

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division**

2017/CLE/gen/00777

IN THE MATTER of the Deed of Settlement dated the 26th May, 2005 and designated as the A.B. Insurance Trust Settlement

AND IN THE MATTER of Section 48 of the Trustee Act 1998 (Chapter 176 Revised Statute Laws of The Bahamas 2000)

BETWEEN

ANN MAXINE PATTON

Plaintiff

AND

**ALVAREZ, JIMENEZ, DE PASS, S.A. A/K/A
ALVAREZ AGUILAR ABOGADOS ASOCIADOS, S.A.**
(in its capacity as the Trustee of the A.B. Insurance Trust Settlement)

First Defendant

AND

JAMES ALFRED WALKER JR.
(in his capacity as the Protector of the A.B. Insurance Trust Settlement)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Sean N. C. Moree with him Mrs. Vanessa L. Smith and Mr. Miguel A. Darling of McKinney, Bancroft & Hughes for the Plaintiff
Non-appearance by the Defendants although properly served

Hearing Date: 4 September 2020

Trusts – Plaintiff seeking removal of trustee and protector - Removal of trustee – Appointment of successor trustee - Protector resigned a day before hearing – Appointment of successor protector – Failure to account and provide information – Dishonesty and potential fraud - Hostility between Defendants and Plaintiff – Defendants’ refusal to submit to Bahamian jurisdiction – Protector resigned a day before hearing – Other beneficiaries do not oppose Plaintiff’s application

The Plaintiff, a beneficiary of the A.B. Trust, commenced these proceedings seeking the removal of the First Defendant (“AJD”) as Trustee and the Second Defendant (“Mr. Walker”) as the Protector of the A.B. Trust. The Plaintiff also seeks that they be replaced by a successor Trustee and a successive Protector.

HELD: The Trustee is removed and replaced by a successor Trustee to the A.B. Trust. The Protector, having tendered his resignation a day before this hearing, leaves that office vacant. A successor Protector is appointed to the A.B. Trust.

1. The Court has an inherent jurisdiction to remove a trustee, the general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust: Lord Blackburn in **Letterstedt v Broers** (1884) 9 App Cas 371 at pages 385-387.
2. Trustees are under an obligation to account to the beneficiaries for their stewardship of the trust assets. The duty to account is one of the “*irreducible core obligations*” owed by trustees to beneficiaries: Millett LJ in **Armitage v Nurse** [1998] Ch.241.
3. The Court finds that the First Defendant failed to account to the Plaintiff for its receipts and dispositions of value of the A.B. Trust.
4. A trustee is not at liberty to simply ignore a beneficiary’s request for information about the trust: HHJ Paul Matthews in **Lewis v Tamplin** [2018] EWHC 777 (Ch) at paras 33-34.
5. In the present case, the Plaintiff has sought information from the Trustee to hold it accountable for its stewardship of the trust property and the Trustee has failed to provide the information requested.
6. Hostility between a beneficiary and trustee by itself is not enough to justify a trustee’s removal. However, the court is encouraged to take these hostilities (and the reasons for them) into consideration when determining whether it is just and equitable to exercise its jurisdiction to remove a trustee: Lord Blackburn in **Letterstedt v Broers** (1884) 9 App Cas 371 at pages 389.
7. Hostility between the Plaintiff and the Trustee is borne out by (i) the misconduct of the Trustee; (ii) the mistrust by the Plaintiff of the Trustee; and (iii) the non-cooperation of the Trustee to deal with legitimate enquiries from the Plaintiff and to provide her with information about the trust to which she is entitled.

8. Despite being properly served with proceedings, the Trustee has refused to submit to the Bahamian jurisdiction and participate in the proceedings. A trustee, who has been served with proceedings concerning the administration of a trust and who does not participate in the proceedings *a fortiori* where its own removal is sought is, *ipso facto*, unfit to continue to act as trustee and an adverse inference with respect to its refusal to participate in these proceedings should be drawn.
9. The Court will exercise its inherent jurisdiction and remove AJD as trustee of the A.B. Trust and appoint a successor trustee pursuant to Section 48 of the Trustees Act.
10. While the Court possesses an inherent jurisdiction to remove a protector of a trust, the Protector tendered his resignation on 2 September 2020. The Deed of Resignation was provided to the Court on 3 September 2020. Accordingly, the office of Protector of the A.B. Trust is now vacant and the Court has the power to appoint a successor protector.
11. The Court has power to appoint a protector of a trust pursuant to its inherent supervisory powers over trusts: See Hargun CJ in **In the Matter of H Trust** [2019] SC (Bda) 27 at paragraphs 11-12.

JUDGMENT

Charles J:

Introduction

[1] By Amended Originating Summons filed on 27 June 2017, the Plaintiff (“Mrs. Patton”) seeks the following order namely:

- (i) The First Defendant, Alvarez, Jimenez, De Pass, S.A. a/k/a Alvarez Aguilar Abogados Asociados, A.A. (“AJD”) be removed as Trustee of the A.B. Insurance Trust Settlement (“the A.B. Trust”) and that Peter James DeLisi (“Mr. DeLisi”) be appointed as the successor Trustee of the A.B. Trust; and
- (ii) The Second Defendant, James Alfred Walker Jr. (“Mr. Walker”) be removed as Protector of the A.B. Trust and that John Michael Koonmen (“Mr. Koonmen”) be appointed as the successor Protector of the A.B. Trust.

[2] The Amended Originating Summons is supported by the following Affidavits:

- a. Affidavit of Ann Maxine Patton filed on 23 June 2017 (“the First Patton Affidavit”);
- b. Affidavit of Ann Maxine Patton filed on 19 July 2017 (“the Second Patton Affidavit”);
- c. Affidavit of Peter James DeLisi filed on 23 June 2017 (“the DeLisi Affidavit”);
and
- d. Affidavit of John Michael Koonmen filed on 23 June 2017 (“the Koonmen Affidavit”).

Procedural history

- [3] The Amended Originating Summons and supporting Affidavits have been duly served on AJD and Mr. Walker. The named discretionary beneficiaries of the A.B. Trust are (i) Mrs. Patton who is the Primary Beneficiary; (ii) Professor Paul Bender, the Settlor’s father; (iii) Mrs. Margaret Bender, the Settlor’s mother; (iv) Mr. Matthew Bender, the Settlor’s brother; (v) Mr. Kenneth E. Patton III, Mrs. Patton’s father; (vi) Mrs. Grace E. Patton, Mrs. Patton’s mother; and (vii) Mr. Kenneth S. Patton IV, Mrs. Patton’s brother. They also have been served with the Amended Originating Summons and the supporting Affidavits.
- [4] AJD has not entered an appearance in these proceedings. Mr. Walker had, in prior interlocutory proceedings, challenged the service of the Amended Originating Summons and supporting Affidavits and the jurisdiction of this Court to hear the Amended Originating Summons (“Mr. Walker’s Challenge”) which was unsuccessful. Thereafter, Mr. Walker advised the Court that he would not be submitting to the jurisdiction and would not further participate in the action.
- [5] Pursuant to the Order dated 3 June 2020 (“the Order”), Mrs. Patton served the other named beneficiaries of the A.B. Trust electronically. The method of service was declared effective by way of the Order dated 17 August 2020.
- [6] None of the aforementioned beneficiaries have filed any appearances in this action.

The hearing of the Amended Originating Summons

[7] The Amended Originating Summons was heard on 4 September 2020 at 10: 30 a.m. via remote hearing using the CISCO WEBEX platform. Despite the Court providing Webex invitations to the following persons, none of them chose to appear:

- 1) Mr. Marco Turnquest and Ms. Chizelle Cargill of Lennox Paton who had previously made representations on behalf of Mr. Walker;
- 2) Professor Paul Bender;
- 3) Mrs. Margaret Bender;
- 4) Mr. Matthew Bender;
- 5) Mr. Kenneth Patton III;
- 6) Mrs. Grace Patton; and
- 7) Mr. Kenneth Patton IV.

[8] Nonetheless, by emails dated 3 September 2020, Mr. Kenneth Patton III, Mrs. Grace Patton and Mr. Kenneth Patton IV expressed their support of the application made by Mrs. Patton.

[9] Additionally, by letter dated 3 September 2020, Mr. Marco Turnquest of Lennox Paton wrote to Mr. Sean N.C. Moree of McKinney, Bancroft & Hughes, Mr. Turnquest stating that Mr. Walker has elected to resign as Protector of the A.B. Trust. The letter reads:

“Re: ANN Maxine Patton v James Walker Jr. (“Mr. Walker”) et al – Action No. 2017/CLE/gen/00777

As you are aware, we represent Mr. Walker. After Justice Charles’ Rulings in early June 2020, our client entered in discussions with the late Mr. John Bender’s father and other family members (“the Bender family”) concerning the captioned Action. Initially, the Bender family advised our client that they intended to participate in the Action as beneficiaries to protect their interest. However, earlier this week, the Bender family abruptly advised our client that they no longer had any interest in participating in the Action. Consequently, the Bender family advised our client that they would not oppose the relief that your client was seeking in the Action. Given the Bender family’s position, our client has decided to respect

their wishes and has instructed us to advise you that in the circumstances he has elected to resign as protector of the A.B. Insurance Trust Settlement (“the Settlement”). Accordingly, we attach a copy of our client’s executed Deed of Resignation.

However, notwithstanding our client’s resignation as the protector of the Settlement, he maintains his position that Mr. Peter J. DeLisi and Mr. John M. Koonman (sic) are not suitable persons to be appointed as trustee and protector of the Settlement respectively for the reasons set out in his previously filed affidavits....”

- [10] Furthermore, neither the Bender family nor the Patton’s family (who are all discretionary beneficiaries) oppose Mrs. Patton’s application.
- [11] Mr. Walker, who declined to enter an Appearance or submit to the jurisdiction of the Court, appears to be the only protestor. In his affidavits filed on 18 December 2017 and 10 May 2018 respectively, Mr. Walker complained about the unsuitability of Mr. DeLisi and Mr. Koonmen. Since he has not submitted to the jurisdiction of the Court, Mr. Moree is unable to cross-examine him on his allegations. In fact, his affidavits ought to be struck out which I do so now.
- [12] At the hearing, both Mr. DeLisi and Mr. Koonmen were present. Both gentlemen had filed affidavits on 23 June 2017 consenting to be appointed in their new position: see para. 6 of Mr. Koonmen’s affidavit and para. 8 of Mr. DeLisi’s affidavit.
- [13] The Court also had the benefit of reading the very comprehensive written submissions of Mr. Moree which was forwarded to me well in advance of the hearing. After briefly hearing from Mr. Moree, I made the following order:

IT IS HEREBY ORDERED THAT:

1. **The First Defendant, Alvarez, Jimenez, De Pass, S.A. A/K/A Alvarez Aguilar Abogados Asociados, S.A., is hereby removed as the Trustee of the Trust;**
2. **Mr. Peter James DeLisi is hereby appointed as the Successor Trustee of the Trust;**

3. **The Second Defendant, Mr. James Alfred Walker Jr., having effectively tendered his resignation as the Protector of the Trust on 2 September, 2020, the position of Protector of the Trust is declared vacant.**
4. **Mr. John Michael Koonmen is hereby appointed as the Successor Protector of the Trust.**
5. **Costs are fixed in the amount of Twenty-Five Thousand Dollars (\$25,000.00) to be paid to the Plaintiff jointly and severally by the First and Second Defendants personally and are not to be borne from the corpus of the Trust.**

[14] My reasons for the Order are set out below.

Relevant background facts

[15] By way of a Deed of Settlement dated 26 May 2005, the A.B. Trust was settled by Mr. John Felix Bender (“the Settlor”) pursuant to the laws of the Commonwealth of The Bahamas.

[16] The Settlor appointed Oceanic Bank and Trust Limited (“Oceanic”) to serve as the initial Trustee of the A.B. Trust. On or about 3 July 2006, Oceanic retired as Trustee and AJD was appointed as the sole successor trustee of the A.B. Trust. Mr. Juan de Dios Alvarez Aguillar (“Mr. Alvarez”) was at all material times the principal, controller and agent of AJD.

[17] The Settlor appointed Mr. Walker as the Protector of the A.B. Trust and he remains its sole Protector. He is an attorney licensed to practise in the United States of America.

[18] As already mentioned, the named beneficiaries of the A.B. Trust are:

1. Mrs. Patton who is the Primary Beneficiary;
2. Professor Paul Bender, the Settlor’s father;
3. Mrs. Margaret Bender, the Settlor’s mother;
4. Mr. Matthew Bender, the Settlor’s brother;
5. Mr. Kenneth E. Patton III, Mrs. Patton’s father;
6. Mrs. Grace E. Patton, Mrs. Patton’s mother; and

7. Mr. Kenneth S. Patton IV, Mrs. Patton's brother.

- [19] The sole asset of the A.B. Trust was a variable life insurance policy, Policy No. 97017 ("the Policy"), issued by Lighthouse Capital Insurance Company ("Lighthouse Capital") insuring the life of the Settlor. Lighthouse is or was managed by Aon Insurance Managers ("Aon"), a wholly owned subsidiary of Aon PLC, a major insurance company headquartered in London.
- [20] Mr. Walker has served as Lighthouse Capital's outside general counsel.
- [21] On the Policy's terms, MeesPierson (Cayman) Limited ("MeesPierson"), a Cayman company, in its capacity as trustee of "The Bender Family Trust", was named as (i) the beneficiary of the death benefit; and (ii) the holder of the rights of the policy owner. Subsequently, AJD in its capacity as trustee of the A.B. Trust was named as (i) the beneficiary of the death benefit; and (ii) the holder of the rights of the policy owner.
- [22] Premiums paid under the Policy were, after deduction of a mortality risk premium and an administrative charge, placed in a separate account underlying the policy ("the Separate Account"). The assets in the Separate Account, and all income earned thereon, were segregated from the general assets and reserves of Lighthouse Capital and held exclusively for the benefit of the Policy.
- [23] Under the Policy, provision was made for the money in the Separate Account to be invested by a Cayman Islands company, Lighthouse Management Ltd. ("Lighthouse Management").
- [24] Beginning in or about 2007, a large portion of the assets in the Separate Account were used (i) to finance projects, including property development and lending, that were under the control of Mr. Alvarez; and (ii) to acquire gemstones.
- [25] The assets held under the Policy, and therefore the A.B. Trust, included the following ("the Assets"):

- a. Two interest bearing promissory notes made by a Panamanian company named Fidrych with a total principal value of just over USD15,000,000.00;
- b. Shares in a company called Ocean Blue Holdings Ltd. (“Ocean Blue”), a Cayman Islands investment company, which owned valuable gemstones, most of which were in SunTrust deposit boxes in Miami, Florida; and
- c. Shares in a company called Xavier Holdings Inc., which was the vehicle through which the Lighthouse Capital policy had made an investment of USD10,000,000.00 in Exponential Biotherapies Inc., (“EBI”).

[26] On or about 8 January 2010, the Settlor met his untimely death. He was only about 44 when he succumbed to a single gunshot wound to the back of the head. Mrs. Patton was subsequently charged with his murder. She has been tried and acquitted of the Settlor’s murder twice and once on appeal; each time on the same set of facts. Following her acquittal after the third trial in September 2015, the prosecution appealed and the case was referred to the Cartago Court of Criminal Appeals (“the Appeal Court”) to determine whether she should be tried a fourth time. On 23 June 2017, the Court of Appeal annulled the second acquittal and ordered a fourth trial. Mrs. Patton is awaiting the fourth trial for the murder of her husband in Costa Rica.

[27] Prior to his death, in addition to the A.B. Trust, the Settlor established the “*Fideicomiso Vida Ecológica*” or “*Ecological Wildlife Trust*” (“VE Arrangement”) under the laws of Costa Rica; the Purple Quartz Trust (“the PQ Trust”) under the laws of Jersey and the Bender Family Trust under the laws of Anguilla. The Plaintiff is a beneficiary of all the aforementioned trusts.

[28] Unbeknown to Mrs. Patton, Mr. Alvarez made a claim pursuant to the Policy subsequent to the Settlor’s death and the death benefit under the Policy was paid to him in his capacity as the Trustee of the A.B.Trust.

- [29] On diverse occasions since the Settlor's death, Mrs. Patton sought distributions and information from AJD and Mr. Walker but on each occasion, her requests have been denied.
- [30] Mr. Walker, has the power, by virtue of clauses 6.3 and 6.4 of the A.B.Trust, to: (i) appoint and remove trustees from office; (ii) transfer the office of Protector to another person; and (iii) release or restrict the powers attaching to this office.
- [31] On numerous occasions, Mrs. Patton has requested that Mr. Walker exercise his power to remove AJD from its office as Trustee of the A.B. Trust and to resign as Protector, but on each occasion Mr. Walker has refused to do so. In particular:
- a. In or about November 2015, the Plaintiff's US counsel, Lewis Baach LLP of Washington DC ("Lewis Baach LLP"), requested Mr. Walker to remove AJD from office. He responded that he would do so only if Mrs. Patton granted him a personal release and indemnity;
 - b. On 6 January 2016, Lewis Baach LLP formally wrote to Mr. Walker seeking the removal of AJD for various reasons, including the findings made by the Costa Rican Court. Again, Mr. Walker indicated that to do so, he would need a full release and indemnification from Mrs. Patton;
 - c. On 22 March 2017, Mrs. Patton's Bahamian counsel, McKinney, Bancroft, & Hughes wrote to Mr. Walker asking him to remove and replace AJD from office as trustee and to resign as the Protector of the A.B. Trust. He failed and/or refused to do either.

Applicable legal principles

Removal of Trustee

- [32] Undoubtedly, the court has a discretion whether or not to remove a trustee. Snell's on *Equity*, at para 10-29 states:

"Apart from statute, the court has an inherent jurisdiction to remove a trustee ...and to appoint a new one in his place. As the interests of

the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct: see *Letterstedt v Boers*... [Emphasis added]

- [33] The leading authority on the removal of trustees is ***Letterstedt v Broers*** (1884) 9 App Cas 371, where Lord Blackburn, approving a passage from ***Story's Equity***, at pages 385 -387 stated the following:

“Story says, s. 1289, ‘But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.’

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

... In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety”. [Emphasis added]

- [34] Then, in ***Jones v Firkin-Flood*** [2008] EWHC 2417, Briggs J, at para 284, referred to a summary of the position in ***Lewin on Trusts***, 18th Edition which described the principle as follows:

“The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct, the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, of a want of reasonable fidelity.

Friction or hostility between trustees and beneficiaries, or between a trustee and his cotrustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee's duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed.”

[35] Similarly, in the recent case of **Caldicott v Richards** [2020] EWHC 767 (Ch), Mrs. Justice Falk cited with approval Lord Blackburn's judgment in **Letterstedt**, specifically the passage referenced above, and expressed the following at paras 125-126:

“The principle that the passage from Lord Blackburn's judgment makes clear is that the key question is whether continuance of the relevant trustee in office would prevent the trusts from being properly executed, having regard to the fact that that trustees exist for the benefit of the beneficiaries. Their welfare is the main guide. However, the intentions of the settlor are relevant (see the reference in the penultimate paragraph to the ‘intentions of the framer of the trust’, and the earlier reference to the creator of the trust). Effectively, I think Lord Blackburn was saying that in determining the interests of beneficiaries you should consider the perspective of the settlor and what he or she was seeking to achieve.

As remarked in Lewin, it is also not the case that every mistake or neglect of duty (falling short of positive misconduct) is a sufficient ground for removal. Equally, misconduct is not a prerequisite for removal. Similarly, friction or hostility between trustees and beneficiaries is not itself a reason for removing trustees, unless it prevents proper execution of the trust, or (potentially) risks doing so: **Brudenell-Bruce v Moore [2014] EWHC 3679 (Ch) at [256], per Newey J.”**

Duty to account

[36] Trustees are under an obligation to account to the beneficiaries for their stewardship of trust assets. The duty to account was described by Millett LJ, as he then was, in **Armitage v Nurse** [1998] Ch. 241 at page 253 as one of the “*irreducible core obligations*” owed by trustees to beneficiaries. Trustees must be cooperative in dealing with legitimate requests for information. Exercising their duty of disclosure appropriately is part of the trustees' fiduciary duties.

[37] In the recent case of **Henchley and others v Thompson** [2017] EWHC 225 (Ch) Chief Master Marsh at para 16 stated:

“Equally, there is no issue between the parties that a trustee has an obligation to account to the beneficiaries. The core obligations of a trustee are summarised by G Thomas and A Hudson in the Law of Trusts 2nd edition at 10.146 as follows: “The absolute minimum that a trustee must do if there is to be a trust is that he must (1) at least hold and safeguard the trust property, (2) provide information to the beneficiaries concerning the terms of the trust, so that they are in a position to check that the trusts are being carried out, and (3) keep accurate and reliable accounts and records of his custodianship to prove that the trusts are observed. Accountability of the trustees to the beneficiaries is one of the fundamental defining features of the trust; the trustee cannot be allowed to treat the trust property as his own; he cannot be relieved of his duty to explain his custodianship; and the beneficiary cannot be deprived of the information he needs to check on, and possibly the trustees' performance. [Emphasis added].”

[38] Then, in **The Royal National Lifeboat Institution et al v Headley and another** [2016] EWHC 1948 (Ch) Master Matthews sought to clarify what an ‘accounting’ involves. At para 11, Master Matthews made the following observations:

“... When the books and cases talk about beneficiaries' “entitlement to accounts” or to trustees being “ready with their accounts” they are not generally referring to annual financial statements such as limited companies and others carrying on business (and indeed some large trusts) commonly produce in the form of balance sheets and profit and loss accounts, usually through accountants, and – in the case of limited companies – file at Companies House. Instead they are referring to the very notion of accounting itself. Trustees must be ready to account to their beneficiaries for what they have done with the trust assets. This may be done with formal financial statements,

or with less formal documents, or indeed none at all. It is no answer for trustees to say that formal financial statements have not yet been produced by the trustees' accountants."

[39] In the present case, it can be gleaned in paras 79, 81, 94-97, 102-103 and Tabs 29, 34, 38 and 42 of the First Patton Affidavit that Mrs. Patton has repeatedly attempted to call for AJD to discharge the basic and fundamental duty to account. Despite these attempts, AJD has failed to account to Mrs. Patton or any other member of the "*Specified Class*" for its receipts and dispositions of value (assets in the Separate Account, and the death benefit) of the A.B. Trust.

[40] As previously stated, the sole asset of the A.B. Trust is the Policy. When the settlor died, Mr. Alvarez made a claim under the Policy as trustee of the A.B. Trust and the death benefit, including the Assets, were transferred to him ("the Transfer"). Mr. Alvarez has failed/refused to provide an accounting to any of the beneficiaries of what has been done with the trust assets when he received them or what he has done with them since.

Duty to disclose information in relation to the management of the A.B. Trust

[41] In *O'Rourke v Darbishire* [1920] AC 581, Lord Wrenbury said, at page 626:

"A beneficiary has a right of access to the documents which he desires to inspect upon what has been called, in the judgments in this case, a proprietary right. The beneficiary is entitled to see all trust documents because they are documents, and because he is a beneficiary. They are, in this sense, his own."[Emphasis added]

[42] The failure by AJD to respond to Mrs. Patton's inquiries and address her concerns amount to another breach of a fundamental duty which every trustee owes to its beneficiaries. As a steward of assets beneficially owned by others, a trustee is not at liberty to simply ignore a beneficiary's request for information about the trust. Especially where the purpose of the request is to obtain further information about the trust, trust assets and the trustees' stewardship of them. Ultimately, this requirement enables the beneficiaries to hold trustees accountable.

[43] In **Lewis v Tamplin** [2018] EWHC 777 (Ch), the central issue was whether or not, following a request from the beneficiaries, the trustees were under an obligation to disclose documentation regarding the trustees' decisions in managing the trust. The documentation consisted of letters regarding tax advice, information in relation to the occupiers of the farm, and evidence of what income was being generated from the farm which was owned by the trust. At para 33 of the Judgment, HHJ Paul Matthews noted that:

"...the evidence is that the claimants want the information for precisely the right reasons, namely, to hold the trustees to account, and thus to vindicate their own beneficial interests, by way of an action for breach of trust if need be."

[44] At para 34, HHJ Paul Matthews continued thus:

"The beneficiaries have the right to hold trustees to account for their stewardship of the trust fund and the performance of the trust obligations which they accepted. If the beneficiaries ask for information from the trustees and the trustees refuse, the beneficiaries may ask the court to order the disclosure of the information in the exercise of the court's jurisdiction to supervise the activities of trustees."

[45] Mrs. Patton has sought information from AJD to hold it accountable for its stewardship of the trust property but that has continuously been ignored by Mr. Alvarez. Mr. Alvarez has refused to engage her in relation to the A.B. Trust, specifically:

- a. In 2010, whenever asked by Mrs. Patton to make payments out of the VE Arrangement or the A.B. Trust, he would say there was a lack of liquidity without providing any evidence of its liquidity; (paras 72 and 73 and Tab. 29 of the First Patton Affidavit); and
- b. In 2012, Mrs. Patton sought distributions and information generally about the A.B. Trust from Mr. Alvarez, and has made specific requests in relation to the sale of the Golconda Diamond (as defined below) (paras 102 and 103 and Tab 42 of the First Patton Affidavit).

[46] The evidence manifestly demonstrates, at the very least, a failure by AJD to provide general information requested by Mrs. Patton as primary beneficiary of the A.B. Trust and more generally to account to the beneficiaries as a class.

Dishonesty and Potential Fraud

[47] On 1 March 2012, Mrs. Patton wrote to Mr. Alvarez to inquire whether a 30.72 carat Golconda diamond, (“the Golconda Diamond”) owned by Ocean Blue valued to be at least USD9,000,00.00 had been sold for USD5,500,000.00. Mr. Alvarez responded that he had not sold the Golconda Diamond and that her information was incorrect: Tab 38 of the First Patton Affidavit. This was wholly untrue, as evidenced from the ‘Details of Transaction’ showing that the Golconda Diamond had indeed been sold for USD5,000,000.00: Tab. 39 of the First Patton Affidavit. As Mr. Moree correctly submitted, this is an obvious breach of trust and the deception does not stop there.

[48] The sale price of USD5,000,000.00 was not deposited or used for the benefit of the A.B. Trust and its beneficiaries but rather deposited in Alpenrose Investments SA, which serves as the trustee of the VE Arrangement: paras 95-101 and Tab 40 of the First Patton Affidavit.

[49] The Golconda Diamond was owned by Ocean Blue, which was ultimately owned by the A.B. Trust. To date there has been no explanation or accounting as to why the sale proceeds were not paid to the A.B. Trust.

[50] According to Mr. Moree, the unsuitability of AJD continuing to act as trustee of the A.B. Trust is further evidenced by the commencement of criminal proceedings in Costa Rica against Mr. Alvarez for the fraudulent mismanagement of the VE Arrangement (“the Costa Rican Proceedings”): para 107 of the First Patton Affidavit. In the Costa Rican Proceedings, the Court ordered, among other things, that Mr. Alvarez be removed as trustee of the VE Arrangement (“the Costa Rica Order”). The Costa Rica Court found that Mr. Alvarez exploited his position and created a structure of related companies under his absolute control to manage and

divert funds from the Trust Estate. Specifically, in their judgment the Costa Rica Court stated:

“... defendant ALVAREZ AGUILAR, taking advantage of his position as manager or Trust, planned the whole scheme and created a structure of related companies under his absolute control, to manage and divert funds from the Trust Estate and make irregular and abusive investments, directed to obtain profit for him and, illegally, causing harm to the victim ANN MAXINE PATTON, in particular from ... when Mr. JOHN FELIX BENDER died. The fraudulent manoeuvres conducted by defendant ALVAREZ AGUILAR to the detriment of the estate of the victim, ANN MAXINE PATTON, include the fact that he paid himself for many years, through a company named Boracayan del Sur S.A., [...]

The extremely serious facts subject matter of the criminal complaint and the evidence produced in the proceedings against Juan de Dios Alvarez Aguilar, have led without a doubt to an absolute loss of trust in him, and make impossible for Alpenrose Investments S.A. and its representative to continue performing any acts required by the management of the Trust, performing its duties with the care expected from [it] ...”

- [51] Mr. Moree properly argued that there is significant and substantial evidence demonstrating AJD's conduct is systematic. Mr. Alvarez has quite obviously abused his office in the VE Arrangement and there are strong reasons to believe that he is doing the same in relation to the A.B. Trust by his refusal to account and provide information.
- [52] Learned Counsel Mr. Moree further argued that if AJD is permitted to continue in office as trustee, it would further endanger the trust property and prevent the Trust from being administered effectively and be contrary to the welfare of the beneficiaries.
- [53] In addition, in July 2010, Graham, Thompson & Co, provided an opinion to Mr. Alvarez addressing very specific questions asked by him, such as:
- a) What is the procedure to remove Mrs. Patton as beneficiary of the A.B. Trust? and

- b) If the trustees remove all the beneficiaries and appoint new ones, what legal recourse do the original beneficiaries and/or the Protector have?

- [54] Mr. Moree submitted that the conduct of AJD/Mr. Alvarez raises serious questions as to the administration of the trust assets, specifically (i) where are the trust assets currently; (ii) if some or all of the trust assets have been liquidated, where are the proceeds being held and how are they being held; (iii) have either of the Defendants personally benefited from trust assets and (iv) why have none of the beneficiaries of the A.B. Trust benefited from any of the trust assets?
- [55] According to Mr. Moree, Mrs. Patton has a legitimate fear that AJD may be seeking the removal of all beneficiaries of the A.B. Trust in order to appoint 'new beneficiaries' which would be connected to the Defendants. I agree given Mr. Alvarez' inquiries to Graham, Thompson & Co.

Hostility between trustee and beneficiaries

- [56] Mrs. Patton contended that, in light of the foregoing and the litigious history between the parties in relation to the VE Arrangement, it is plain that the relationship between AJD/Mr. Alvarez and Mrs. Patton, as the primary beneficiary of the A.B. Trust and one who takes an active interest in the Trust, has irreparably broken down.
- [57] Hostility between a beneficiary and trustee in isolation will often not be enough to justify a trustee's removal; however the authorities encourage Courts to take these hostilities (and the reasons for them) into consideration when determining whether it just and equitable to exercise its jurisdiction to remove a trustee. Lord Blackburn points out at page 389 of **Letterstedt**:

"It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded."[Emphasis added]

[58] In **National Westminster Bank Plc v Lucas & Ors** [2014] EWCA Civ 1632, the residuary beneficiary had totally lost confidence in the executor, National Westminster Bank Plc. Patten LJ had this to say at para 83:

“...the direct intervention by the Court in the administration of a trust ... by the removal of the trustee... has... to be justified by evidence that their continuation in office is likely to prove detrimental to the interests of the beneficiaries. A lack of confidence or feelings of mistrust are not therefore sufficient in themselves to justify removal unless the breakdown in relations is likely to jeopardise the proper administration of the trust or estate. This is something which requires to be objectively demonstrated and considered on a case-to-case basis having regard to the particular circumstances.”

[59] Learned Counsel Mr. Moree argued that the hostility between Mrs. Patton and AJD is justified, considering the misconduct of AJD and that by any objective standard, the concerns and mistrust of Mrs. Patton are substantiated when considering the evidence before the Court.

[60] In my opinion, the hostility between Mrs. Patton and AJD are borne out by (i) the misconduct of AJD; (ii) the mistrust by Mrs. Patton of AJD; and (iii) the non-cooperation of AJD to deal with legitimate enquiries from Mrs. Patton and to provide her with information about the trust to which she is entitled.

Failure to participate in these proceedings

[61] Mr. Moree submitted that despite AJD being properly served with proceedings, it has refused to submit to the Bahamian jurisdiction. AJD prepared the Affidavit of Mr. Alvarez dated 17 November 2017, providing his opinion on whether the service on AJD was valid and effective, which was merely exhibited to the Affidavit of James Alfred Walker Jr. filed 18 December, 2017 (“the Walker Affidavit”) in support of Mr. Walker’s Jurisdictional Challenge: Exhibit JW-2 of the Walker Affidavit.

[62] Mr. Moree further submitted that a trustee, such as AJD, who has been served with proceedings concerning the administration of a trust who does not participate in the proceedings *a fortiori* where its own removal is sought is, *ipso facto*, unfit to

continue to the Trustee of the A.B. Trust and the Court should draw an adverse inference with respect to his refusal to participate in these proceedings. I agree.

[63] In the circumstances, I will exercise this delicate jurisdiction and remove AJD as trustee of the A.B. Trust and appoint a successor trustee.

Appointment of new trustee

[64] Mrs. Patton ask that Mr. DeLisi be appointed as a new trustee.

[65] The statutory jurisdiction of the Court to appoint new trustees is conferred by section 48 of The Trustees Act which provides as follows:

“(1)The Court may, whenever it is expedient to appoint a new Trustee and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee.

(2) In particular and without prejudice to the generality of subsection (1) the Court may make an order appointing a new trustee in substitution for a trustee who is convicted of a felony or is a person of unsound mind or is a bankrupt or is a corporation which is in liquidation or has been dissolved or has been removed from the register of companies or has otherwise ceased to have corporate existence or where a trustee appears to the Court for any other reason whatever to be undesirable as a trustee”

[66] The jurisdiction of the Court to appoint a new trustee was confirmed by Evans J.(as he then was) in **Grand Bahamian Hills Limited and another v Benjamin Sands and others (As Trustees of The Royal Bahamian Estates Subdivision)** [2012] 3 BHS J. No. 10. At paras 37-39, his Lordship stated:

“Section 48 of The Trustees Act provides that:

‘The Court may, whenever it is expedient to appoint a new Trustee and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees or although there is no existing trustee.’

Gilbert Kodilyne MA, LLM, in his treatise *Caribbean Law of Trusts* at pages 224 to 226 states, inter alia:

‘The Court in addition to its statutory jurisdiction has an inherent power to remove a trustee...Under the principle in *Letterstedt v Broers* [1884] 9 App. Case 371 which is that a trustee may be removed if his continuance in office would be prejudicial to the due performance of the trust and so to the interests of the beneficiaries.’

Then Snell's on Equity, at para 10-29 states:

‘Apart from statute, the court has an inherent jurisdiction to remove a trustee...and to appoint a new one in his place. As the interests of the trust are of paramount importance to the court, this jurisdiction will be exercised whenever the welfare of the beneficiaries requires it, even if the trustees have been guilty of no misconduct. See *Letterstedt v Broers*...’

[67] At paras 64-68 of **Grand Bahamian Hills Limited**, Evans J set out the factors that the Court will consider in exercising its discretion whether or not to appoint a new trustee as follows:

“64 It was established in *Re Tempest* (1866) 1 Ch App 485 that, in exercising its discretion whether or not to appoint a new trustee, the court must:

- (1) Consider the wishes of the author of the trust expressed in or plainly deduced from the instrument creating it;**
- (2) Not appoint a person with a view of the interest of some of the cestui que trusts in opposition to others;**
- (3) Have regard to the question whether the appointment will promote or impede the execution of the trust.**

65 And Pettit on Equity and the Law of Trusts, says that qualities to be looked for, when making an appointment, include “integrity, a willingness to spend time and trouble on the trust affairs, the ability to get on with co-trustees and beneficiaries, and knowledge of financial matters, business acumen and common sense.” (6th edn, 1989, p 295)...

67 ...I accept that due to the onerous nature of the job, the court will not appoint a person as a trustee without that person's consent, and that such consent will not be implied but must be ‘clear and unambiguous.’

68 I also accept that before appointing persons as trustees, the court ought at least to be satisfied as to the fitness and willingness of the persons to act as trustees.”

- [68] Having regard to the legal authorities cited above, in my judgment, Mr. DeLisi is a fit and proper person to be appointed as successor trustee of the A.B. Trust. He has already provided his consent and expressed his willingness to be appointed as successor trustee of the A.B. Trust, and confirmed that he understands the onerous nature of the office.
- [69] Mr. DeLisi has a professional background in finance and investments in the United States of America. He is already familiar with the complex background to this case including the Costa Rica Proceedings. Mr. DeLisi is also currently the sole trustee of the Bender Family Trust and the PQ Trust.
- [70] Mr. DeLisi was also present during the hearing of this matter. In the circumstances, I will appoint Mr. Peter James DeLisi as Trustee of the A.B. Trust in substitution for AJD, which would allow him to conduct a full accounting of the trust assets and investigation of the conduct of AJD which will ultimately be for the benefit the beneficiaries of the A.B. Trust and provide for the proper administration of the underlying trust assets.

Removal of protector/ vacation of office

- [71] There is an abundance of judicial authorities that the Court has an inherent jurisdiction to remove a protector of a trust but there is no need to venture any further into a legal discourse as Mr. Walker tendered his resignation as the Protector of the A.B. Trust on 2 September 2020. The Deed of Resignation was provided to the Court on 3 September 2020, that is, a few hours before the hearing. That said, the office of Protector of the A.B. Trust is now vacant.

Appointment of protector

- [72] The court can, in certain circumstances, where the trust instrument makes provision for such an office, appoint protectors of a trust pursuant to its inherent supervisory powers over trusts. The ambit of this jurisdiction was discussed in **In the Matter of H Trust** [2019] SC (Bda) 27, a case in which the Supreme Court of

Bermuda Court exercised its inherent jurisdiction to appoint protectors. Hargun CJ at paras 11-12 had this to say:

“In *Rawcliffe v Steele* the court held that it had the power in principle to remedy the defect caused by the failure to appoint the protector. Hegarty JA outlined the scope of the jurisdiction at 503 in the following terms:

‘It seems to me that, once a power is categorised as a fiduciary power, the donee of the power is in a position sufficiently analogous to that of the trustee in the traditional sense to make it difficult to see why the court cannot appoint a person to exercise those powers, even in cases which fall outside the limits of the particular cases that I have instanced. In my judgment, though the jurisprudence may not be fully developed as in the case of a trustee in the classical sense, there is a legal framework within which discretionary powers of this kind are to be exercised which is independent of the particular person exercising those powers and which, to some extent at least, constrains and guides him. I therefore consider that the court’s inherent jurisdiction to appoint a new trustee extends so as to enable it, in appropriate circumstances, to appoint a person to exercise fiduciary powers under a trust even though he may not be a trustee in the classical sense. Furthermore, I take the view that the court could, if necessary, in the last resort, itself exercise fiduciary powers under a trust, though it would not normally do so.’

‘Accordingly, I would hold that where a fiduciary power intended to be vested in a person other than a trustee, in the absence of any clear indication that the personal characteristics of that individual are an essential ingredient in the exercise of the power, the court has power either to appoint a person to exercise that power or, perhaps exceptionally, to exercise the power itself’ (at 507).’

Smith JA also considered that the inherent jurisdiction of the court to appoint a protector was similar in scope with the jurisdiction to appoint a trustee and held at 530:

‘In my opinion, those characteristics are characteristics that are equally applicable to a carefully chosen trustee, and it has never been suggested that such characteristics as that would prevent a court appointing a trustee, if for some reason a trustee did not actually

exist at the time of the trust was constituted. Accordingly, in my opinion, the court could and if necessary should appoint a protector just in the same circumstances as it would appoint a trustee if the trustee was either not appointed or declined to act.”

[73] Having elaborately quoted from **In the Matter of H Trust** [supra], there is no doubt in my mind, that the Court has the inherent jurisdiction to appoint a Protector of the A.B. Trust. I will therefore appoint Mr. Koonmen as the successor Protector of that Trust. Mr. Koonmen, who was present during this hearing, is willing and able to accept the office of Protector of the A.B. Trust, and to discharge his duties as Protector with vigilance. He knew the Settlor for more than 10 years prior to his death. He has a professional background in finance and investments in the United States of America and Japan. Mr. Koonmen and the Settlor were co-managers of a hedge fund which they successfully ran together.

[74] In the circumstances, I hereby appoint John Michael Koonmen as the successor Protector of the A.B. Trust as it is in the best interests of the due administration of the Trust.

Conclusion

[75] For all of these reasons, which owe much to Mr. Moree’s formidable submissions, I will remove AJD from the office as Trustee of the A.B. trust and appoint Mr. DeLisi in its stead. In addition, as the office of Protector is now vacant following the resignation of Mr. Walker, I will appoint Mr. Koonmen as the Protector of the A.B. Trust. Both these appointments accord with the wishes of all the beneficiaries who did not challenge Mrs. Patton’s application.

[76] Last but not least, I am also immeasurably grateful to Mrs. Smith for assisting with the headnote and editing of this Judgment.

Dated this 15th September, A.D., 2020


Indra H. Charles
Justice