>
> > *"Trusts are neither created nor implied by law to defeat the intention of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out, and give effect to their true intentions, expressed or implied."*
> >
> > ....

[6] (1885) 31 Ch. D. 282, 289 C.A.

A very good example of this is to be found in the case of In re Curteis' Trusts[7] *where Bacon V-C, without any direct evidence as to the intention of the settlor, drew a common-sense deduction as to what he must have intended. In reality, the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution."*

110. Continuing (at 313 E) Lord Upjohn stated the principle even more succinctly:

"If A intends to give away all his beneficial interest in a piece of property and thinks he has done so but, by some mistake or accident or failure to comply with the requirements of the law, he has failed to do so, either wholly or partially, there will, by operation of law, be a resulting trust for him of the beneficial interest of which he had failed effectually to dispose. If the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him."

111. Lord Wilberforce declared to like effect (at 329 B-C):

"The conclusion, on the facts found, is simply that the option [(to purchase the shares in question)] was vested in the trustee company as a trustee on trusts not defined at the time, possibly to be defined later. But the equitable or beneficial interest cannot remain in the air: the consequence in law must be that it remains in the settlor".

[7] (1872) L.R. 14 Eq. 217.

112. And as to the standard of proof to be satisfied by the party who seeks to set aside the transaction, citing ***Fowkes v Pascoe*** (1875) 10 Ch. App. 343, 352 C.A. Lord Upjohn further noted (at 313 C-D):

> *"James LJ in the same case [(at 349)] also pointed out in effect that it was really a jury matter, on the basis, I may add, of weighing the evidence of the balance of probabilities".*

113. From those statements of principle, whilst there will be an underlying presumption as to intention potentially giving rise to a resulting trust where there is a disputed transfer of beneficial interest, that will occur only where the Court is unable to reach a conclusion as to the true nature of the transaction on the balance of probabilities. As Deputy judge of the English High Court Michael Furness QC stated in ***Sillett v Meek*** *(2007) 10 ITELR 617 at [33]:*

> *"...The presumption (of resulting trust) operates only where there is no significant evidence one way or the other, or the evidence, such as it is, is inconclusive. But once evidence becomes available the presumption falls out of account. There is no minimum level of evidence needed to rebut the presumption"*

114. In keeping with the foregoing dicta[8], I consider that I should approach the question that arises here as follows:

[8] For an authoritative discussion of the "twofold classification of resulting trusts" see Lewin on Trusts, 18th Ed. Sweet & Maxwell, Chp 7.05 and 8.02 where that classification taken from Lord Brown – Wilkinson's speech in Westdeutsche Landesbank Girozentrale v Islington L.B.C. [1996] A.C. 669 H.L. is set out; affirming Lord Upjohn in ***Vandervell*** (above) in the identification of a resulting trust arising by operation of law where a person makes a disposition of property upon trust but no trusts are effectively declared or the trusts that are declared fail to exhaust the beneficial interests.

(1) First, assess whether the documentation effecting the 2004/2005 Transfers of the Portfolios discloses the intentions of J.F. and M.F. as the transferors;

(2) If it does not, consider the entirety of the extrinsic evidence as to their intention;

(3) If the evidence is conclusive, then declare according to its meaning and effect;

(4) If the evidence is inconclusive on the balance of probabilities, fall back upon the relevant presumption (here as to a resulting trust).

115. On behalf J.F. and M.F., Mr. Wilson submits that the extrinsic evidence (including J.F.'s own evidence concerning the transfers) demonstrates that there was no intention on the part of J.F. and M.F. to dispose of their beneficial interests in the Portfolios. The transfers to HIL taken by themselves were no less likely to have been intended to convey the beneficial interest in HIL than intended to convey those interests to HIL as trustees of the Hexagon Settlement. In fact, says Mr. Wilson, there would have been good reason for the assets to be transferred to HIL beneficially rather than to the Settlement, as U.K. inheritance tax would be chargeable as a result of the latter but not the former.

116. Most significant though, were the expressed intentions of J.F. and M.F. never wishing to alienate the beneficial interests in the Portfolios.

117. Given the inconclusive state of the evidence, submits Mr. Wilson, the only appropriate outcome is to fall back onto the most basic presumption of all: that of the presumption of resulting trust, on the basis that if the Court cannot decide which of the two forms of alienation of beneficial ownership was intended by the transferor, it should find that neither occurred.

Alternative Argument – Failed disposition

118. Mr. Wilson further submitted that even if I were to conclude that the intention of J.F. and M.F. (either actual or inferred) was to add the Portfolios to the Hexagon Settlement, such addition would have failed and a resulting trust arose because of that failure. This is on the basis of the principle stated by Lord Upjohn in ***Vandervell*** (at 313 E; see paragraph 108 above)

119. One must therefore look to the provisions of the Hexagon Settlement itself. Clause 1(1)(j)(ii) provides that the "Trust Fund" is defined as the original USD100 settled, together with "*all money instruments and property paid or transferred to and accepted by the Trustee...as additions to the Trust Fund*" (emphasis supplied).

120. The requirements that there should be acceptance of any assets to be added to the Settlement is a commonplace one, submits Mr. Wilson; and is included for good reason: it prevents trustees being saddled with burdensome assets that could give rise to considerable liabilities for the trust. Whilst the Portfolios did not fall into that category, the requirement for acceptance is unambiguous and cannot be ignored. It was not complied with – HIL (per J.F. and M.F. as its directors and as trustees of the Hexagon Settlement), never resolved to accept the Portfolios - and the result is that any purported transfer to the Hexagon Settlement failed. It must follow that there could have been no valid onward transfer of the Rathbone Portfolio to the Hope Trust on 3rd September 2009.

121. In such circumstances, says Mr. Wilson, HIL would not take the Portfolios beneficially: there would be a resulting trust for J.F. and M.F.

122. On behalf of the daughters as secondary beneficiaries (and the remoter beneficiaries), Mr. Hewitt argued in support of the validity of the Hexagon Settlement and the purported transfers of the Portfolios to it.

123. Citing the evidence (in particular as discussed at pp 11-25 above) he submits that it is clear that the whole purpose of the 2004/2005 Transfers to the Hexagon Settlement was to remove both Portfolios from the beneficial ownership of J.F. and M.F. by transferring them offshore (in one way or another). That purpose, he says, would have been entirely defeated if HIL as transferee, held the Portfolios on resulting trust for J.F. and M.F.

124. He describes as misconceived the assertion in J.F.'s affidavit, expounded upon by Mr. Wilson in his submissions above that:

> *"There was also no resolution to accept the Portfolios as part of the trust fund as is required by clause 1(j)(ii) of the Hexagon Settlement so the formalities required by the trust deed of the Hexagon Settlement were not complied with."*

125. Mr. Hewitt submits in this regard that there is no general requirement at common law or in equity that a trustee of an existing trust must take some positive step – such as signing a formal resolution – in order to accept an asset as an addition to an existing trust. On the contrary, once the transferor has done everything required of him to transfer the asset to the transferee, the transfer is complete without any further action being required of the transferee, who may not even know about the transfer. The assets will be vested in the transferee but the transferee will also acquire the assets together with a right to disclaim them; citing ***Standing v Bowring*** (above).

126. In that longstanding case, the English Court of Appeal, in considering whether the transfer of legal title to corporate stocks was complete upon execution by the transfer in proper form by the plaintiff to the defendant, decided that the legal title of the defendant in the stocks was complete once the transfer was executed although it had taken place without his knowledge.

127. The effect was that the transfer in proper form vested the property in the transferee "at once", subject to his right to repudiate it when informed of the transfer.

128. Moreover, submits Mr. Hewitt, when the transferee is the trustee of an existing trust (here HIL as trustee of the Hexagon Settlement), a presumption arises that the property is transferred to him as an addition to the existing trust; citing ***In re Curteis' Trusts*** (above).

129. This is a proposition which is supported, says Mr. Hewitt, by the following commentary from the practitioners text, Kessler & Sartin, Drafting Trust and Will Trusts and Will Trusts[9]:

> *"It is plainly not necessary to say that the trust fund includes property which shall be added to the trust. If property is subsequently transferred to the trustee with intent that it should be added to the trust fund, then the trustee can hardly be heard to say the added property is not held on the terms of the original trust."*

Relying on these citations, Mr. Hewitt argues that although in principle it would be open to a settlor to require a trustee to take some positive act to accept an asset as an addition to the trust (e.g. by acknowledging receipt in writing or by deed), no such

[9] 11 Ed. Sweet and Maxwell 2012 at 10.40. Both the New Zealand and Cayman editions of this work contain commentary in identical terms: Kessler and Ayers, Drafting Trust and Will Trusts in New Zealand, Brookers, 2010 at 9.26 and Kessler and Pursall, Drafting Cayman Islands Trusts, Kluwer Law International 2006, at 9.41.

requirement is imposed by the terms of the Hexagon Settlement. In other contexts, the terms of the Hexagon Settlement do require the trustee to exercise certain powers by executing a deed (e.g. the exercise of the power to add/exclude a beneficiary[10], to release or restrict the future exercise of their powers[11] or to change the proper law of the trust[12].

No formal requirement is, however, imposed in relation to the acceptance of additional trust property: Recital B records that "*Further money, investments and property may subsequently be paid or transferred to the Trustee, or either of them if more than one, to be held upon the trust of this Settlement [....]*" and *"all money, investments and property paid or transferred to and accepted by the Trustee, and if more than one, one of them on or after the date of the Settlement as addition to the Trust Fund"*.

130. It is therefore submitted by Mr. Hewitt, that once the Portfolios had been transferred from J.F. and M.F. to HIL as trustee of the Hexagon Settlement, HIL immediately held the Portfolios on the terms of the Hexagon Settlement, either because HIL is presumed to have accepted them as additional trust assets or because HIL impliedly accepted them as such.

131. Its attractive simplicity notwithstanding, this argument fails to overcome a number of obvious difficulties.

132. The first of course, is that presented by the terms of clause 1(1)(j)(ii) of the Hexagon Settlement deed itself, in its requirement of acceptance of transfers of assets by the Trustee (see para. 119 above).

[10] Clause 7(2)(a)
[11] Clause 9(2) and (3)
[12] Clause 16(2)(b)

133. This requirement in my view, cannot be regarded as anything less than a pre-condition in its plain terms laid down by the Settlement itself, before the addition of assets to the Trust Fund of the Settlement will be effective.

134. There is good reason as a matter of construction also to read the clause in this way if one assumes that the draftsman was aware of the common law rule as stated in ***Standing v Bowring*** (above), which would otherwise deem the asset vested in the Trustee(s) as transferees acquired together with a right to disclaim them. The draftsman would only have needed to reflect for a moment upon the obvious disadvantages of the Settlement becoming straddled with burdensome assets only to have to go to the trouble of disclaiming them, to elect for a requirement of formal acceptance.

135. And to my mind, of more significance in the context of the structure here – involving J.F. and M.F. not only as settlors of the Hexagon Settlement but also as the persons who would likely be transferring assets to add to its trust fund – there is also the practical consideration that they might wish when wearing their trustee hats, to reconsider the acceptance of any transfer, having regard, for instance, to tax implications which may not have been apparent at the moment of first directing the transfer.

136. The present imbroglio over the tax consequences of the 2004/2005 Transfers is illustrative.

137. Finally, and to my mind decisive on this point, it is far from clear on the evidence, either that J.F. and M.F. intended to transfer or actually effectuated the transfer of the Portfolios, to HIL, in its capacity as trustee of the Hexagon Settlement.

138. As regards the Rathbone Portfolio, the client management agreement dated 1 December 2004, as noted above (at paragraph 65), clearly identifies in the handwriting of J.F. – and signed by himself and M.F. – HIL as the account holder. The letter of the 26 November 2004 from G.C. to Rathbone (also referenced at paragraph 65 above) conveyed the incorporation document of HIL (not the deed of the Hexagon Settlement) for the purposes of opening the account in the name of HIL.

139. From then until the time of this hearing, the Rathbone Portfolio has remained within the books of Rathbone, nominated to HIL as the owner. This is entirely in keeping with the intentions of J.F. and M.F. as expressed in the earlier email of 11 November 2004 to Charles Heaton of Rathbone.

140. The same is true of the Merrills Portfolio: notwithstanding the confusing reference to the establishment of a trust relationship in G.C.'s communication and in documents described as to be sent to both Merrills and Rathbone for execution (as mentioned above at paragraph 65), the evidence (including the W8-BEN certificates) still shows HIL as the beneficial owner of the Merrills Portfolio.

141. And it is again to be noted that J.F.'s unrefuted evidence, is that in all his subsequent dealings with Rathbone and Merrills, there was never any discussion of the Portfolios being held upon the trusts of the Hexagon Settlement.

142. This is entirely consistent also with J.F.'s evidence that the Hexagon Settlement was established only as a "safe harbour" for his and M.F.'s assets for recourse only in the event of an adverse change in the New Zealand tax regime.

143. No general principle emerges from the case law – ***Standing v Bowring*** or ***In re Curteis' Trusts*** (both above) or from the textbooks (which cite no authority for the

propositions of their authors) that would require me to override the intentions of settlors as clearly expressed in the Settlement Deed for the purposes of effecting and accepting transfers of assets into their Settlement.

144. Rather, in my view, the common law proposition of deemed acceptance for which those cited cases stand, will apply only where not precluded by the express terms of a valid settlement.

145. I conclude that even if the 2004/2005 Transfers to the Hexagon Settlement were put in train by Rathbone and Merrills respectively (propositions which find no support in the documented evidence), HIL was required as trustee to take the positive step of resolving formally to accept them. That HIL could not have done without acting through J.F. and M.F. as its directing minds and their unrefuted evidence (as given by J.F.) is that no such positive step was ever taken. Indeed, nowhere within the bundles of materials placed before me is there any document by which HIL purports, in its capacity as trustee of the Hexagon Settlement, to accept the Portfolios as additions to that Trust Fund.

146. I therefore conclude that the Portfolios never became vested in HIL as trustee of the Hexagon Settlement.

147. It follows that the purported transfer from the Hexagon Settlement on 3 September 2009 to the Hope Trust was also ineffective: J.F.'s and M.F.'s instructions of that date to Rupert Heggs to transfer "all the assets of the Hexagon Settlement" to the Hope Trust was wholly ineffectual, as there were no such assets to be transferred. Indeed, as even the nominal sum of US$100 to constitute the Hexagon Settlement

appears never to have been settled upon it, the very existence of the Settlement is doubtful.

148. The ineffectiveness of the instructions of 3rd September 2009 is only confirmed by the questions raised by Ms. Sheridan in her earlier email also of 3rd September 2009 which appear never to have been satisfactorily answered (see paragraphs 89-99 above) and which resulted in title to the Rathbone Portfolio remaining in the accounts of Rathbone in the name of HIL.

149. What then are the consequences of both the Rathbone and the Merrills Portfolios remaining in the name of HIL?

150. I am satisfied after a full examination of the relevant facts and circumstances, that the title to the accounts being held in the name of HIL is not merely the incidental outcome of confused and conflicting intentions and instructions but is the correct reflection of J.F.'s and M.F.'s real intention and objective from the outset. That being so, there is no need and no basis for resort to the "*so-called presumption of resulting trust (as) ...a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution*" per Lord Upjohn from ***Vandervell*** (above).

151. In determining where the beneficial interests in the Portfolios subsist, it has been my task to discern J.F.'s and M.F.'s true intention in effecting the assignments or transfers (see again ***Vendervell*** per Lord Upjohn above).

152. In addition to the facts and circumstances last discussed above, others helpfully identified and emphasised by Mr. Child in his arguments will help to explain my conclusion.

153. From the account of their earliest discussions with G.C., it appears that the common understanding had emerged that the Portfolios were "*their main liquid assets outside of New Zealand*" and the concern was to ensure that they would not become liable to New Zealand tax. G.C. recognised that it was "*good that the assets were not in New Zealand*" and to that end the Portfolios were to be held in an effective vehicle "*ring-fenced*" as G.C. described the idea.

154. J.F.'s impression from this first meeting "*was that the idea would be to remove the Portfolios from our direct ownership, while allowing us to retain control over those assets.*"

155. As J.F. explains, it was at the further meeting in October 2004 that G.C. first raised the possibility of a trust structure but he and M.F. were not keen on the idea since "*it was neither my intention nor (M.F.' s) to alienate our assets in a way that would transfer the ownership to someone else*".

156. I take this statement as implicitly recognising that although J.F. and M.F. might themselves be appointed trustees (or the directing minds of a corporate trustee), legal title to the Portfolios would not be truly alienated to any corporate trust, with all the consequences that attend the creation of successive beneficial interests.

157. Thus, there is no reason to doubt (and G.C. has not suggested to the contrary) that J.F. and M.F. were, as attested "*more relaxed about a company structure as we could/would be shareholders and directors and therefore have, in effect, the same degree of ownership and control. (M.F.) and I were concerned about the loss of control, but we were reassured by (G.C.) that as we would be the two directors of the*

controlling company we would retain 100% control and would be able to wind up the company at any point in the future with the Portfolios returning to us."

158. I am satisfied that that was the true mandate given to G.C. for the establishment of the Cayman Islands company that became HIL.

159. The significant confusion that subsequently arose through the establishment of the Hexagon Settlement with HIL as trustee, I am satisfied was the result of G.C.'s failure to observe J.F.'s and M.F.'s wishes and instructions not to alienate the Portfolios into a trust but instead to establish a settlement as a future recourse in the event of unfavourable changes to the New Zealand tax regime.

160. That purpose as well as the purpose of receiving the WOF bequest were expressly recognised and reflected in the terms of the Hexagon Settlement[13].

161. An immediate vesting of the Portfolios into the Hexagon Settlement, thereby bringing them onshore New Zealand and potentially within the scope of its tax regime, was anathema to the stated objectives.

162. Those objectives, I might add, would appear to be unexceptional: rather than being immediately liable for inheritance or capital gains tax upon all their global assets in New Zealand, as J.F. explains, he and M.F. would be liable to tax on income they would receive by way of dividend distributions from HIL.

163. The only documents that directly speak to the assignment of the Rathbone Portfolio is the email from J.F. to Charles Heaton of Rathbone dated 11 November 2004 and the

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[13] Clause 1(1)(j)(v) provides:

"The "Trust Fund" means such moneys as the Trustees shall receive from the estate of, or from any grandparent...which money shall be held upon trust...which shall be called "the WOF Settlement Trust". Whilst Clause 1(j)(ii) states that the Trust Fund also means *"all money, investment and property paid or transferred to and accepted by the Trustees...as addition to the Trust Fund."*

Client Agreement of 1 December 2004 (see paragraph 65 above). In the email, J.F. informs Charles Heaton of the formation of HIL in the Cayman Islands and instructs that the Rathbone Portfolio be assigned to HIL.

164. That assignment, in my view, was clearly intended to transfer the beneficial interest in the Portfolio, as the ownership of the company HIL, is expressly referred. And it is worthy of note here again, that there was no mention at all of the Portfolio being assigned to the Hexagon Settlement, the beneficiaries of which are not simply limited to J.F. and M.F. The actual client agreement which followed on 1 December 2004 confirmed the intention to transfer to HIL.

165. The position in respect of the Merrill Portfolio is, in the final analysis it must be recognised, somewhat murkier. But this I find is in large part due to the fact that G.C. appears to have been left to act unmonitored by J.F. and M.F. in his email correspondence with Merrills.

166. Whilst there is suggestion from G.C.'s emails to Merrills[14] that the assignment of the Merrills Portfolio would be to HIL in its capacity as a trustee, it is notable that J.F. was not copied in on that correspondence. In this regard, J.F. states: "*I was not copied in on that email and it does not accord with my recollection and understanding of what we had decided to do in relation to the transfer of the Portfolios*".

167. It is in this respect that J.F.'s evidence continues and is worth repeating here: - "*in all subsequent conversations and meetings I had with Rathbone and Merrill Lynch they accepted my position as director of HIL which owned the respective portfolios and there was no reference to trusts and trustees*".

[14] (see again paragraph 65 above)

168. This statement is borne out by the recent disclosure of the Merrill Lynch file[15] including the W-8BEN Forms. These forms, as discussed above, constitute certificates of Foreign Status of Beneficial Owner for United States Tax Withholding. A false declaration in them would constitute the criminal offence of perjury. What is notable here from the W-8 BEN Forms is that they are signed alternatively by J.F. solely and J.F. and M.F. jointly. They are express in their terms and state:

(i) that the beneficial owner of the Merrills Portfolio is HIL;

(ii) HIL is described under the "Type of beneficial owner" section as a "Corporation" as opposed to other available options including "Simple Trust", "Complex Trust" or "Grantor Trust";

(iii) the beneficial owner (that is: HIL) is described as a resident of the Cayman Islands (cf. the Hexagon Settlement which is New Zealand domiciled);

(iv) J.F. and M.F. sign as "Authorised Signatory" or as "Director", not for and on behalf of HIL as trustee.

169. When considered in the context of all the other facts and circumstances, these forms dating back to September 2008 are, in my view, conclusive as to the intention of J.F. and M.F. that the Merrills Portfolio be owned beneficially by HIL.

170. Approaching the evidence with the advice of James LJ in ***Fowkes v Pascoe*** (above) in mind, "*as a jury would*" – in my view any presumption of a resulting trust existing in this case would be easily rebutted.

171. And as Mellish LJ also advised in ***Fowkes v Pascoe***:

[15] Under cover of a letter dated 4 May 2012 from Loni Vermeulen of Merrill Lynch to Ziva Robertson of Withers LLP.

"...where there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption[16].

172. Equally, to the extent that the secondary and remoter beneficiaries through Mr. Hewitt seek to rely on ***Re Curteis' Trusts*** (above) to advance the proposition that in circumstances where a person transfers assets to a trustee of a settlement previously made by him, there is a presumption that he meant to add the property to the trust fund, such a presumption, if it does exist in law, is easily overcome by the evidence of J.F.'s and M.F.'s intentions and actions taken to the contrary in this case.

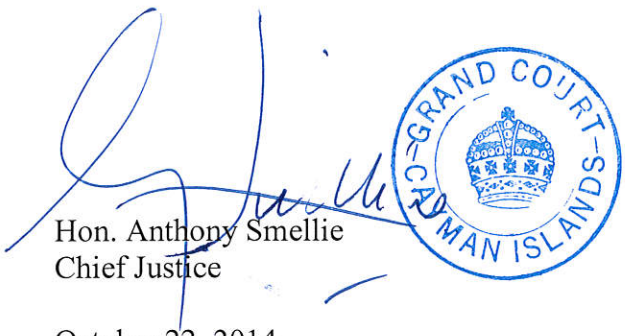
173. Indeed I feel compelled to express the view, in agreement with Mr. Child, that ***Re Curteis' Trusts*** was a decision specific to its facts and stands for no more than the proposition that the Court should look at the existing evidence presented to it before coming to a conclusion as to the parties' requisite intentions.

174. Lord Upjohn himself characterised the ***Re Curteis' Trusts*** decision in this manner in his judgment in ***Vandervell*** (above):

"A very good example of this is to be found in the case of In re Curteis' Trusts where Bacon VC, without any direct evidence as to the intention of the settlor, drew a common sense deduction as to what he must have intended."

[16] Expressly approved by Lord Upjohn in *Vandervell* (above).

175. After full consideration of the evidence, I am compelled to the conclusion and so declare, that HIL took the Portfolios legally and beneficially – not in its capacity as trustee of the Hexagon Settlement – and such that there was no resulting trust to J.F. and M.F. of the Portfolios.



Hon. Anthony Smellie
Chief Justice

October 22, 2014