WTHK Ltd and Valentin NZ Ltd v UBS Trustees (Jersey) Ltd

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Birt
Judgment Date:	27 May 2016
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Text

[2016] JRC 099

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Commissioner, sitting alone.

In the Matter of the Antares and Other Trusts

Between
WTHK Limited and Valentin NZ Limited
Representors
and
UBS Trustees (Jersey) Limited
Respondent

Advocate J. P. Speck **for the Representors**.

Advocate D. M. Cadin **for the Respondent**.

A. J. Belhomme, **Esq., Crown Advocate for the Attorney General**

Authorities

Proceeds of Crime (Jersey) Law 1999.

Re Bird Charitable Trust [2008] JLR 1.

Re Jasmine Trustees Limited [2015] JRC 196.

Trusts (Jersey) Law 1984.

Gichuru v Walbrook Trustees (Jersey) Limited [2008] JLR 131.

R v Smith (Wallace Duncan) (No. 4) [2004] QB 1418.

R (Rusbridger) v Attorney General [2003] 3 All E R 784.

Bowman v Fels [2005] 1 WLR 3083.

Trust — application for a declaration that the representors have been validly appointed as additional trustees and validly empowered.

THE COMMISSIONER:

1 This is an application by the Representors for a declaration that they have been validly appointed as additional trustees of four trusts and, if so, that as a majority of the trustees, they are validly empowered to issue certain instructions to agents of the trustees in connection with assets of the trusts and to terminate the trustees' contractual arrangements with those agents if necessary.

2 At the conclusion of the hearing the Court held that the Representors had been validly appointed as additional trustees and also granted certain more limited declarations in connection with their powers as set out later in this judgment. What follows constitutes the Court's reasons for reaching its decision.

3 The matter was originally listed for hearing before a court which included Jurats but, at the request of the parties, I sat alone as they considered that no matters of fact arose in connection with the decision.

Factual Background

(i) The Trusts

4 The Representation is concerned with four trusts known as the Antares, Orion, Sirius and Venus Trusts (together "the Trusts"). All of them were established on 3 rd December, 1997, by deed between the nominee settlor Mr Adriano Riva ("the settlor") and the Respondent ("UBS Trustees") as original trustee under its then name of Swiss Bank Corporation Trust (Jersey) Limited.

5 The Trusts are all conventional discretionary trusts governed by the law of Jersey. The beneficiaries of each Trust are not identical but it is not necessary to distinguish between them for the purposes of this application. The beneficiaries of each Trust comprise the settlor and one or more children and remoter issue of Emilio Riva, the deceased brother of the settlor. It was Emilio Riva who was in fact the economic settlor of the Trust.

6 Each Trust has a protector. The protector of the Antares, Venus and Orion Trusts is Mr Edo Romano and the protector of the Sirius Trust is Alessandra Riva, one of the adult beneficiaries.

7 For present purposes, the relevant provisions of the trust deeds (which are in virtually identical form) are as follows:-

> (i) Pursuant to Clause 15 and the First Schedule, the protector of each Trust has the power to appoint new or additional trustees.
>
> (ii) Pursuant to Clause 15(6), on every change in the trusteeship a memorandum is to be endorsed on or annexed to the trust deed stating the names of the trustees for the time being and should be signed by the trustees. It goes on to provide that any person dealing with the Trust shall be entitled to rely upon such memorandum as sufficient evidence that the trustees named therein are the duly constituted trustees for the time being.
>
> (iii) Pursuant to Clause 17, every decision, resolution or exercise of a power or discretion by the trustees will be validly made if it is made by a majority of the trustees for the time being and any deed or instruction executed in pursuance of any such decision, resolution or exercise shall have binding legal effect (as if executed by all trustees) if it shall be executed by a majority in number of the trustees for the time being and no trustee shall be liable for any act or decision of the majority of the trustees of which he was not a member.

8 The assets of the Trusts consist of a portfolio of investments held in Zurich with UBS Switzerland AG ("UBS Switzerland"). The assets are currently valued at approximately €990 million.

9 The assets of the Trusts with UBS Switzerland are held in the name of UBS Fiduciaria SpA ("UBSF"), an Italian company within the UBS group. That arose in the following manner.

10 It appears that in 2009 the Italian tax authorities offered participation in a tax amnesty programme known as Scudo Fiscale ("the Scudo"). This enabled Italian taxpayers (and entities established for their benefit) to repatriate assets previously held abroad without incurring the full extent of the standard tax liabilities. Such assets could be repatriated at a concessionary tax rate of 5% of the value of the assets.

11 Taxpayers could choose whether actually to repatriate the assets to Italy or, as an alternative, to enter into arrangements that the assets, although remaining abroad, were held in the name of an Italian bank or fiduciary company whose duty was to calculate, levy and pay to the Italian tax authorities any tax in respect of the assets without disclosing the name of the ultimate principal.

12 UBS Trustees was asked by the protectors on behalf of the beneficiaries to participate in the Scudo on behalf of the Trusts. After discussion and taking advice, it was agreed that the second alternative would be followed. Thus the assets were to be held in the name of UBSF, as the authorised intermediary in Italy, whilst actually remaining abroad. To that end, UBS Trustees, as trustee of each Trust, entered into separate but substantially identical fiduciary agreements with UBSF in respect of each Trust ("the Fiduciary Agreements"). Under the terms of the Fiduciary Agreements, UBS Trustees, as 'principal' instructed UBSF as 'fiduciary agent' to enter into agreements with UBS Switzerland to open investment accounts with UBS Switzerland.

13 As a result of entering into the Scudo, the position therefore is that, although the assets of the Trusts held with UBS Switzerland belong to UBS Trustees as trustee of the Trusts and UBS Trustees is regarded as the 'beneficial owner' by UBS Switzerland, legal title to the assets rests with UBSF pursuant to the Fiduciary Agreements.

(ii) Subsequent events in Italy and Switzerland

14 The Ilva steelworks is one of the largest steelworks in Europe, located in Taranto, southern Italy. It is owned and operated by Ilva S.p.A. ("Ilva"). Ilva was apparently a state-owned entity from its establishment in 1961 until 1995 when it was acquired by the Riva Group during a government sponsored privatisation.

15 In 2012, charges were brought against senior executives of Ilva (including members of the beneficiaries' family) in connection with alleged environmental offences committed by Ilva. These proceedings are ongoing. The defendants dispute the allegations. In December 2012, Ilva was placed into special administration by decree of the Italian government and a

special administrator was appointed.

16 Quite separately from the Taranto proceedings, an unrelated criminal investigation was commenced in Milan in 2013 against Emilio Riva and the settlor, together with two accountants. The allegation against the defendants in the Milan investigation is that the shares in Ilva and other companies were sold at below market value to companies under the control, inter alia, of the settlor with the proceeds of the re-sale of those shares being settled on the terms of the Trusts. These allegations are denied by the persons under investigation and no charges have as yet been laid.

17 On 21 st May, 2013, the Milan State Attorney's office issued a request for judicial assistance to the office of the Zurich State Attorney for orders that the accounts of the Trusts in the name of UBSF at UBS Switzerland ("the Accounts") be frozen pending the outcome of the Milan investigation and any subsequent criminal proceedings. On 4 th June, 2013, the Zurich State Attorney complied with that request and froze the Accounts ("the Freezing Order"). The Freezing Order has remained in place since that date, so that the Trusts have not been able to deal freely with the Accounts.

18 On 3 rd August, 2013, the Italian government passed a Decree (amended on 10 th December, 2013,) which enabled the special administrator of Ilva to demand funds from the shareholders of Ilva to implement measures for environmental protection. The decree also provided that, in the event that the special administrator was not furnished with those funds, he would be able to request the transfer of any funds which were subject to a seizure order in unrelated criminal proceeds against the shareholders of Ilva.

19 On 28 th October, 2014, following an application by the special administrator of Ilva, the ordinary court in Milan issued a decree ordering the transfer of the assets in the Accounts to a newly opened account in Italy held on behalf of Fondo Unico di Giustizia ("the FUG"), to be used to subscribe for shares in Ilva. The settlor and others have filed an appeal against this order.

20 The FUG is a fund established under Italian law to receive, inter alia, monies seized or confiscated pursuant to criminal proceedings, the application of preventative measures or the imposition of administrative sanctions. It is managed by an Italian government entity called Equitalia Guistizia S.p.A. ("Equitalia").

21 In November 2014, the Milan State Attorney's office issued a request for judicial assistance to the Zurich State Attorney with a view to giving effect to the order of the Milan court on 28 th October, 2014, by facilitating the transfer of the frozen assets in the Accounts to Italy in accordance with the order. That request was dismissed by the Zurich State Attorney as it did not comply with Swiss law regarding international mutual legal assistance in criminal matters.

22 On 5 th January, 2015, the Italian government amended the 3 rd August, 2013, Decree to provide that the sums seized in the Milan investigation would be used by the FUG for the subscription of bonds issued by Ilva rather than for shares to be issued pursuant to a capital increase.

23 On 28 th January, 2015, Ilva was declared bankrupt.

24 On 11 th May, 2015, following an amended application by the special administrator of Ilva, the investigatory judge of the ordinary court in Milan issued a further order. This maintained the order of 28 th October, 2014, that the monies in the Accounts should be repatriated to Italy and credited to an account in the name of the FUG but amended the previous order by saying that the seized assets should now be used for the subscription of bonds issued by Ilva rather than to increase Ilva's capital ("the Transfer Decree"). The monies derived from the issue of the bonds would be used to remedy the alleged environmental deficiencies of Ilva.

25 On 13 th May, 2015, Equitalia instructed UBSF to give effect to the Transfer Decree by issuing instructions to UBS Switzerland for the transfer of the assets in the Accounts to the FUG account in Italy. Later the same day, UBSF complied with that instruction and issued instructions to UBS Switzerland to transfer the monies in the Accounts to the FUG account in Italy ("the Transfer Instruction").

26 On 22 nd May, 2015, the settlor and others filed a notice of appeal to the Supreme Court of Cassation in Italy seeking orders setting aside the decree issued by the Milan court on 28 th October, 2014, and the Transfer Decree of 11 th May, 2015. This appeal remains pending.

27 On 19 th June, 2015, the Zurich State Attorney issued an order ("the Unfreezing Order") that the Freezing Order be lifted, but only subject to the condition that UBS Switzerland execute the Transfer Instruction issued by UBSF on 13 th May, 2015. On 22 nd June, 2015, Mourant Ozannes wrote to UBS Trustees on behalf of the beneficiaries to request that UBS Trustees file an appeal against the Unfreezing Order. Similarly the beneficiaries' Swiss lawyers wrote to UBS Switzerland stating it was not authorised to honour the Transfer Instruction and requesting UBS Trustees to immediately revoke and/or annul any instructions issued by UBSF in connection with the intended transfer of assets.

28 On 26 th June, 2015, UBS Trustees responded to Mourant Ozannes noting it had been advised that it was not entitled to appeal against the Unfreezing Order, nor had it taken any steps to revoke and/or annul the Transfer Instruction.

29 On 26 th June, 2015, UBSF wrote to UBS Trustees asserting that, as a matter of Italian law,

it was obliged to follow the instructions of Equitalia. It asserted that, if it did not comply, criminal and administrative sanctions would be applied against it.

30 On 1 st July, 2015, the protectors and certain beneficiaries of the Trusts filed an appeal before the Federal Penal Court in Bellinzona, Switzerland, seeking orders setting aside the Unfreezing Order. That court granted a stay of execution of the Unfreezing Order pending the appeal hearing.

31 The Zurich State Attorney argued that the appellants had no standing to file the appeal and that the only possible appellant was UBSF, which had chosen not to appeal. He further argued that the Transfer Instruction was valid and must be respected by UBS Switzerland.

32 On 18 th November, 2015, the Federal Penal Court in Bellinzona handed down its decision. It agreed that the appellants did not have standing to bring the appeal but nevertheless declared the Unfreezing Order to be void. This was on a number of grounds including that:-

> (i) The Italian request for legal assistance was designed to achieve a purpose other than a criminal law purpose required under Swiss law. This meant that the Zurich State Attorney had no justification to issue the Unfreezing Order.
>
> (ii) The conversion of the assets of the Trusts into assets of *'worthless or of greatly reduced value'* would constitute an unlawful expropriation in circumstances where no criminal judgment had been entered.

33 The position was conveniently summarised at para 13 of section U of the judgment, which included the following (in translation):-

> " ***And finally, due to the legal constellation in Italy, the surrender would lead to the surrendered assets being converted, now, and without waiting for a legally enforceable expropriation decision, into bonds of a bankrupt company which is today under State administration.*** Valuable securities would be converted into assets not of equivalent value (presumably worthless or of greatly reduced value), which constitutes an expropriation without a criminal judgment."

34 The Federal Department of Justice has appealed that decision of the Federal Penal Court and a decision is awaited.

(iii) Events in relation to the Trusts

35 When it became aware of the Taranto charges in late 2012, UBS Trustees sought advice

on and gave consideration to the impact of those criminal proceedings on the Trusts. It concluded that, as these related only to possible environmental infractions by Ilva or its management, the proceedings were separate from the Trusts and did not give rise to any suspicion that the Trusts had been funded by the proceeds of crime. It therefore concluded that, at that stage, it was unnecessary for any report to be made to the Joint Financial Crimes Unit in Jersey ("JFCU") pursuant to the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law").

36 However, when it became aware of the Milan investigation, it became clear to UBS Trustees that there was at least the possibility that the funds settled into the Trusts were the proceeds of criminal conduct. Accordingly it filed a suspicious activity report ("SAR") with the JFCU on 24 th May, 2013.

37 In his affidavit, Mr Butel, now the former chairman of UBS Trustees, gives considerable detail of the various exchanges which UBS Trustees has had with the JFCU but, for present purposes, suffice it to say that, other than for ordinary changes in investments, the JFCU has issued a 'no consent' letter in relation to the Trusts. In particular, it has confirmed that it does not consent to any request to move funds/assets outside the control of UBS Trustees.

38 UBS Trustees was aware of the hearings before the Milan court which gave rise to the order of 28 th October, 2014, and the Transfer Decree of 11 th May, 2015, but, having consulted with representatives of the beneficiaries and taken legal advice, it decided not to appear in those proceedings. Similarly it decided not to appeal against the orders made by the Milan court. Furthermore, as already mentioned at para 28, it gave consideration as to whether to appeal against the Unfreezing Order but decided on advice that it had no standing to do so.

39 In relation to the request that it should instruct UBSF to revoke the Transfer Instruction, UBS Trustees explained by letter dated 28 th June that UBSF had no choice but to follow Equitalia's instructions, as non-compliance would lead to criminal and administrative sanctions under Italian law and that in any event, it could not issue such an instruction to UBSF because of the terms of the 'no consent' letter from the JFCU.

40 On 30 th July, 2015, the protectors appointed LGL Trustees Limited and LGL Fiduciary Limited (together "LGL") as additional trustees of the Trusts. UBS Trustees duly noted those appointments and executed a memorandum in respect of each Trust in accordance with Clause 15 of the trust deeds referred to earlier. It also notified UBSF of LGL's appointment.

41 LGL subsequently informed UBS Trustees that it wished to hold a meeting of trustees on 3 rd September to consider a resolution that the trustees should give a written direction to UBSF requiring UBSF to revoke the Transfer Instruction within 5 days and inform UBS Switzerland of this direction and further that if UBSF failed to revoke the Transfer Instruction

within five days, the trustees should terminate the Fiduciary Agreements.

42 There was then correspondence between LGL and UBS Trustees and with the JFCU, during which UBS Trustees noted that the JFCU had expressed the view that instructing UBSF to revoke the Transfer Instruction and/or terminating the Fiduciary Agreements would fall within the terms of the no consent letter and that it was not willing to consent to such actions. Following these various exchanges of correspondence, LGL stated that it did not wish to proceed with the planned trustees' meeting and, by notice given to UBS Trustees on 21 st September, LGL resigned as trustees of the Trusts. Accordingly, at that stage, UBS Trustees was once again the sole trustee of the Trusts.

43 However, on 21 st September, 2015, the protectors executed further deeds of appointment appointing the Representors as additional trustees of the Trusts. The Representors also convened a meeting of the trustees for 23 rd September, 2015, for the purpose of passing resolutions (i) that the trustees instruct UBSF to revoke the Transfer Instruction ("the Revocation Instructions") and (ii) that should UBSF not comply with the Revocation Instructions within three business days, the trustees should exercise their contractual right to terminate the Fiduciary Agreements.

44 UBS Trustees immediately sought further information about the standing and expertise of the Representors. Given these requests and the position of the JFCU, UBS Trustees did not attend the meeting on 23 rd September. Each of the Representors attended by telephone and agreed to pass the two resolutions referred to. On the same date, the Representors sent the Revocation Instructions to UBSF. UBSF has declined to act on the Revocation Instructions and accordingly on 1 st October the Representors gave notice that the Fiduciary Agreements would terminate on 9 th October, 2015.

45 There have been various exchanges of correspondence but in summary UBSF has refused to accept that the Representors have any authority in relation to the Fiduciary Agreements. It has stated that only UBS Trustees may give any kind of instruction in relation to the Fiduciary Agreements. It has further asserted that the Fiduciary Agreements are regulated by Italian law and that it cannot comply with any such instructions in any event.

46 There then followed a number of communications between UBS Trustees, the Representors and the JFCU. I do not think it necessary to recount these in detail. Suffice it to say that UBS Trustees was not satisfied that the Representors had produced evidence sufficient to show they had the relevant standing, experience etc. to act as trustees of such substantial and complex trusts, nor had a satisfactory explanation for their appointment been given. It was also of the view that its freedom of action was severely limited by the JFCU. In particular, in a letter dated 2 nd October to Mourant Ozannes (who in these proceedings act for the protectors and beneficiaries of the Trusts as well as the Representors), UBS Trustees stated that the terms of the no consent letter from the JFCU

prevented it from:-

(i) transferring any trust documentation to the Representors;

(ii) endorsing any memorandum adding the names of the Representors as additional trustees; and

(iii) doing any act which would facilitate movement or control of assets from UBS Trustees.

47 Faced with the refusal of UBS Trustees, UBSF and UBS Switzerland to recognise their appointment or, in the case of the latter two entities, to act upon their instructions, the Representors issued the current representation on 13 th January, 2016. As already stated, that representation raises two issues. The first is as to the validity of the appointment of the Representors as co-trustees and the second relates to their authority to give the Revocation Instructions or to terminate the Fiduciary Agreements and generally give instructions to agents. I shall consider each of these issues in turn.

Validity of the appointment of the Representors

48 Counsel were agreed that the power of the protector of each Trust to appoint new or additional trustees is a fiduciary power (see *Re Bird Charitable Trust* [2008] JLR 1 at paras 80–81).

49 They were further agreed that the duties of the holder of a fiduciary power of appointment are conveniently summarised at para 45 of *Re Jasmine Trustees Limited* [2015] JRC 196 as follows:-

> ***"45. We accept the point made by Lewin that the duties of the holder of a fiduciary power can be formulated in different ways and the formulation may vary having regard to the nature of the particular power under consideration. Without purporting to assert an exhaustive statement of the duties, for the purposes of this case, we would hold that, when exercising the power to appoint a new trustee, the protector was under a duty:-***
>
> ***(i) to act in good faith and in the interests of the beneficiaries as a whole;***
>
> ***(ii) to reach a decision open to a reasonable appointor;***
>
> ***(iii) to take into account relevant matters and only those matters; and***
>
> ***(iv) not to act for an ulterior purpose*** ."

50 In *Jasmine Trustees*, the trustee who was being replaced raised concerns as to the

expertise, experience, financial standing etc of the proposed replacement trustee. The Court held that it was entirely proper for the outgoing trustee to raise such concerns and indeed, on the facts of the case, held that the appointor had failed to take such matters into account and had reached a decision at which no reasonable appointor could have arrived. The Court therefore declared the appointment of the new trustee to be invalid.

51 Following the appointment of the Representors in this case, UBS Trustees sought information as to their suitability to act as co-trustees of the substantial trusts. As at the date of the issue of the representation in January 2016, it considered that it had not received sufficient information in response to its requests to satisfy itself that the Representors were indeed suitable appointees.

52 However, following the provision of additional information in the affidavits in support of the representation, UBS Trustees is now satisfied that the Representors are in principle suitable to act as trustees of the Trusts. In particular, it accepts from the information that is now available that the Representors and their directors have sufficient experience in trust administration and are of sufficient standing and are suitably regulated and insured so as to be suitable to act as co-trustees of the Trusts. It now rests on the wisdom of the Court.

53 Suffice it to say that I agree. WTHK Limited is incorporated in Hong Kong and provides trustee corporate and fiduciary services. It is part of the Wintrust Group which operates in Switzerland, Singapore, Hong Kong, New Zealand and Anguilla and provides fiduciary services to clients across the globe. Valentin is a New Zealand company which is part of the Anchor Group ("Anchor"). Anchor has been in operation for some 20 years and over that period has provided trusteeships, trust structuring services, trust and company administration advice etc. for a wide range of clients based in New Zealand and internationally. Valentin is a 'Qualifying Trustee' under the New Zealand Foreign Trust Discloser Rules. Accordingly, whilst, given the circumstances and nature of the appointment, it was reasonable for UBS Trustees to make enquiries as to the suitability of the Representors, there is no ground for concluding that the decision of the protectors to appoint the Representors is irrational in relation to this aspect.

54 The evidence filed on behalf of the Representors asserts that the appointments of both LGL and the Representors were made by the protectors (following requests from the beneficiaries) for the following four reasons:-

(i) the desire that the trustees take action to prevent a total loss of the assets of the Trusts as a result of the Transfer Instruction;

(ii) the desire to preserve the status quo and ensure that the assets of the Trusts stay frozen in Switzerland pursuant to the Freezing Order pending the outcome of the Milan investigation and any criminal proceedings which may result;

(iii) the desire to avoid the making of decisions by UBS Trustees as sole trustee

which could be influenced by a potential conflict of interest on the part of UBS Trustees; and

(iv) a desire that a wider pool of trustees, with different experiences and expertise, be involved in decision making in relation to the Trusts.

55 These reasons have to be assessed against the very unusual facts of this case. In what follows, I am conscious that I have heard no evidence from the Italian authorities. The only evidence before me comes from the Representors and from UBS Trustees. However I do have the advantage of the judgment of the Federal Penal Court in Bellinzona which goes into considerable detail about the position in Italy. Nothing in that judgment appears to be inconsistent with the information with which I have been provided by the Representors and UBS Trustees.

56 Subject to that qualification, I would summarise the position as follows. There is a criminal investigation in Milan concerning the actions of the settlor, his deceased brother Emilio and two accountants whereby it is suggested that, as a result of criminal offences on their part in relation to the buying and selling of shares in various companies, the proceeds of those criminal offences have ended up in the Trusts.

57 In support of that investigation and at the request of the Milan prosecutor, the assets of the Trusts have been frozen by the Swiss authorities by means of the Freezing Order. Presumably, if there is subsequently a prosecution and conviction in Milan, the assets of the Trusts may be confiscated by the Swiss authorities in aid of any order to that effect made by the Milan court following conviction. On the other hand, if there is no prosecution or if there is an acquittal, the Freezing Order will presumably have to be lifted so that the Trusts are thereafter free to deal with their assets in the normal way. As one would expect, confiscation of the assets of the Trusts will be dependent upon a criminal conviction arising out of the Milan investigation leading to a confiscation order.

58 But the Transfer Instruction is not given in support of the Milan investigation. It arises out of events in Taranto. There, criminal proceedings have been instituted against the settlor and other executives of Ilva relating to environmental offences allegedly committed whilst they were in charge of Ilva. There is no suggestion of any connection between the Trusts and the alleged offences in Taranto. Despite this, and despite the fact that there has been no conviction, the Italian authorities have passed legislation which provides that the assets of the Trusts must be applied in the purchase of bonds in Ilva (which is now bankrupt) so as to be used to remedy alleged environmental deficiencies by Ilva. As the Federal Penal Court made clear, such bonds are likely to be worthless or worth very much less than the value of the assets of the Trusts.

59 The effect would seem therefore to be that, despite the absence of any criminal conviction, the assets of the Trusts are in effect to be confiscated and converted into Ilva bonds which are likely to be worthless. As the Federal Penal Court indicated, this would seem on the

face of it to be a breach of the European Convention on Human Rights – no Article of the ECHR is specified in the judgment but I assume that the Federal Penal Court had in mind Article 1 of Protocol 1 — and amount to a confiscation of assets without cause and without compensation.

60 In those circumstances, it is hardly surprising that the beneficiaries and protectors of the Trusts wish to ensure that the assets in the Accounts are not remitted to Italy and in effect confiscated in this way, but are kept in Switzerland subject to the Freezing Order. It is asserted on their behalf that they accept that the assets should remain subject to the Freezing Order until the outcome of any proceedings in Milan. They believe that the appointment of the Representors as co-trustees would assist in achieving this objective.

61 Against this background, in my judgment, on the unusual facts of this case, reasons (i) and (ii) of paragraph 54 above for appointing the Representors cannot possibly be categorised as irrational or not taken in good faith in the interests of the beneficiaries as a whole.

62 As to reason (iii), as set out at paragraph 37, I have had the benefit of an affidavit from Mr Alan Butel. He has explained in considerable detail the steps which UBS Trustees has taken at every stage, the advice which it has sought and the reasons for its various decisions. On the basis of that evidence, I am prepared to accept that it has not in fact been influenced by any conflict of interest arising out of its association with UBSF or UBS Switzerland. Nevertheless, I can understand that the protectors and beneficiaries may have a perception of such a conflict of interest. It is clear that UBSF is acting under compulsion in Italy in order to avoid criminal or administrative sanctions and one can understand the beneficiaries being concerned as to whether UBS Trustees might wish to avoid doing anything to exacerbate the position for UBSF. I therefore consider that it is not unreasonable for the protectors to wish to establish a majority of non-UBS Trustees, so as to remove any possible risk of decisions being influenced by a conflict of interest.

63 I am not impressed with reason (iv) and suspect it is something of a makeweight. The fact is the protectors and beneficiaries have been entirely happy to have only one trustee throughout the existence of these Trusts and it hardly seems likely that they suddenly see the need for a wider pool of trustees with different experiences and expertise.

64 Nevertheless, the decision to appoint the Representors has to be considered in the round. On the facts of this case, I cannot possibly categorise the decision of the protectors as being irrational or otherwise in breach of duty. In my judgment it is reasonable for the protectors to wish to try and preserve the assets of the Trusts in Switzerland subject to the Freezing Order. Although for reasons which will appear, the outcome remains uncertain, it is reasonable for the protectors to conclude that the appointment of two trustees outside Jersey and separate from the UBS Group may assist in this process. I conclude therefore that the decision of the protectors was taken in good faith and in the interests of the beneficiaries as a whole, it was not an irrational decision, it took into account relevant matters and only those matters and it was not taken for an ulterior purpose.

65 I therefore conclude that the appointment of the Representors was valid and accordingly they have been co-trustees of the Trusts since 21 st September, 2015.

Are the Representors 'validly empowered' to give instructions to UBSF and/or terminate the Fiduciary Agreements?

66 It follows from the Court's decision that the Representors were validly appointed that, by virtue of Clause 17 of the trust deeds, as from the date of their appointment they have been able to take decisions in relation to the assets of the Trusts by majority decision. One might have thought therefore that the second declaration sought by the Representors, namely that the Representors acting as a majority of the trustees are 'validly empowered' to issue instructions to UBSF or other agents and to terminate contractual arrangements with those agents, would follow automatically.

67 However, UBS Trustees has raised the question of what is meant by the expression 'validly empowered'. It raises two points of concern. First, it submits that it is necessary to vest the assets of the Trusts in the Representors before they are 'empowered' to act in relation to those assets. As this has not yet occurred (for the reasons discussed below) it would be going too far to rule that they are now 'validly empowered'. Secondly, it submits that any action to instruct UBSF to revoke the Transfer Instruction or to terminate the Fiduciary Agreements would arguably amount to a breach of the 1999 Law and the Court should not therefore declare that such actions could be 'validly' done, as this would imply that it was lawful to do so.

68 When the representation was originally presented, the Court ordered that it be served on the JFCU. At the first hearing thereafter, the Court asked the Attorney General to assist by way of submissions in relation to the 1999 Law. Crown Advocate Belhomme appeared on behalf of the Attorney General at the final hearing and I am most grateful to him for his helpful submissions.

69 As the hearing developed, Advocate Speck very realistically accepted that he could not at this stage, on the information available, ask the Court to make a final determination as to whether certain actions might or might not constitute a breach of the 1999 Law and that a declaration that the Representors were 'validly empowered' to take certain actions could carry with it the implication that such actions were lawful. He ultimately accepted that the Court's declaration should be limited to that which is set out at the end of this judgment and in effect deal simply with the ability of the Representors, as a majority of the trustees, to take decisions in relation to the Trusts. Accordingly it is not necessary to deal in detail with the arguments rehearsed in the parties' written arguments. Nevertheless, in case it may be of assistance in future cases I shall deal briefly with some of the points raised.

70 Dealing first with the issue of vesting, Advocate Cadin was correct to submit that

appointment of a trustee does not of itself vest the trust assets in that new trustee. It will often be necessary for the present trustee to vest title to the asset in the new or additional trustees. This is consistent with Article 17(4) of the Trusts (Jersey) Law 1984 which provides:-

> ***"(4) On the appointment of a new or additional trustee anything requisite for vesting the trust property in the trustees for the time being of the trust shall be done*** ."

71 Thus, as a matter of trust law, the new trustee is entitled to demand that the old trustee vest title in the new trustee and the old trustee must comply with any such requirement. Applying that principle to the facts of the present case, the Representors are entitled, as a matter of trust law, to demand that UBS Trustees assign the benefit of the Fiduciary Agreements to UBS Trustees and the Representors as trustees of the Trusts and to demand that UBS Trustees give notice accordingly to UBSF. Again, as a matter of trust law, until that happens, UBS Trustees must act in accordance with the decision of the majority of the trustees. Thus, if the Representors as such majority decide to terminate a contract which is still in the name of UBS Trustees, UBS Trustees must act in accordance with the directions of the Representors as a matter of trust law.

72 Whether, before there has been a formal vesting of assets, a new trustee can effectively act in relation to an asset without the involvement of the old trustee in whom title is vested will depend upon the circumstances. For example, where a contract has been entered into by the old trustee expressly as trustee of a trust, it may be that the counterparty to the agreement will accept the new trustee as having taken the place of the old trustee and become entitled to act in relation to the contract without the need for a formal assignment. This may well depend upon the proper law of the contract.

73 On the facts of the present case, it will therefore be a matter for the proper law of the Fiduciary Agreements (quite possibly Italian law) as to whether UBSF is, as a matter of contract law, obliged to act on the instructions of the Representors in the absence of an assignment by UBS Trustees to itself and the Representors. It is accordingly not appropriate for this Court to make a declaration that the Representors are at this point 'validly empowered' to give such instructions, which might be interpreted as ruling that UBSF is so obliged.

74 A further issue in relation to the topic of vesting is the effect of the 1999 Law. The JFCU has specifically declined to consent to UBS Trustees doing any act which would facilitate the movement or transfer of control of the assets from UBS Trustees. Because it has a suspicion that the assets of the Trusts may be the proceeds of crime, UBS Trustees is not willing to act on any instructions given by the Representors to transfer assets into the control of all three trustees (so they could thereafter be dealt with by a majority) without the consent of the JFCU. Although the provisions of the 1999 Law have been amended, the position is still broadly as explained in *Re Bird* at paragraphs 101 – 103 as follows:-

> ***"101. In this connection, it is important to analyse exactly what art. 32 prohibits. Article 32 creates the criminal offence of entering into an arrangement to facilitate the retention or control by another of that person's proceeds of criminal conduct where the person entering the arrangement knows or suspects that the other has been engaged in criminal conduct. Thus, where a bank holds an account for a customer and, with the requisite suspicion, makes a payment out of the account on the instructions of the customer in circumstances where it eventually transpires that the monies in the account were indeed the proceeds of criminal conduct, the bank will have committed an offence of money laundering under art. 32*** .
>
> ***102. In order to enable commerce to be carried out in these circumstances, art.32(3) provides a defence for the bank. Even where it has the requisite suspicion, provided it obtains the consent of the police to make the payment, it will not guilty of an offence even if the money later turns out to be the proceeds of crime. Naturally, it is the policy of most banks, where the consent of the police is not forthcoming following the making of an SAR, to refuse to make a payment on the customer's instructions because to do otherwise is likely to open it up to having committed an offence if it subsequently transpires that the monies are the proceeds of crime*** .
>
> ***103. Nevertheless, it is important to note that art. 32(3) does not prevent a bank from making a payment without police consent. Unless or until it is proved that the monies in question are the proceeds of crime, there is nothing unlawful about the bank making such a payment. It is a matter of choice for the bank. Unless a saisie judiciaire is in existence, there is nothing to prevent a bank making a payment upon a customer's instructions even after it has made an SAR and formed the requisite suspicion. In practice, of course, not many banks will do so because of the risk that the bank runs of thereby committing an offence should the money turn out to be the proceeds of crime, but the making of such a payment at a time when it is not known whether or not one is dealing with the proceeds of crime is not prohibited by art. 32*** ."

75 In the case of *Gichuru v Walbrook Trustees (Jersey) Limited* [2008] JLR 131 (approved on appeal at [2008] JLR N39) it was held that, where a customer wishes to overcome the sort of informal freeze which is thereby imposed when a bank chooses not to act on instructions after an SAR, he has two alternative remedies. He may seek to judicially review the refusal of the police to grant consent to payments or he may institute a private law action against the financial institution seeking payment of his funds. In the latter event, the Court will have to consider whether, on the balance of probabilities, the monies in question are the proceeds of criminal conduct or not.

76 Transposing that to the present situation, if UBS Trustees were to refuse to transfer any assets of the Trusts into the name of the current trustees (i.e. UBS Trustees and the

Representors), the Representors would either have to judicially review the refusal of the JFCU to consent to the transfer or institute an action against UBS Trustees seeking an order that it transfers the assets into the names of the three trustees in accordance with its obligation under trust law. In the course of that hearing, they would need to prove on the balance of probabilities that the assets of the Trusts were not the proceeds of criminal conduct.

77 Turning to the second aspect, namely whether issuing the Revocation Instructions or terminating the Fiduciary Agreements would constitute an offence under the 1999 Law (assuming always that the assets transpired to be the proceeds of criminal conduct), one must begin by recording the terms of the money laundering offences under the 1999 Law, which have changed since the decision in *Re Bird*.

78 The relevant provisions now provide as follows:-

> ***"29. Criminal property***
>
> ***(1) For the purposes of this Part of this Law, property is criminal property if:-***
>
> ***(a) it constitutes proceeds of criminal conduct or represents such proceeds, whether in whole or in part and whether directly or indirectly; and***
>
> ***(b) the alleged offender knows or suspects that it constitutes or represents such proceeds*** .
>
> ***(2) For such purposes it does not matter:-***
>
> ***(a) whether the criminal conduct was conduct of the alleged offender or of another person;***
>
> ***(b) whether the person who benefitted from the criminal conduct was the alleged offender or another person; nor***
>
> ***(c) whether the criminal conduct occurred before or after the coming into force of this provision*** .
>
> ***30. Offences of dealing with criminal property***
>
> ***(1) A person who:-***
>
> ***(a) acquires criminal property;***
>
> ***(b) uses criminal property; or***
>
> ***(c) has possession or control of criminal property*** ,

is guilty of an offence .

(2) For the purposes of paragraph (1):-

(a) having possession or control of property includes doing an act in relation to the property; and

(b) it does not matter whether the acquisition, use, possession or control is for the person's own benefit or for the benefit of another .

(3) A person who:-

(a) enters into or becomes concerned in an arrangement; and

(b) knows or suspects that the arrangement facilitates, by any means, the acquisition, use, possession or control of criminal property by or on behalf of another person

is guilty of an offence .

…

(6) Subject to paragraph (7), a person shall not be guilty of an offence under paragraph (1) if the person acquired, used, possessed or controlled the property for adequate consideration .

(7) The defence of adequate consideration in paragraph (6) shall not be available where:-

(a) property or services provided to a person assist that person in criminal conduct;

(b) a person providing property or services to another person knows, suspects or has reasonable grounds to suspect that the property or services will or may assist the other person in criminal conduct; or

(c) the value of the consideration is significantly less than the value of the property acquired or, as the case may be, the value of its use or possession ."

79 The Court has received conflicting submissions as to whether (assuming always that the assets of the Trusts transpire to be the proceeds of criminal conduct) the issuing of the Revocation Instructions and the purported termination of the Fiduciary Agreements would amount to an offence under Article 30(1) or (3). Crown Advocate Belhomme on behalf of the Attorney General submitted that it would. In that he was supported by an opinion from Mr Collingwood Thompson QC obtained by LGL. However, a particular difficulty for any prosecution (which did not arise in the case of LGL and was therefore not considered by Mr Thompson) is that it is arguable that all the relevant acts by the Representors took place outside Jersey. If that were found to be so, then even assuming that

R v Smith (Wallace Duncan) (No. 4) [2004] QB 1418 is good law which would be applied by analogy in Jersey, there would be no jurisdiction to try any offence in Jersey.

80 Conversely, Advocate Speck, supported by an opinion obtained by the Representors from Mr Graham Brodie QC submitted that on the facts of this case, bearing particularly in mind the existence of the Freezing Order in Switzerland, no offence under Article 30 would be committed by the issue of the Revocation Instructions or the termination of the Fiduciary Agreements.

81 I do not propose to rehearse the arguments put forward in support of these respective submissions. That is because, in my judgment it would be wholly inappropriate for the Court to determine whether the giving of the Revocation Instructions and the termination of the Fiduciary Agreements amounted or would amount to an offence under Article 30 or not. I so conclude for the following reasons:-

(i) Only in exceptional circumstances should a civil court make a declaration as to the criminality or otherwise of future conduct – see the observations of Lord Steyn at para 16–25 in *R (Rusbridger) v Attorney General* [2003] 3 All E R 784 and the cases therein cited.

(ii) This is particularly so where the case is fact sensitive rather than a question of pure law (see Lord Steyn at para 23).

(iii) The present case is clearly fact sensitive. The Court only has the version of events put forward by the Representors and UBS Trustees which has not been tested and there is no evidence from any prosecuting authority whether in Jersey or elsewhere.

(iv) I accept that in this case one is arguably considering past conduct rather than future conduct (because the Representors have already given the Revocation Instructions and purported to terminate the Fiduciary Agreements). Nevertheless, the reasoning in *Rusbridger* seems to me to be equally applicable. It would only be in very rare circumstances that it would be appropriate for a civil court to determine whether something which a person has already done is or is not criminal conduct rather than leave that matter to be determined by the criminal courts in the event of a prosecution. Such circumstances might arise, for example, where there was no dispute about the facts and the civil court felt that the answer was so obvious that there was no risk of prejudicing any possible criminal proceedings.

82 In my judgment if the Court were to grant a declaration that the Representors are ‘validly empowered’ to issue the Revocation Instructions to UBSF or to terminate the Fiduciary Agreements, that may well carry with it the implication that this is lawful conduct, whereas for the reasons I have given, the Court has not decided and should not decide that aspect in the present circumstances.

83 For these reasons the declaration which I agreed to issue at the conclusion of the hearing was in more limited terms and was to the following effect:-

> ***"(1) The appointments of the Representors as trustees of the Trusts on 21st September 2015 were valid and effective from that date*** .
>
> ***(2) Under Jersey law and under the terms of the Trusts, the trustees from time to time of the Trusts are permitted to act by majority decision, including in relation to nominees and/or agents, and such has accordingly been the position in relation to the Trusts since 21st September 2015; and***
>
> ***(3) The implementation of any decision of the trustees (whether by all or a majority of them) is a matter subject to the terms of and law applicable to any relevant contract and any other applicable law*** ."

I further ordered that UBS Trustees should transfer relevant trust documentation to the Representors within a reasonable time and should endorse a memorandum noting the appointment of the Representors as trustees and affix the same in accordance with Clause 15(6) of the trust deeds of the Trusts.

Other matters

84 Certain other matters arose during the course of the hearing upon which it may be helpful if I express a view either because they do not relate to possible criminal conduct or because I am satisfied that the issue is not fact specific and seems to me clear beyond doubt.

(i) Effective date of appointment

85 It was contended at one stage in the correspondence by UBS Trustees (although it was not a position UBS Trustees maintained before the Court and no submissions were made on the point) that the appointment of the Representors did not take effect until the memorandum stating the names of the trustees and signed by them had been endorsed on or permanently annexed to the trust deed in accordance with Clause 15(6). That contention was wholly incorrect. Clause 15(7) of the trust deed of each Trust provides:-

> " *Any such appointment of new or additional trustees as is referred to above may at the discretion of the person for the time being having the power to appoint new trustees hereof take effect forthwith or on such date as is specified in the deed of appointment or on the occurrence of such circumstances as are specified in the deed of appointment*."

86 The various deeds of appointment were expressed to take effect immediately and accordingly the Representors immediately became co-trustees. It was not a condition of appointment that the memorandum referred to in Clause 15(6) be executed. That is simply a provision to assist in proving who are the trustees for the time being. It is not relevant to

the validity of any appointment of trustee.

(ii) Provision of documents

87 It is a duty of a trustee (whether outgoing or continuing) to provide all necessary documents to any new or additional trustees so that they can familiarise themselves with the trust assets. For my own part, as at present advised, I do not see that the mere provision of such documents can amount to a breach of Article 30. In those circumstances, I consider the JFCU exceeded its powers in stating specifically that it did not consent to UBS Trustees providing trust documents to the Representors.

(iii) Endorsement memorandum

88 Similarly, I do not consider that the mere endorsement or annexing of a memorandum on the trust deed setting out the names of the current trustees in accordance with Clause 15(7) could in any circumstances amount to an offence under Article 30. It follows that again I consider that the JFCU exceeded its powers by informing UBS Trustees that it did not consent to UBS Trustees endorsing any such memorandum.

(iv) Participation in judicial proceedings

89 Crown Advocate Belhomme made it clear that the ordinary conduct (and genuine settlement) by trustees or others of litigation to determine the rights and liabilities of parties in relation to the proceeds of crime does not constitute an offence under Article 30 or any other money laundering provision of the 1999 Law (see *Bowman v Fels* [2005] 1 WLR 3083). It follows that it is open to the Representors and/or UBS Trustees to participate in litigation in Jersey, Switzerland (e.g. by joining in the appeal from the Federal Penal Court) or in Italy in relation to the Trusts without the risk of thereby committing a money laundering offence contrary to the 1999 Law.