Biema Holdings Ltd(First Plaintiff) v SG Hambros Bank (Channel Islands) Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Pitman
Judgment Date:	01 August 2017
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Text

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner and Jurats Grime and Pitman.

Between
Biema Holdings Limited
First Plaintiff

and

Evolution Partners Limited
Second Plaintiff

and

Pearl Investments Limited
Third Plaintiff

–v–

SG Hambros Bank (Channel Islands) Limited
Defendant

Advocate E. L. Jordan **for the Plaintiffs**.

Advocate N. M. Sanders **for the Defendant**.

Authorities

Proceeds of Crime (Jersey) Law 1999.

Criminal Justice (International Co-operation) (Jersey) Law 2001.

Gribbon v Lutton and another [2002] Q.B. 902 [2002] Q.B. 902 .

In the matter of the Exeter Settlement [2010] JLR 169 .

In re Tantular [2014] (2) JLR 25 .

Snell's Equity 32nd Edition.

Lewin on Trusts 19th Edition.

Companies — transfer of funds relating to the third plaintiff.

THE COMMISSIONER:

1 On 21 st September, 2016, the Master listed certain preliminary issues for determination by the Royal Court. Before setting out those issues, we need to go into the background.

2 The plaintiff companies, owned in equal shares by three Nevis discretionary trusts, have bank accounts with the defendant ("SG Hambros") in Jersey, which has refused to act on their instructions to pay the funds away to an account in Switzerland.

3 That refusal emanated from an order made by the Southern District Court of New York ("the US District Court") on 25 th March, 2013, restraining Arnold Bengis, his son David Bengis and his nephew by marriage, Jeffrey Noll, *"from transferring or otherwise disposing of any assets held at SG Hambros Bank in the Channel Islands except to the extent that any such assets exceed the sum of $54,883,550."*

4 What led to that order was that between 1987 and 2001, Arnold Bengis, David Bengis and Jeffrey Noll were engaged in a scheme involving the illegal harvesting of lobsters in South African waters for export to the United States in violation of both South African and US law. The fishing business was conducted by Hout Bay Fishing Industries (PTY) Limited ("Hout") in South Africa, which was convicted in or around 2002 of over fishing. It was required to pay a fine of 40 million Rand and to forfeit its fishing vessels leading to its collapse.

5 Large quantities of rock lobsters harvested in amounts that exceeded the authorised quotas were exported to the US in violation of the Lacey Act which makes it a crime to, inter alia, import fish taken in violation of foreign law.

6 On 2 nd March, 2004, Arnold Bengis, David Bengis and Jeffrey Noll pleaded guilty before the US District Court to violations of the Lacey Act, for which Arnold Bengis was sentenced to imprisonment for 46 months, David Bengis for 12 months and Jeffrey Noll for 30 months. They were also made subject to a forfeiture order in the sum of US$7.4m, which as we understand it represented the US assessment of the proceeds of their crime and which has been paid in part with funds drawn from the accounts of the plaintiffs with SG Hambros.

7 Initially, an application by the US authorities for a restitution order was denied, but that was overturned on appeal. Following the initial restraint order referred to above, the US District Court made a restitution order on 14 th June, 2013, ordering Arnold Bengis, David Bengis and Jeffrey Noll to pay restitution to the Republic of South Africa jointly and severally, in the reduced sum of US$22,446,720, amending the restraint order to that sum. The plaintiffs have obtained advice from Marc A. Weinstein, a partner in the US firm of Hughes Hubbard & Reed LLP, who explains that restitution in a federal criminal case is *"essentially compensatory"*, the purpose of which is to restore someone to the position he occupied before the commission of a crime.

8 On 17 th October, 2013, the US District Court then made what has been described as *a "deposit order"*, which provided that:-

> *"…. the defendants and all persons in active concert or participation with any of them, who get actual notice of this Order, through personal service or otherwise, forthwith shall transfer all funds that are the property of any defendant or on which any defendant has a legal, beneficial or other interest, (up to the aggregate sum of $22,446,720) to the Clerk of Court."*

The US Court also ordered that the:-

> *"….. defendants and all persons in active concert or participation with any of them who get actual notice of this Order through personal service or otherwise, be and hereby are enjoined from encumbering or transferring to anyone other than the Clerk of Court any property of any defendant in which any defendant has a legal, beneficial, or other interest (up to the aggregate sum of US$22,446,720)"*

9 Following an appeal, the restitution ordered against David Bengis was reduced to US$1,250,000 which has been paid and accordingly, the balance of the restitution order against the remaining two defendants, Arnold Bengis and Jeffrey Noll who we will refer to together as “the US defendants”, now stands at the reduced sum of US$21,196,720. The advice of Mr Weinstein is that although David Bengis has now discharged the orders against him, as with everyone else who has notice of the deposit order, he cannot act in breach of it in concert or participation with the US defendants.

10 The instruction to transfer the balance of the accounts of the plaintiffs to an account in Switzerland was given on 10 th June, 2013, and has been complied with save to the extent of a balance of US$23.3 million, as at 16 th December, 2016, retained by SG Hambros in the account of the third plaintiff (“Pearl”), sufficient to meet the reduced restraint and deposit orders. The amount in the accounts of the other plaintiffs are negligible, namely £3,125 in the account of the second plaintiff (“Evolution”) and £27,674 in the account of the first plaintiff (“Biema”). We are therefore principally concerned with the funds retained within the account of Pearl.

11 The concern of SG Hambros is that if it complies with the instruction of the plaintiffs in respect of these retained amounts, it may be at risk of being found in contempt of the US restraint and deposit orders.

12 On 13 th June, 2013, the plaintiffs issued these proceedings against SG Hambros for a declaration (as per the re-amended Order of Justice) that the US defendants have no legal, beneficial or other interest in the accounts and that SG Hambros had no discretion to refuse to act on the instructions given under the mandate. The plaintiffs also obtained an interim injunction against SG Hambros preventing it from dealing with or disposing of the assets within the accounts, varied on the 21 st June, 2013, to allow transfers out of the account of amounts in excess of US$22,446,720.

13 In its answer, SG Hambros seeks the directions of the Court as to whether it should comply with the instructions and has taken a neutral role in the proceedings. Advocate Sanders made it clear that a direction from this Court would protect SG Hambros from any allegation that it had acted in breach or in contempt of any of the US orders.

14 A proceeds of crime issue also arises in that the Jersey Financial Crimes Unit issued a *“no consent”* to transfers/withdrawals letter to SG Hambros on 20 th July, 2016, and despite the vigorous efforts of Advocate Jordan acting for the plaintiffs, consent for transfers/withdrawals has not been given to date. By consent, we of course mean consent by the Jersey Financial Crimes Unit under Article 32 of the Proceeds of Crime (Jersey) Law 1999 (“Proceeds of Crime Law”) to transfers/withdrawals being made from the accounts.

15 In its letter of the 17 th August, 2016, the Jersey Financial Crimes Unit said that the source of the funds in the accounts was central to the question of whether consent should be given:-

> *"We are aware of criminal proceedings in both the United States and South Africa in relation to the lobster export business of Mr [Arnold] Bengis.* It appears from those proceedings that the running of that business included at least smuggling, corruption, fraud and other serious criminal offences. It would appear to follow, at least without further information from your client, that there are good grounds to suspect that the assets held by SG Hambros are the proceeds of crime"

16 The issue of the source of funds has not been directly addressed by the plaintiffs, although Advocate Jordan fairly points out that any issue as to the proceeds of crime would presumably have been dealt with by both South African and US courts under the forfeiture orders they have both made.

17 A substantial amount of information in relation to the accounts has been provided by SG Hambros under notices issued by the Attorney General pursuant to the Criminal Justice (International Co-operation) (Jersey) Law 2001, and the US authorities take the view that the funds in the accounts of the plaintiffs at SG Hambros represent Arnold Bengis' fortune, over which he has sufficient practical authority to justify the orders that have been made. Indeed, quoting from this observation of District Judge Kaplan at a hearing on 8 th April, 2013:-

> *"The likelihood that this is the Arnold Bengis fortune at Hambros Bank in my mind approaches certainty.* The likelihood that Arnold Bengis' fortune at the Hambros Bank is utterly beyond his reach and/or the reach of his family including David Bengis is slim. The likelihood that after he leaves this world it is his intention that his son and other family members benefit from whatever is left in terms of economic resources is extremely high …. …. In all likelihood, [somebody] has used all of the considerable skill that can be brought to bear on a problem such as this to distance, as a matter of form, the Bengises from the money but that the practicalities in the end, I think, are pretty likely to be clear."

18 On 1 st February, 2016, the Master ordered that the Republic of South Africa, the USA, via the office of the United States Attorney for the US District Court, and our Attorney General be given notice of these proceedings and an ability to intervene within a given timeframe. There has been no application to intervene by any of the parties so notified.

19 In the case of the USA, it instructed Carey Olsen to act for it, and after two extensions of time given by the Master, Carey Olsen confirmed by letter of 17 th June, 2016, that it would not be intervening. They suggested that it might be most proportionate for the proceedings to be stayed pending the final outcome of the mutual legal assistance process that had

apparently been set in train.

20 There was no stay and the plaintiffs and SG Hambros are not aware of any further steps that have been taken by the authorities in the USA, South Africa or Jersey in relation to the accounts.

Preliminary issues

21 It is against this background that we are asked to determine the following preliminary issues:-

> (i) Do the US defendants have or have they at any time had a legal beneficial or other interest in the property currently held by SG Hambros in the accounts;
>
> (ii) Consequent upon the Court's determination of what legal beneficial or other interest in the property currently held by SG Hambros in the accounts the US defendants may have or have had, whether the terms of the US orders prevent the transfer of funds held by SG Hambros in the accounts in accordance with the instructions received from the plaintiffs; and
>
> (iii) Depending on the answer to paragraphs (i) and (ii), whether SG Hambros should be directed to transfer property currently held by it in the accounts in accordance with the wishes of the plaintiffs.

First preliminary issue

22 We interpret *"currently"* in the first preliminary issue as meaning at the date of our judgment, so that we are required to determine whether they have such an interest now, or have had at any time in the past.

23 We are dealing with orders issuing from the US District Court and need to ascertain what is meant by *"legal, beneficial or other interest"* under US law, a term not defined in the relevant US statute. Quoting from Mr Weinstein's first opinion at paragraph 15:-

> *"… An "interest" has been defined as "all or part of a legal or equitable claim to or right in property".* Black's Law Dictionary 828 (8th ed. 1999). The Second Circuit Court of Appeals has stated that "it would be reasonable for a court to hold that an individual has an interest in property, even when he does not own that property, so long as the property benefitted him as if he had received the property directly." *Export-Import Bank v Asia Pulp Paper Co.* , 609 F.3d 111,120 (2d Cir. 2010). *Using these definitions, it is my opinion that "other interests" as that term is used in the All Writs Act Order encompasses property for which Arnold Bengis or Jeffrey Noll has an equitable claim to or right in."*

24 We are not dealing, therefore, with *"interest"* in its wider meaning of wanting to know or learn about something, but an interest which equates to an equitable claim to or right in property. The question is whether either of the US defendants has or had a legal or equitable claim to or right in the accounts. Put another way do they or did they have any entitlement to the accounts.

History of the Pearl accounts

25 SG Hambros' first involvement with the Bengis family goes back to February 2002, when it was introduced to Arnold Bengis, and his son David Bengis, by Mr Kevin Gold, a partner in Mishcon de Reya in London. Its file note of 19 th February, 2002, records:-

> *"Along with Mishcons, he is contemplating establishing an Anglo-Saxon approach with part of his asset worth and hence the reason for the unscheduled meeting.* Against the backdrop of his extensive property and investment portfolio with UBS, he is looking to take a more cautious stance with the funds he is looking to forward to us which will be in the tune of $5 — $10 million. We talked through our approach for investment management, our research capabilities, the fund shop in Guernsey, etc. as well as the relationship afforded by a private banker such as myself and assistant. Arnie was very keen on the relationship perspective and was looking for someone who would look after the family connection, including himself and his son, etc."

26 Accounts were opened for two companies, namely Pearl, which had been incorporated in the BVI on 3 rd July, 2001, and a company called Armine Investments Limited ("Armine"). The purpose of Armine was to provide credit card facilities for Arnold Bengis and his wife under an arrangement by which its account was topped up from time to time by funds from the account of Pearl. A letter of introduction from Mishcon de Reya of 13 th March, 2002, in relation to these two accounts confirmed that the beneficial owner had been known to the firm for fifteen years, the beneficial owner being, by necessary implication, Arnold Bengis.

27 Some $8 million was introduced into the Pearl account and a letter of authority issued to SG Hambros, gave Arnold Bengis the power to make investment decisions. The affidavit of Richard White, a senior AML officer at SG Hambros, shows that Pearl accounts (there appear to have been seven in all) benefited from additional funding resulting from directions given by Arnold Bengis and David Bengis. It was clearly a sizeable and complex banking relationship.

28 A letter from Mishcon de Reya of 28 th March, 2002, confirms that both companies were, in fact, held under a settlement known as the Rosebud Settlement dated 11 th March, 1997. Furthermore, a letter from First Advisory Trust reg, trustee of the Rosebud Settlement, dated 28 th March, 2002, says this in relation to the initial US$8 million placed into the Pearl account:-

"We confirm that these funds were accumulated by investments and income from the ownership of Icebrand Seafood Inc which imports and distributes fish products."

Advocate Jordan accepted that Icebrand Seafood Inc ("Icebrand") was a company associated with Arnold Bengis and David Bengis.

29 According to the affidavit of Thomas Haas of the First Advisory Group, First Advisory Trust reg, was trustee of the Rosebud Settlement from 2001 – 2009, when it was replaced as trustee by InWealth Trustees SARL Limited ("InWealth"). We have a copy of the Rosebud Settlement, drafted by Mishcon de Reya. It is a discretionary settlement and the discretionary beneficiaries, although not named in the original deed, were Arnold Bengis, his wife Shelley Bengis, his son David Bengis, his daughter Lana Rubinstein and his daughter Gabi Bengis. The initial settlor of $10 was a Hans Bachofen, but his name does not feature anywhere else in the documentation we have, and we infer that he was not the economic settlor.

30 It is not in dispute that during the time of the Rosebud Settlement and in particular when Pearl formed part of the trust fund, Arnold Bengis and David Bengis received distributions and other benefits as beneficiaries, and were fully involved in the investments, certainly those held through Pearl. In addition to his authority over investments, on 20 th August, 2002, Arnold Bengis was given authority to draw funds from the Pearl account up to $1 million from time to time. SG Hambros have carried out a careful search of its records from which it concludes that there is no positive evidence of Arnold Bengis seeking to withdraw funds pursuant to this authority, save for one occasion on the 29 th August, 2003. On 23 rd May, 2003, David Bengis was given authority to withdraw an accumulative figure of $2 million.

31 It is clear that Arnold Bengis had an interest in the trust fund of the Rosebud Settlement, which would have included the accounts of Pearl, as a discretionary beneficiary of the Rosebud Settlement. Thomas Haas in his third affidavit accepts that Arnold Bengis *"had a discretionary beneficial interest in"* the accounts as a member of the class of beneficiaries of the Rosebud Settlement, the assets of which included the accounts, although whether that would give him an equitable claim to or right in the accounts is another issue, which we will return to.

32 When InWealth became trustee of the Rosebud Settlement, the trust fund comprised ownership of Pearl, Armine, Biema and Evolution (the latter being held through a company called Nashglobe Business SA).

33 The account held by Biema was closely connected to those held by Pearl and in the main the account served a particular purpose, namely to finance and maintain a portfolio of properties. The account of Evolution was connected to the property purchases associated with David Bengis.

34 In 2010 the trust fund of the Rosebud Settlement was decanted into a new structure under an Isle of Man company called Jaz Holdings Limited ("Jaz"), a hybrid company limited by guarantee but with a share capital. We have no documentation at all in relation to this structure, not even the memorandum and articles of association, so we have no knowledge as to how it operated and how assets were passed into and out of it. What we do know is that it incorporated a company in Belize called Balagan Limited ("Balagan"), which on 26 th May, 2010, acquired the shares in Pearl, Biema and Armine. Evolution appeared to remain separately owned by Jaz through Nashglobe Business SA.

The Nevis trusts

35 On 13 th January, 2012, David Bengis settled with a nominal $100 three discretionary trusts in similar terms governed by the law of Nevis, namely the Gamma Trust, the Lambda Trust and the Delta One Trust (referred to collectively as "the Nevis trusts"). The trustee was another InWealth associated company, namely InWealth Trustees Nevis Limited ("InWealth Nevis"). On 22 nd February, 2012, each Nevis trust acquired 33.33% of Balagan from Jaz, which held beneath it Pearl, Biema and Armine. The Delta One Trust also acquired Evolution from Nashglobe Business SA. The basis upon which these assets were acquired by the Nevis trusts is not clear, but we are asked to infer that David Bengis was the economic settlor.

36 As executed, the beneficiaries of the Nevis trusts were the three branches of Arnold Bengis' family, so that David Bengis' wife and daughter were the beneficiaries of the Delta One Trust, Lana and her children the beneficiaries of the Lambda Trust and Gabi (who has no children) the beneficiary of the Gamma Trust.

37 Each trust gave the trustees the power to add and remove beneficiaries and each appointed Arnold Bengis as protector. His powers included, and quoting from each trust:-

> *"(a.) Power of veto on intended distributions of income or capital;*
>
> *(b.) Power of veto on intended investments;*
>
> *(c.) Power to remove trustees;*
>
> *(d.) Power to appoint new or additional trustees;*
>
> *(e.) Power to exclude any beneficiary as a beneficiary of the trust;*
>
> *(f.) Power to add any person (other than the Settlor) as a beneficiary of the trust in addition to any existing beneficiary of the trust, including any private or charitable trust or foundation;*
>
> *(g.) Power to determine the proper law of the trust;*

(h.) Power to change the forum of administration of the trust;

(i.) Power to release any of the Protector's powers."

38 We have had no advice on the law of Nevis, but it would seem on the face of these deeds that in addition to a power of veto over distributions and investments, the protector had the power himself to appoint and remove trustees, to exclude and add beneficiaries and to change the proper law and forum of administration – very extensive powers on any analysis. Although not named as a beneficiary, Arnold Bengis was not an excluded person and could therefore be added as a beneficiary at any time.

39 We asked what guidance the trustees were given as to the exercise of their powers and the intentions of David Bengis in establishing the Nevis trusts, but were told that there was no guidance and no letter of wishes.

40 On the same day that the trust deeds were executed, Arnold Bengis wrote a letter to InWealth Nevis asking that Aryeh Rubinstein (Lana's son) and David Bengis be added and David Bengis' wife and daughter removed from the Delta One Trust and Aryeh Rubinstein and David Bengis added and Gabi removed from the Gamma Trust. Deeds to that effect were executed on that day.

41 We have no information on the rationale behind these changes, but were told it may to relate tax issues connected with their place of residence. In any event, the result was that Arnold Bengis' son David Bengis and his grand-son, Aryeh, were the only beneficiaries of the Delta One and Gamma Trusts and Arnold Bengis' daughter Lana and her four children remained the beneficiaries of the Lambda Trust.

42 We have been provided with no explanation as to why the Nevis trusts were established when they were in January 2012 and whether this was in any way connected with the US restitution proceedings. Although the restitution order itself was not imposed until 14 th June, 2013, the possibility of a restitution order would have been clear from the time of the decision of the US Court of Appeal on 4 th January, 2011, which held that South Africa was a victim and entitled to restitution. The matter was then referred for a report recommendation from Magistrate Judge Peck, which was issued on 16 th August, 2012, after argument had been heard before him.

43 On 11 th March, 2013, the US government moved to restrain Arnold Bengis, David Bengis and Jeffrey Noll from transferring the assets held in the accounts of the plaintiffs with SG Hambros. On 22 nd March, 2013, three days before the restraint order was imposed:-

(i) Arnold Bengis retired as protector of all of the trusts appointing the family's South African lawyer, Basilio Robert De Sousa, in his place; and

(ii) Arnold Bengis wrote to InWealth asking for David Bengis to be removed as a beneficiary of the Delta One Trust and the Gamma Trust, which was effected by deeds that day.

44 Mr De Sousa now has very extensive powers as protector over the Nevis trusts, but we again have no evidence as to the basis upon which he has accepted this role and from whom he would look for guidance as to the exercise of these powers. We also have no information as to who would succeed him. On the face of the trust deeds, it would appear to be open to the trustees or to the protector at some point in the future to appoint Arnold Bengis as an additional beneficiary and to make distributions to him.

45 Following what we were told was a breakdown in relations between the family and InWealth Nevis, on 22 nd September, 2014, Mr De Sousa, as protector, removed InWealth Nevis as trustee of the Nevis trusts and subsequently appointed First Trust Management AG, part of the First Advisory Group, as trustee in its place. It is a requirement of Nevis law that there should be one trustee incorporated under the Nevis Business Corporation Ordinance, and accordingly at some point, Hightown Ventures Inc was appointed co-trustee.

Source of funds

46 We are not asked to make a determination as to the source of the funds in the accounts of the plaintiff companies today, and indeed the wholesale lack of accounting information would make that task impossible. No accounts were shown to us for the Rosebud Settlement, Jaz, the Nevis trusts and the plaintiff companies and, as we understand it, none exist.

47 The internal records and KYC documentation held by SG Hambros would indicate that Arnold Bengis was the ultimate source, but Mr Haas maintains that Arnold Bengis was never the settlor of the structure which owned Pearl. Having spoken to colleagues within the First Advisory Group, he confirmed that whilst Arnold Bengis was within the class of beneficiaries of the Rosebud Settlement and received distributions in that capacity, he never personally contributed any funds to the Rosebud Settlement. If it was not Arnold Bengis, then Mr Haas makes no suggestion as to who was the economic settlor of the Rosebud Settlement. Certainly, the correspondence from First Advisory Trust reg in 2002 was clear that the initial funds within Pearl came from Icebrand, a company associated with Arnold Bengis.

Jeffrey Noll

48 We can deal fairly shortly with the position of Jeffrey Noll. He is Arnold Bengis' nephew by marriage, and worked for Hout as a director. He was not a beneficiary of the Rosebud

Settlement and there is no suggestion that he contributed any assets to it. He is not a beneficiary of the Nevis trusts and again there is no suggestion that he contributed any assets to them. The US authorities have never asserted that he has any kind of interest in the accounts and the records show that he had no authority over or involvement in any of them. His name simply does not feature in any of the relevant documentation that we have seen. We do, therefore, find that Jeffrey Noll does not have and has not at any time had a legal, beneficial or other interest in in the accounts of the plaintiffs. We are left therefore with the position of Arnold Bengis.

Arnold Bengis

49 The plaintiffs' case is straightforward. Whilst Arnold Bengis was a beneficiary of the Rosebud Settlement and benefited from it, he has never been a beneficiary of the Nevis trusts. Even if he was the economic settlor of the Rosebud Settlement, and therefore the source of the funds now held within the accounts of the plaintiffs, that has no bearing, they say, on whether he has an interest in the accounts now held within the Nevis trusts. No question has been raised as to the validity of the Nevis trusts and so it is fundamentally a question of what interest, if any, he has under them.

50 The position of SG Hambros is as follows:-

(i) It makes no personal proprietary claim to the assets retained in the plaintiffs' accounts – that retention and the refusal to act on the instruction has been made in view of the risk summarised above, and in accordance with its terms of business – ultimately, SG Hambros will abide by the Court's directions as to the accounts.

(ii) SG Hambros does not advance a case in relation to the first and second preliminary issues and rests on the wisdom of the Court as to a determination of the third issue.

(iii) In respect of the first and second preliminary issues, SG Hambros submits that it is in a position akin to that of an interpleader, and/or neutral trustee and consequently submits that it should assist the Court with its enquiry from the point of view of providing relevant evidence and that it is entitled to retain sufficient funds to meet the costs that it has been required to incur in these proceedings by virtue of its position as an innocent custodian of funds that are the subject of a dispute, in reality, between the plaintiffs and the US government and in which it has been compelled to take steps.

(iv) SG Hambros does not seek to delay a determination of these proceedings.

51 The position of SG Hambros is an invidious one, in so far as it rests between potential contempt of court risks in relation to the US proceedings and a breach of mandate claim by the plaintiffs. This is a position well-rehearsed in interpleader jurisprudence. Advocate Sanders submitted that:-

(i) It is an analogous position to that of a custodian in interpleader proceedings;

(ii) That relevant principles as to the conduct of a custodian in interpleader proceedings should instruct its conduct; and

(iii) Its approach to these proceedings has consequently been aligned to that of a custodian in interpleader proceedings in so far as relevant and possible.

52 Interpleader proceedings arise in circumstances where a person, who has no interest in property in his hands, is being, or expects to be, sued by two or more parties claiming adversely to each other in relation to that property. SG Hambros recognises that, strictly, the US government has not applied to intervene in these proceedings to lay claim to the funds; however, Advocate Sanders submitted that the position the US government has adopted in the US proceedings concerning the assets in the accounts, whereby it has not resiled from the US Orders, but instead is currently seeking to enforce them against Arnold Bengis, presents a risk of suit to SG Hambros in respect of the funds held in the accounts sufficient to constitute a “claim”.

53 Following the decision of the English Court of Appeal in *Gribbon v Lutton and another* [2002] Q.B. 902, interpleader proceedings typically bear three distinctive hallmarks:

(i) The interpleading party must claim no interest in the subject matter in dispute other than for charges or costs;

(ii) He (the interpleading party) must not collude with any of the claimants to the subject matter; and

(iii) He (the interpleading party) must be willing to pay or transfer that subject matter into court or dispose of it as the court directs.

54 We accept that the position of SG Hambros fits in with each of the criteria set out above.

55 There is limited judicial guidance in the decided cases as to how a party caught between adverse claims to the same assets ought to conduct themselves, or what role that party should adopt. Some limited indication as to the role of an interpleading party was given in *Gribbon* at page 918 where Justice Laddie said as follows:-

“[…] they [the interpleading party] were never in any real sense parties.
They could not plead a case for or against the purchaser's or vendor's claims. They could not present arguments before the court. They could not challenge by cross-examination any of the evidence given. They could not appeal the decision.” (Emphasis added)

56 Following these broad principles, SG Hambros has not advanced a case as to whether the funds in the accounts should be paid away to the plaintiffs and has not sought to challenge

by cross-examination the evidence filed on behalf of the plaintiff companies. SG Hambros has complied with its discovery obligations and filed affidavits of evidence, the purpose of which is to furnish the Court with information and documents that may be relevant to the determination of the preliminary issues, and to place all potentially relevant information before it. We endorse its approach.

57 We have no advice on Nevis trust law and therefore approach the matter applying Jersey trust law by way of analogy, and this on the basis that Nevis trust law would be based upon common law trust principles.

58 Arnold Bengis was a beneficiary of the Rosebud Settlement. We have no information as to his interest under Jaz. We are told that David Bengis was the settlor of the assets held under Jaz into the Nevis trusts, but not how that was done, but on the face of the trust documentation, Arnold Bengis is not and has never been a beneficiary of any of the Nevis trusts.

59 He is a person in whose favour the power to add beneficiaries to the Nevis trusts could be exercised in the future. In the case of *In the matter of the Exeter Settlement* [2010] JLR 169, it was held that a possible object of a power to add beneficiaries was not a beneficiary unless and until the power was exercised in his favour. Until that moment, the trustees could not distribute income or capital in his favour and he had none of the rights of a beneficiary. Therefore, the fact that Arnold Bengis could be added as a beneficiary does not, in our view, make him a beneficiary of any of the Nevis trusts.

60 Until 22 nd March, 2013, Arnold Bengis had extensive powers as protector of each of the Nevis trusts. We agree with Advocate Jordan that these powers would be fiduciary powers; certainly, it is well established that the power to appoint a new trustee is a fiduciary power. However, in terms of the trust assets, the protector has a veto on intended investments and a veto over distributions of income or capital and extensive as the protector's powers are, they do not render the protector a beneficiary or give him an equitable claim to or right in any of the trust assets themselves.

61 Even if Arnold Bengis was a beneficiary of the Nevis trusts, that would not give him any beneficial entitlement to the trust assets. That issue arose in the case of *In re Tantular* [2014] (2) JLR 25, in which the Attorney General, acting at the instance of the Central Jakarta District Court in respect of criminal proceedings being brought there against an Indonesian banker in which a confiscation order was anticipated, sought to enforce a *saisie judiciare* against the assets of a discretionary trust of which the Indonesian banker was a discretionary beneficiary, and this on the basis that the assets of the trust constituted his property for the purposes of the Proceeds of Crime Law. It was held that a beneficiary of a discretionary trust had no ***"entitlement"*** to any of the trust property. His sole right is to be considered as a potential recipient of benefit by the trustees and to have his interests protected by a court of equity. The point is made in Snell's Equity 32nd edition at paragraphs 22–004 and 22–005 and in Lewin on Trusts 19th edition at paragraphs 1–06 to

1–08.

62 In *Tantular*, Sir Michael Birt, then Bailiff, described it as incompatible with fundamental principles of trust law to assert that a discretionary beneficiary of a trust is ***"beneficially entitled"*** to any of the assets of the trust. Quoting from paragraph 30 of the judgment:-

> ***"The true position is that he has no right to any of those assets unless or until the trustees decide in their discretion to make an appointment to him and he then becomes beneficially entitled only to such assets as are appointed to him."***

63 The way the case was put by the US authorities in the proceedings before the US District Court was that Arnold Bengis "had the practical ability to direct these entities [the plaintiff companies] to transfer any assets that may be held by them", but if the US authorities were to seek to enforce the deposit order in this jurisdiction on that basis, they would come up against the same fundamental principle of trust law. Whilst in practice the trustees of a discretionary trust may, in the exercise of their discretion, appoint assets to members of the discretionary class of beneficiaries, that does not give any of those members a right to the trust assets, save to the extent that assets have actually been appointed to them. As a matter of trust law, and assuming valid trusts, a discretionary beneficiary does not have the ability to direct appointments.

64 Under the provisions of the Rosebud Settlement, Arnold Bengis would have had no ability as a member of the discretionary class of beneficiaries to direct the trustees to make an appointment of trust assets to him as he had no right to any of those assets and, if he had been named as a member of the discretionary class of beneficiaries of the Nevis trusts, he would have had no ability under their provisions to direct the trustees to make an appointment of trust assets to him, again as he had no right to any of those assets. As it transpires, he was not named as a beneficiary of the Nevis trusts.

65 Before proceeding further, there are two aspects of the administration of these accounts which we need to address:-

> (i) Armine continued to provide credit card facilities for Arnold Bengis up until instructions were given by Armine on the 28 th March, 2013, for its account with SG Hambros to be closed, but between March 2009 and its closure, payments in excess of £350,000 were made to American Express at the request of Arnold Bengis. The account of Armine was funded from the account of Pearl.

For the bulk of this period Armine was under the Jaz structure, but for a short period it was owned by the Nevis trusts at a time when InWealth Nevis was trustee. The documents we were shown indicate that the last payment to American Express in the sum of £926.87 was made on the 26 th February, 2013, four days after Armine became an asset of the Nevis trusts. Mr Haas was unable to explain why this was permitted, bearing in mind that Arnold Bengis was not a beneficiary. The overall explanation given to him by InWealth Nevis'

lawyers was that David Bengis and Lana Rubinstein were beneficiaries of the Nevis trusts at this time and they requested distributions to enable them to assist their father meet his expenses. Accordingly, to save David Bengis and Lana Rubinstein receiving monies themselves and then having to make payment of the credit card invoices, InWealth Nevis made payments directly to American Express.

(ii) The authorities given to Arnold Bengis over the account of Pearl in 2002 were not formally cancelled until 30 th December, 2016, after the current trustees first became aware of their existence following discovery.

66 We have little information on the credit card arrangements in the time of the Rosebud Settlement, but it was a facility which presumably the trustees at the time in the exercise of their powers gave to Arnold Bengis. The arrangements under the Jaz structure are unknown. As for the Nevis trusts, Arnold Bengis was not a beneficiary and should not, therefore, have had the benefit of such a facility for even this short period. It would be for InWealth Nevis to justify what would otherwise appear to be a breach of trust. The existence of such a facility would not, however, as a matter of trust law, give Arnold Bengis any kind of entitlement over the Pearl account or over the other accounts of the plaintiffs.

67 As for the historic mandates, there is a difference between being given authority by the directors to withdraw funds from an account, an authority that can be withdrawn at any time, and having an equitable claim to or right in the monies in that account. We have no information as to the basis upon which Arnold Bengis was given the authority to withdraw funds and therefore do not know whether it was for his own personal purposes or for the purposes of the company. It was apparently only used once in August 2003 and it seems clear that the mandate had fallen into disuse, only to see the light of day on discovery. Advocate Jordan referred us to a bank questionnaire of 24 th March, 2010, completed when a corporate director provided by InWealth had replaced the previous directors. It is a comprehensive document which covers the whole of the relationship between Pearl and SG Hambros, and which incorporates a new mandate. Only the role of David Bengis as investment adviser is continued. As from that point, it would seem clear that Arnold Bengis no longer had the authority of the directors either on the investments held by Pearl or to withdraw funds from the account of Pearl and he has not attempted to do so. Advocate Sanders told us that if he had attempted to do so, SG Hambros would have referred it back to the directors of Pearl.

68 In any event, as of now, the credit card facility and the historic mandates are no longer in place and, their existence does not alter the fundamental position under trust law.

69 The US authorities have not taken the opportunity of applying to intervene in these proceedings, having taken legal advice here. We are not aware of any other steps being taken by the authorities here. We can only proceed, therefore, on the basis of the information given to us and without any party opposing the submissions of the plaintiffs.

70 We can understand how District Judge Kaplan expressed the view on the information before him that the funds in the accounts represent part of Arnold Bengis' fortune, but we have to apply principles of trust law that are well established both under Jersey law and under English law to the evidence that has been presented to us. There is no suggestion that Nevis trusts are invalid in any way or that they were not legitimately funded. Accordingly, on the evidence and contentions before us, we find on the first preliminary issue that Arnold Bengis does not have a legal, beneficial or other interest in the property currently held by SG Hambros in the accounts of the plaintiffs.

71 Turning to the question of whether he has ever had such an interest in the past, Advocate Jordan accepted that he did have an interest in the sense that he was a beneficiary of the Rosebud Settlement, but as shown above that would not give him a claim to or right to the accounts held by plaintiff companies that formed part of the trust fund.

72 Subject to one caveat, we find that Arnold Bengis has not at any time in the past had a legal, beneficial or other interest in the accounts held by the plaintiffs with SG Hambros. That caveat relates to the period when the plaintiff companies formed part of the Jaz structure. We have no means of knowing what his legal, beneficial or other interest may have been during this period.

73 However, it seems clear that the US orders would not apply to property in which the US defendants had an interest in the past, but no longer had an interest at the date the US orders were made. Mr Weinstein addressed this question.

74 He points out that the orders themselves were expressed in the present tense and applied to property in which any US defendant *"has"* not *"had"* an interest, so that the plain terms of the deposit order do not enjoin persons other than the US defendants from transferring property which, prior to the date of the order, was owned by any of the defendants or in which they had an interest but no longer have. That conforms with common sense in that it would be exorbitant to require persons to transfer to the Clerk of the US District Court property in which the defendant has no interest but on the basis that he may have had an interest in the past.

75 He analysed the authority under which the deposit order was made, as that was not clear from the order itself, but regardless of the authority, and after consideration of the relevant case law, he concluded that the deposit order only enjoins persons other than the US defendants from transferring property that the US defendants or either of them owned or had an interest in as of the date of that order, namely 17 th October, 2013.

76 At that time, and indeed at the time of the earliest of the US orders, namely the restraint order of the 25 th March, 2013, the plaintiffs were still held within the trust funds of the Nevis trusts, of which neither Arnold Bengis nor Jeffrey Noll were beneficiaries, and so the same analysis applies as to their interests in the bank accounts of the plaintiffs, notwithstanding

the credit card facility of Arnold Bengis that continued up until at least 26 th February, 2013, and the existence of the historic mandates going back to 2002, for which there was no longer any authority.

77 Accordingly, we can say, without any caveat, that currently and as at the date of the earliest of the US orders, namely 25 th March, 2013, Arnold Bengis has no legal, beneficial or other interest in the accounts held by the plaintiffs with SG Hambros.

Second Preliminary Issue

78 We now turn to the second preliminary issue namely whether the US orders prevent the transfer of funds held by SG Hambros in the accounts in accordance with the instructions received from the plaintiffs. This comes down to whether the US orders have extra-territorial effect.

79 The US orders are defined in paragraph 14A of the amended answer as comprising the restraint order of 25 th March, 2013, the restitution order of 14 th June, 2013, and the deposit order of 17 th October, 2013.

80 The restraint order as issued on 25 th March, 2013, and as amended on 14 th June, 2013, makes reference to the accounts of the plaintiffs at SG Hambros (whereas the restitution order and the deposit order do not) and the question arises whether the restraint order purported to have extra-territorial effect upon SG Hambros under US law.

81 The first point to make is that, whilst the accounts at SG Hambros are referred to, the orders are not addressed to SG Hambros and do not purport to restrain SG Hambros from doing anything. The orders are addressed to Arnold Bengis, Jeffrey Noll and David Bengis (the latter now being discharged).

82 The US restitution order is also addressed to Arnold Bengis, Jeffrey Noll and David Bengis. The US deposit order, however, applies on its face to *"all persons"* who act in concert or participation with any of the US defendants. Does that extend to persons outside the jurisdiction of the US courts?

83 We are only concerned now with US defendants and we have found that neither of them have any legal, beneficial or other interest in the accounts, and so as a matter of Jersey law, in complying with the instructions of the plaintiffs under the bank mandates, SG Hambros would not be acting in concert with them in breach of the deposit order, nor would they be aiding and abetting a breach of the restraint order.

84 Mr Weinstein addresses the issue of extra-territorial effect under US law and makes the

following points:-

(i) Under US law there is a presumption against extra-territoriality. Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.

(ii) Neither of the relevant statutes contains any clearly manifested intent by Congress to apply the statutes extra-territorially. He is not aware of any precedent for the proposition that restitution or deposit orders issued under the relevant Act have extra-territorial effect.

(iii) Even if the restitution orders can be applied extra-territorially, a restitution order is an in personam order imposed solely on the criminal defendant who is convicted and is the subject of the order. Here, none of the parties to the Jersey proceedings are subject to a restitution order. Also, unlike a civil forfeiture order, a restitution order is not an *in rem* order over property. In his opinion, therefore, the restitution order can only be applied against the defendant who is the subject of that order.

85 He concludes that the deposit order, which is the only order arguably applicable to persons or entities other than the US defendants, does not apply extra-territorially.

86 If the US authorities were to take a different view as to extra-territoriality, then it is pertinent that no application has been made by them to enforce any of the US orders in this jurisdiction, and they have not, on advice, sought to intervene in these proceedings, when given the opportunity to do so.

87 Accordingly, we conclude that there is nothing in the US orders to prevent the transfer of the funds held by SG Hambros in the accounts of the plaintiffs.

Third preliminary issue

88 In view of our findings, there are, as Advocate Jordan submits, no reasons for SG Hambros not to comply with the instructions given to it under the banking mandates, other than the suspicion, as voiced by the Jersey Financial Crimes Unit, that these monies may be the proceeds of crime. SG Hambros cannot be expected to transfer the monies to the Swiss bank account as instructed, unless and until the Jersey Financial Crimes Unit gives its consent, thus providing SG Hambros with the protection afforded by Article 32 of the Proceeds of Crime Law. Subject only to that and to the further input of counsel, we would be minded to direct SG Hambros to comply with the instructions of the plaintiffs, thus protecting it from any allegation that it might be acting in contempt of any of the US orders.