# Anne Marie Heinrichs and Werner Cornelius Heinrichs and G B Trustees Ltd v Pantrust International SA and Richard George De Winton Wigley and James Richard De Winton Wigley

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| **Jurisdiction:** | Jersey |
| **Judge:** | J. A. Clyde-Smith, Jurats Grime, Pitman |
| **Judgment Date:** | 02 May 2018 |
| **Neutral Citation:** | [2018] JRC 81A |
| **Reported In:** | [2018] JRC 81A |
| **Court:** | Royal Court |
| **Date:** | 02 May 2018 |



**Text**

[2018] JRC 081A

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE BRAZILIAN TRUST

AND

IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) Law 1984

Between
Anne Marie Heinrichs
First Representor

and

Werner Cornelius Heinrichs
Second Representor

and

G B Trustees Limited
Third Representor
and
Pantrust International SA
First Respondent

and

Richard George De Winton Wigley
Second Respondent

and

James Richard De Winton Wigley
Third Respondent

**Advocate** S. M. Baker **for the First and Second Representors**.

**Advocate** M. L. Preston **for the Third Representor**.

**Advocate** H. Sharp **for the minor and unborn beneficiaries**.

**Authorities**

*Heinrichs v Pantrust and Others* [2016] JRC 106A .

*Heinrichs -v- Panturst and Ors* [2016] JRC 174

*Heinrichs v Pantrust and Ors* [2017] JRC 006

*Representation of the Manor House Trust and the Russian Trust* [2015] JRC 208

*Stock v Pantrust International and Others* [2016] JRC 053

*National Westminster Bank plc v Jones* [2001] BCLC 98 per Neuberger J at 59

*Mackinnon v Regent Trust Company Limited & Ors* [2005] JLR 198 at 14

*Shalson v Russo* [2003] EWHC 1637 per Rimer J at 189

*A v A* [2007] EWHC 99 (Fam) per Munby J at 42–43

*In re Curatorship of X* [2002] JLR 259

*Rahman Showlag v Mansour* [1994] JLR 269 at 275

*Eckman v Sidem International Limited & Michault* [2010] JLR 299 .

Trusts — The First and Second Representors seek declarations and directions to the trustee of the Brazilian Trusts.

**THE COMMISSIONER:**

1 The first representor, Ms Anne Marie Heinrichs, and her father, the second representor Mr Werner Cornelius Heinrichs, seek declarations in relation to, and directions to the trustee of, the Brazilian Trusts.

2 Their application is made under the representation they issued on 5 th November, 2015, now amended, and which has given rise to three judgments of the Court, namely on 16 th June 2016 *Heinrichs v Pantrust and Others* [2016] JRC 106A, on 30th September *Heinrichs -v- Pantrust and Ors* [2016] JRC 174 and on 12th January 2017 *Heinrichs v Pantrust and Ors* [2017] JRC 006. It is supported by a detailed affidavit by Mr Heinrichs setting out his memory of the history of the Brazilian Trusts and affidavits by Ms Heinrichs. For ease of reading, we summarise the background again.

**Background**

3 Mr Heinrichs was the economic settlor of a settlement made on 9 th December, 1977, between Alan Norman Kimble, the named settlor of $100, and Barclaytrust International Limited (“Barclaytrust”). The settlement was drafted by Bedell Cristin and is the standard form of discretionary settlement with which this Court is familiar. It is governed by Jersey law and the beneficiaries are named as Mr Heinrichs, his wife and their issue. Ms Heinrichs is their only daughter. We will refer to this as “the 1977 Brazilian Trust”.

4 Mr Heinrichs, who is Canadian, was introduced to Mr Howard Scholefield of Barclaytrust by his brother-in-law, Mr John Dick, of St John's Manor, who has himself been involved in proceedings with the first to third respondents (see, for example, *Representation of the Manor House Trust and the Russian Trust* [2015] JRC 208). Over the years Mr Heinrichs and Mr Dick have been involved in a number of property development ventures.

5 At the time the 1977 Brazilian Trust was created, the second respondent, Mr Richard George De Winton Wigley, was a junior employee at Barclaytrust under Mr Scholefield. In 1984, Mr Scholefield and Mr Richard Wigley left Barclaytrust to run a small trust company known as La Hougue Boëte Société Fiduciaire avec Responsabilité Limitée ("La Hougue Boëte"), which operated from an office attached to St John's Manor, taking the trust business associated with Mr Heinrichs and Mr Dick with them. It was Mr Heinrichs' understanding that La Hougue Boëte was ultimately beneficially owned by Mr Dick. In due course Mr Scholefield retired and Mr Richard Wigley took over the conduct of the relationship with Mr Heinrichs.

6 There is an unsigned copy of a deed of retirement and appointment of trustees dated 1984 by which Barclaytrust retired as trustee of the 1977 Brazilian Trust in favour of La Hougue Boëte, which makes no reference to the assets then held in trust. There is evidence that La Hougue Boëte was indeed appointed trustee in that:–

(i) There is a share transfer agreement between Barclaytrust and La Hougue Boëte dated 1 st June, 1984, in respect of shares in a company known as Galty Investments NV, a company associated with Mr Heinrichs and which, as we understand it, at one time owned the house in Toronto in which he and his family lived. There is a copy of a share certificate dated 31 st August, 1984, issued in the name of La Hougue Boëte.

(ii) There is an office copy letter to Barclaytrust initialled by Mr Richard Wigley dated 28 th June, 1984, acknowledging receipt of trust documentation relating to the Brazilian Trust and in which he says he is looking forward to receiving the deed of retirement duly completed by Barclaytrust.

7 There is no documentation in relation to the 1977 Brazilian Trust from 1984 onwards, save for the existence of copy letters of wishes dated 27 th June, 1986, 2 nd September, 1987, and 28 th June, 1988. There is a further lengthy handwritten letter of wishes dated 9 th February,1989, and a short memorandum from Mr Richard Wigley to Mr Heinrichs about his letter of wishes dated 9 th July, 1990, which do not expressly state the settlement to which they refer.

8 There is sparse evidence as to the assets held by Barclaytrust during the period of its trusteeship of the 1977 Brazilian Trust, save for the following:–

(i) There is a copy ledger from Barclaytrust relating to the 1977 Brazilian Trust covering the period 30 th January, 1978 to 1st August, 1981, listing some six companies and a pearl necklace as assets of the 1977 Brazilian Trust.

(ii) There is a file note from Mr Richard Wigley dated 14 th May, 1981, which lists two of those companies and one additional company as assets of the 1977 Brazilian Trust.

9 On the face of it, the next chronological event is the declaration by La Hougue Boëte of a second Brazilian Trust in 1984 over $100. It is dated 15 th November, 1984, and appears to be an "in-house" document in that its drafting is not credited to any firm of lawyers. It is governed by Jersey law and is in broadly the same terms as the 1977 Brazilian Trust save that the beneficiaries are listed as two charities, namely Cancer Research Campaign and the British Heart Foundation. The registered office of La Hougue Boëte is crossed out in handwriting, and a residential address inserted in its place — "La Fallue, Gorey in the Parish of St Martin". We will refer to this as the "1984 Brazilian Trust". No reference is made in the declaration to the 1977 Brazilian Trust.

10 There is no documentation showing what assets, if any, were settled into the 1984 Brazilian Trust, but it was the subject of a number of further deeds as follows:–

(i) On 30 th June, 1997, La Hougue Boëte retired as trustee in favour of a Jersey company, Faldouet Company Limited ("Faldouet"), a private trust company ultimately owned by Mr Heinrichs and administered by La Hougue Boëte.

(ii) On 30 th November, 2007, Faldouet retired as trustee in favour of the first respondent, Pantrust International SA ("Pantrust"), a Panamanian company, and the proper law was changed to Panama. This arose out of a decision taken by Mr Richard Wigley that he and his family and the trust business of La Hougue Boëte should move to Panama, it would seem to avoid the tightening regulatory regime in Jersey.

(iii) On 15 th May, 2015, Pantrust retired as trustee in favour of Mr Richard Wigley and his son, the third respondent James Richard De Winton Wigley, and the proper law was changed to that of England. This followed the cancellation by the Panamanian regulator of Pantrust's licence to conduct trust business in Panama.

11 The report of the superintendent of banking in the Republic of Panama dated 4 th December, 2014, into the business of Pantrust under the direction of Mr Richard Wigley and Mr James Wigley is damning. It refers to the refusal of Pantrust to provide information and to cooperate in the inspection process, using " *all sorts of subterfuges and excuses"* and concludes that Pantrust is exercising the trust business *"in a harmful manner, hazardous to the public interest, its customers and to the detriment of the good name of the financial centre … in this jurisdiction"*.

12 In its judgment of 16 th June, 2016 *Heinrichs v Pantrust and Others*, the Court found that the changes of proper law of the 1984 Brazilian Trust to Panama in 2007 and the subsequent change to English law in 2015 were invalid (although no formal declaration to this effect was made by the Court), and indeed that was conceded by Advocate Langlois, for the first to third respondents (see paragraphs 34–38 of the judgment). The Court appointed the third representor, GB Trustees Limited ("GB Trustees"), at that stage a respondent to the representation, as trustee in place of the first to third respondents. The

first to third respondents, who denied the validity of the 1984 Brazilian Trust, were ordered to account fully for their trusteeships of the Brazilian Trusts and to transfer all of the assets of the Brazilian Trusts to GB Trustees.

13 The first to third respondents have not complied with the orders made against them. They have given notice that they do not accept the jurisdiction of this Court, and have not appeared in any subsequent proceedings. Mr Richard Wigley and Mr James Wigley continue to reside in Panama.

14 Save for the documents to which we have referred, no accounts of either trust, no trustee resolutions or minutes and no deeds of addition of assets or appointment out of assets have been found by the representors. Barclaytrust have been able to identify that it was trustee of the 1977 Brazilian Settlement, but has been unable to find any files or documents which it assumes were passed over to La Hougue Boëte in 1984. Much of the evidence that has been obtained by the representors has been taken from the documents found at and removed from St John's Manor.

15 That documentation casts a serious doubt as to the date when the 1984 Brazilian Trust was actually executed. It starts with inquiries being made in 1991 by Mr Richard Wigley of the Swiss law firm of Lenz & Staehlin for an Anstalt *"which would have been active from the mid 1970s"*. Correspondence with Mr Heinrichs' then legal adviser, Mr V M Seabrook, shows that they were looking for a Liechtenstein entity to hold shares in two companies referred to as "Quetzel" and "Willowtree". They were informed that the market for such Anstalts had *"dried up"* and so consideration was given to the use of a trust. A *"Note to client: 0085"* of 1 st July, 1993, initialled by Mr Richard Wigley said this:–

> *"At the moment there is no Trust in existence to provide ultimate ownership of the various Companies.* Although we discussed the possibility of putting a S.V.I. Trust together, and the formalities relating to an acceptable Trust Deed have yet to be agreed with the Lawyers, I think it might be prudent for us to at least do an in-house Trust on the usual format to cover the present position as it will be inexpensive (disbursements £500) and we can always amend things later.
>
> *Perhaps we could discuss this."*

16 That was followed by a *"Note for File Client: 0085"* of 28 th March, 1994, again initialled by Mr Richard Wigley:–

> *"Reviewed the trust aspect with the client who believes it advisable to reinstate the Brazilian Trust.* We agreed that revised Letters of Wishes would be needed and I agreed to provide him with copies of the existing Letters when we next meet.
>
> *Diarise to review the matter further with him and ensure that a satisfactory arrangement is put in place."*

17 A diary note of 10 th April, 1994, has this entry:–

> *"DIARY*
>
> *Review with WCH the need for a new Trust or reinstate the Brazilian bearing in mind that Curitiba went and Connaught was formed.* My view is that there should be a new Trust so as to have a clean sheet to start from without any traceable entries."

18 That diary note is annotated in handwriting belonging, we believe, to Mr Richard Wigley with the words *"reviewed with Client"* and *"consider putting Brazilian Trust back in place"*.

19 That diary note was followed by this note of 27 th October, 1994:–

> *"NOTE*
>
> *All of the attached documentation was provided to the client during meetings in Toronto and he notes our view that, rather than fix the amounts due to Charities, they should perhaps be paid out of income in order that emergency funds are available for family members in the future.* He will come back to us regarding the letter of wishes and it was agreed that a new Trust would be put in place. We need to ascertain whether we will utilise the same name or everything will start afresh."

20 Finally, there is an agenda for a meeting with "C.0085" with one of the matters being *"Outstanding matters re the Brazilian Trust and letters of wishes."* The *"Note for File"* of the meeting held on 2 nd August, 1995, with *"the client"* has this entry *"Client requested that we create a new Brazilian Trust through La Hougue Boëte in 1984."*

21 The trust business operated by Mr Richard Wigley used client numbers and 0085 was the client code for the Brazilian Trust used by La Hougue Boëte, which code changed in 1997 to F.0052 when Faldouet was (apparently) appointed trustee of the 1984 Brazilian Trust. In the context in which the word *"client"* is used in this documentation it is referring to a person and it would seem clear, assuming the documentation is genuine, that it is a reference to Mr Heinrichs whose initials are WCH.

22 Mr Heinrichs denies having any discussions with Mr Richard Wigley over the setting up of a new Brazilian Trust or indeed knowing anything about it. He says the first he heard of it was in 2015, when he made inquiries of the Dutch administrators of Galty BV, who gave him a copy of the trust deed, pointing out that he was not a beneficiary. A copy of the 1984 Brazilian Trust was not amongst the papers recovered from St John's Manor.

23 Advocate Baker, for Mr Heinrichs, relied on this documentation to show that the 1984

Brazilian Trust was a sham, in that it purports to be a trust created in 1984, when it was actually created in 1995, presumably in an attempt to show corporate assets being under the ownership of a trust of which Mr Heinrichs and his family were not beneficiaries. He pointed out that if the 1984 Brazilian Trust had been executed in 1984, that is inconsistent with Mr Heinrichs' writing a letter of wishes on 27 th June, 1986, expressly in respect of the 1977 Brazilian Trust at a time when, according to Mr Richard Wigley, it had been superseded by the 1984 Brazilian Trust.

24 Mr Richard Wigley also asserts that the 1984 Brazilian Trust is a sham, but for different reasons, although his position on this has not been consistent—see paragraph 49 of the judgment of the 16 th June, 2016, *Heinrichs v Pantrust and Others* In his affidavit of 22 nd December, 2015, he states at paragraph 11 that in 1984, when Mr Heinrichs moved his business away from Barclaytrust to La Hougue Boëte, he said it was his intention to create a new trust which would replace the 1977 Trust entirely, and this because he no longer wished his family to be expressly named in the trust instrument. Quoting from paragraphs 12 to 14:–

> *"12. …….Although the 1984 Declaration purports, on its face, to have been established for the benefit of two charities, namely Cancer Research Campaign and the British Heart Foundation, in reality it was never intended to be anything other than a bare Trust for the benefit of Mr Heinrichs. To the extent that assets were subsequently transferred to La Hougue Boëte purportedly in its capacity as Trustee of the Brazilian Trust, the reality was that La Hougue Boëte merely held those assets as nominee for Mr Heinrichs. To the best of my knowledge, as soon as the Brazilian Trust was established the instrument creating the 1977 Trust was put away and never referred to again*.
>
> *13. Over the years that I have known him Mr Heinrichs has gone to great lengths to shield his assets from creditors. Insofar as concerned the assets held in the Brazilian Trust, he personally controlled the affairs and assets of that Trust at all times*.
>
> *14. The Brazilian Trust has therefore been a sham from the date it was established. At no time did either the Trustee, or Mr Heinrichs, pay any regard to the provisions of the instrument by which the Brazilian Trust was purportedly created. It was understood by everyone concerned that the assets in it belonged to Mr Heinrichs absolutely. Accordingly, his instructions concerning those assets were always followed to the letter."*

25 Much of the hearing was taken up by Advocate Baker examining the conduct of Mr Richard Wigley, and indeed an affidavit was filed by Ms Clara Hamon of Baker & Partners, setting out in detail the evidence from which she drew the conclusion that the evidential test for the offence of perjury on his part had been *"easily passed"* and that the facts demonstrate *"that the offence of perverting the course of justice has taken place."*

26 We are conscious that these are allegations of criminal conduct on his part, and it would not be appropriate, in his absence, for the Court to reach any conclusion in this respect, and we are not invited to do so. However, there is evidence to suggest that the Court should consider the affidavit evidence of Mr Richard Wigley with considerable caution:–

Mr Heinrichs denies any involvement in or knowledge of the manufacture of such documentation.

(i) In proceedings in Colorado, brought by the first to third respondents against Mr Dick and his family for the repayment of some US$29M allegedly due in respect of loans, Mr Richard Wigley admitted formally that the loan documentation (covering facility letters, promissory notes and minutes from 1994–2010) which had been relied on and filed in evidence were, in fact, manufactured in 2013,

(ii) That same manufactured documentation had been filed by Mr Richard Wigley and relied on in the Jersey proceedings of *Stock v Pantrust International and Others* [2016] JRC 053 (see paragraphs 27 and 28 of the judgment of 4th March)

(iii) Mr Richard Wigley has admitted making untrue statements in these proceedings. Quoting from his third affidavit of 17th March 2016, he said this:–

> *"5. The reason I am filing this third affidavit is because it is necessary for me to correct one of the statements made in my affidavit of 22 December 2015. At paragraph 26 of the affidavit, I stated that the Heinrichs Loans were made by the company Oxford Financial Services Limited in its capacity as agent for the Trustee of certain third party Trusts in which Mr Heinrichs had no interest. That statement was untrue. The actual lenders of the various loans which comprise the Heinrichs Loans were the companies La Hougue Boëte Société Avec Responsabilité Limitée and Pantrust respectively. In each case they made loans with monies obtained from third parties.*
>
> *6. I also wish to make clear that in seeking to recover the Heinrichs Loans, the lender companies will not be relying on the loan documentation exhibited to Mr Heinrichs' affidavit at AMH1/4 ("the Documentation"). The reason for this is that, although all of the loans referred to in the Documentation were genuinely made (and, if necessary, this will be proved in proceedings before the Courts of Ontario) the Documentation itself is a fiction, and was executed with the knowledge and approval of Mr Heinrichs for the sole purpose of disguising the true identity of both the lender and the borrower.*
>
> *7. I very much regret that my December Affidavit contained a misleading statement and I apologise unreservedly for this."*

27 Mr Heinrichs and Ms Heinrichs allege serious malpractice on the part of Mr Richard

Wigley, going back many years, by which they say millions have been extracted from the 1977 Brazilian Trust through such devices as secret interest turns, false loans and other illicit transfers disguised in what they describe as a complex and sophisticated operation. That malpractice allegedly extends to the illicit use of Mr Heinrichs' personal KYC documentation for entities around the world with which he has no connection, and the use of an asset of the 1977 Brazilian Trust to enable another client of La Hougue Boëte to evade UK tax. Exhibited to Mr Heinrichs' affidavit is a letter to an unconnected family dated 6 th July, 2000, enclosing papers that should not " *fall into the wrong hands"*. These papers summarise some eleven methods by which La Hougue Boëte was apparently willing to assist in tax evasion.

28 Ms Heinrichs calculates that some CAD$4.8M has been illicitly extracted by the first to third respondents from the 1977 Brazilian Trust by way of interest turns between 1994 and 2014. The full extent of the claims for breach of trust against the first to third respondents is in the region of CAD$50M.

29 The first to third respondents have chosen not to participate in these proceedings, and are not here, therefore, to respond to these allegations by Mr Heinrichs and Ms Heinrichs, but these allegations are independently supported to this extent by the report of the Superintendent of Banking in the Republic of Panama, who says this at paragraph 2 of his report of 4 th December, 2014:–

> *"2. PANTRUST INTERNATIONAL, S.A., in an apparent scheme of opacity and lack of transparency, created the following corporation: QUARTZ INTERNATIONAL FINANCE LIMITED and OXFORD FINANCIAL SERVICES LIMITED as intermediaries of the "loans" in order to hide, on the one hand, the identity of lender customer, and on the other hand, the identity of the borrower client, i.e. the beneficiaries. In addition, as mentioned above, they receive a percentage of the interest collected."*

30 Although not part of the relief being sought by Mr Heinrichs and Ms Heinrichs, to which we will come shortly, Advocate Baker invited us to regard the 1984 Brazilian Trust as a sham, not on the basis put forward by Mr Richard Wigley, but on the basis that firstly it had been back-dated, and secondly, that Mr Heinrichs knew nothing about it.

31 That request places the Court in some difficulty. We accept that the documentation set out above supports the notion that the 1984 Brazilian Trust was in fact executed in 1995, some eleven years later, but that same documentation implicates Mr Heinrichs in its backdating. Accordingly, it is difficult for the Court to conclude from that documentation both that the 1984 Brazilian Trust was backdated and that Mr Heinrichs knew nothing about it.

32 Mr Richard Wigley is a person who, by his own admission, is capable of *"manufacturing"* documents and using them in court proceedings, but it would seem unlikely that he would manufacture this correspondence and numerous file notes (found as we understand it

amongst the documents at St John's Manor) in order to undermine his own contention that the 1984 Brazilian trust was indeed executed in 1984. The documentation includes correspondence to and from a well-known firm of Swiss lawyers and contains numerous file notes annotated in hand writing; it has the look of authenticity to the Court. We discuss this further below.

**Declarations and directions sought**

33 The summons issued by Mr Heinrichs and Ms Heinrichs is in the following terms:–

(i) "(1) That declarations shall be made in relation to the following issues:–

*(a) The terms of the trust or trusts on which the property was formerly held by the First to Third Respondents as trustees and, in particular, whether the trust assets were held by First to Third Respondents on the terms of the settlement dated 9 December 1977 rather than 12 November 1984 Declaration:*

*(b) That the Brazilian Trust [the 1977 Brazilian Trust] was or is not a sham;"*

34 The first part of the relief, which reflects part of the relief sought in the amended representation, was not pursued at the hearing. Instead Advocate Baker sought the following declaration, namely that the 1977 Brazilian Trust is a valid Jersey discretionary trust. He further sought a direction that GB Trustees should administer the 1977 Brazilian Trust on the basis of the 1977 trust deed and to ignore the 1984 Brazilian Trust. That relief was supported by Advocate Preston for GB Trustees.

35 The need for a declaration of validity in relation to the 1977 Brazilian Trust is not entirely clear to the Court. No one, as far as we can see, has alleged that it is a sham. The evidence of Mr Heinrichs was that Mr Richard Wigley had little to do with its creation in 1977 when he was a relatively junior employee of Barclaytrust; Mr Heinrichs' dealings were with Mr Scholefield. In his affidavit of 22 nd December, 2015, Mr Richard Wigley said this in relation to the 1977 Brazilian Trust:–

*"9. I am aware that, whilst Mr Heinrichs' financial affairs were still being managed by Barclaytrust, he settled a trust known as the "Brazilian Trust". For reasons which shall shortly become clear, in the remainder of this Affidavit I shall refer to this Trust as the "1977 Trust".*

*10. The party expressed to be the settlor of the 1977 Trust was an individual by the name of Alan Norman Kimble ("Mr Kimble"). In reality, the true economic settlor was Mr Heinrichs. The original Trustee of the 1977 Trust was Barclaytrust International Limited. The beneficiaries identified in the Third Schedule to the Trust instrument were Mr Heinrichs, his wife*

*Elfrieda and Miss Heinrichs. The initial Trust Fund comprised US$100. I have no knowledge of whether any additional assets were subsequently settled into the 1977 Trust or, if they were, what became of them."*

There is no suggestion here that the 1977 Brazilian Trust is a sham.

36 Whilst acknowledging that there was no allegation of sham in relation to the 1977 Brazilian Trust, Advocate Baker drew two matters to our attention:–

(i) In their letter of 21 st March, 2016, Sinels, acting for the first to third respondents, contended that they had never been appointed trustees of the 1977 Brazilian Trust, but there was no suggestion in that letter that it was a sham.

(ii) In his affidavit of 19 th December, 2017, sworn in connection with the proceedings in Ontario, which we come to below, Mr Richard Wigley said this at paragraph 11:–

*"It is my belief based upon my dealings with Werner Cornelius Heinrichs (" Vern") over some 35 years that the Brazilian Trust has never filed a Canadian Income Tax return even though all decisions relating to that bare Trust were made by Vern for his benefit solely ……."* (our emphasis)

It is not clear which Brazilian Trust he was referring to, but his reference to 35 years would take us back to 1982, and we do not think this can be interpreted as an allegation by Mr Richard Wigley that the 1977 Brazilian Trust, created some 40 years ago and in which creation he had little involvement, was a sham.

37 Advocate Baker submitted that a declaration as to the validity of the 1977 Brazilian Trust was necessary in any event, because Mr Richard Wigley, who he described as inherently unreliable, might at some stage in the future change his position and allege that the 1977 Brazilian Trust was also a sham.

**The law**

**Sham Trusts**

38 Where there is a document establishing a trust, the presumption is that the document means what it expresses itself to be on its face and the court should not lightly find a trust to be sham. See *National Westminster Bank plc v Jones* [2001] BCLC 98 per Neuberger J at 59:–

***"…. There is a very strong presumption indeed that parties intend to be bound by the provisions of agreements into which they enter, and, even more, intend the agreements they enter to take effect" and "there is a very strong and natural presumption against holding a provision or a document a sham."***

39 The leading statement of Jersey law on what is necessary to prove a trust to be a sham is *Mackinnon v Regent Trust Company Limited & Ors* [2005] JLR 198 at 14:–

> *"**In** Re Esteem Settlement* [2003] JLR 188 , ***at paras. 42–60, the Deputy Bailiff had occasion to consider what were the necessary ingredients for a claim that trust deeds were shams.*** He held that it must be shown that both settlor and trustee had a common intention that the true position should be otherwise than as set out in the trust deed which they both executed. I agree. The Deputy Bailiff went on, in that passage, to consider whether an intention of both settlor and trustee to mislead third parties or the court, by giving the appearance of creating between the parties legal rights and obligations different from the actual rights and obligations (if any) which the parties intend to create, is a necessary ingredient for such a claim. He held that this is a necessary ingredient. Again, I agree. He so held in reliance on the relevant English authorities, as did the Bailiff on this case; and in my judgment, this branch of the law, having been most fully developed in England and Wales (and also in Australia) it is entirely appropriate that Jersey law should take full account of English law in this regard."

40 In the English decision of *Shalson v Russo* [2003] EWHC 1637 per Rimer J at 189 with which the Royal Court in Mackinnon agreed, it was said:–

> ***"When a settlor creates a settlement he purports to divest himself of assets in favour of the trustee, and the trustee accepts them on the basis of the trusts of the settlement.*** The settlor may have an unspoken intention that the assets are in fact to be treated as his own and that the trustee will accede to his every request on demand. But unless that intention is from the outset shared by the trustee (or later becomes so shared), I fail to see how the settlement can be regarded as a sham. Once the assets are vested in the trustee, they will be held on the declared trusts, and he is entitled to regard them as so held and to ignore any demands from the settlor as to how to deal with them. I cannot understand on what basis a third party could claim, merely by reference to the unilateral intentions of the settlor, that the settlement was a sham and that the assets in fact remained the settlor's property. One might as well say that an apparently outright gift made by a donor can subsequently be held to be a sham on the basis of some unspoken intention by the donor not to part with the property in it. But if the donee accepted the gift on the footing that it was a genuine gift, the donor's undeclared intentions cannot turn an ostensibly valid disposition of his property into no disposition at all. To set that sort of case up the donee must also be shown to be a party to the alleged sham. In my judgment, in the case of a settlement executed by a settlor and a trustee, it is insufficient in considering whether or not it is a sham to look merely at the intentions of the settlor. It is essential also to look at those of the trustee."

41 The relevant subjective intentions in the case of the 1977 Brazilian Trust are those of:–

(i) Alan Norman Kimble in relation to the US100 he settled; and

(ii) Those of Mr Heinrichs as the economic settlor on each occasion that he transferred assets to Barclaytrust or to its successor Le Hougue Boëte, to be held on the terms of the 1977 Brazilian Trust. In this case, we have no evidence as to when assets were settled.

42 A valid trust does not become a sham because the trustee subsequently departs from the terms of the trust and administer it in a particular way. In the English decision of *A v A* [2007] EWHC 99 (Fam) per Munby J at 42–43:–

> ***"it seems to me that as a matter of principle a trust which is not initially a sham cannot subsequently become a sham.*** The reason is that elaborated by Rimer J in the passage in *Shalson and others v Russo and others (Mimran and another, Part 20 claimants)* [2003] EWHC 1637 (Ch) , [2005] Ch 281***at para [190] which I have just set out.*** Once a trust has been properly constituted, typically by the vesting of the trust property in the trustee(s) and by the execution of the deed setting out the trusts upon which the trust property is to be held by the trustee(s), the property cannot lose its character as trust property save in accordance with the terms of the trust itself, for example, by being paid to or applied for the benefit of a beneficiary in accordance with the terms of the trust deed. Any other application of the trust property is simply and necessarily a breach of trust: nothing less and nothing more.
>
> ***A trustee who has bona fide accepted office as such cannot divest himself of his fiduciary obligations by his own improper acts.*** If therefore, a trustee who has entered into his responsibilities, and without having any intention of being party to a sham, subsequently purports, perhaps in agreement with the settlor, to treat the trust as a sham, the effect is not to create a sham where previously there was a valid trust. The only effect, even if the agreement is actually carried into execution, is to expose the trustee to a claim for breach of trust and, if may well be, to expose the settlor to a claim for knowing assistance in that breach of trust. Nor can it make any difference, where the trust has already been properly constituted, that a trustee may have entered into office — may indeed have been appointed a trustee in place of an honest trustee — for the very purpose and with the intention of treating the trust for the future as a sham. If, having been appointed trustee, he has the trust property under his control, he cannot be heard to dispute either the fact that it is trust property or the existence of his own fiduciary duty."

**Declarations**

43 The Court has eschewed the structured and technical approach to the granting of declaratory relief under English law. Quoting from the judgment of Sir Michael Birt, then

Deputy Bailiff, in the case of *In re Curatorship of X* [2002] JLR 259 at paragraph 18:–

> ***"We think that the broad and flexible approach summarized above [referring to the Scottish approach] is preferable to the more structured and technical approach which appears to hold sway in England, which is based partly upon historical considerations which have no application in Jersey.*** The principles of Scottish law described above offer a sensible and convenient approach to the question of when the court should agree to give declaratory relief and we hold that they represent the correct approach under Jersey law. … In our judgment, the court should not become embroiled in a technical consideration of whether a matter can be categorized as a future or hypothetical right. The court should adopt a broader approach and consider whether there is a live practical question with practical consequences when deciding whether to exercise its discretion to grant declaratory relief."

44 As the Court said in *Rahman Showlag v Mansour* [1994] JLR 269 at 275, the jurisdiction to grant a declaratory judgment should be exercised with caution, but without hesitation where necessary to do justice between the parties.

45 In *Eckman v Sidem International Limited & Michault* [2010] JLR 299 the Court held that in general a declaration would not be granted in advance of a trial if based on admissions or in default of defence, particularly if the declaration sought was that the defendant had acted fraudulently, but the Court would consider granting a declaration if the applicant could not obtain the fullest justice to which he was entitled without it. It is no bar to the giving of declaratory relief that the respondents had not entered an appearance, and that the Court only has affidavit evidence before it, although in that case, declaratory relief was denied because the affidavit evidence did not come up to the high standard necessary for declarations that extended to allegations of fraud.

46 Mr Heinrichs and Ms Heinrichs are seeking declaratory relief from this Court for use in the Ontario proceedings, and as Sir Michael Birt has said in the case of In re Curatorship of X, we need to consider the practical consequences of the declaration that we have been asked to make. We need to understand how such a declaration might be used in the Ontario proceedings, and how it might affect the rights of other parties to those proceedings.

**Ontario proceedings**

47 On 12 th January, 2017, the Court declined an application by GB Trustees to order an account on the basis of wilful default to be taken by the Master in relation to the Brazilian Trusts for the reasons set out in the judgment of that date *Heinrichs v Pantrust and Ors* [2017] JRC 006, one of the principal reasons being that the first to third respondents, who are best able to provide that account, were outside the jurisdiction of the Court and had given notice that they would ignore any orders made by the Master.

48 Shortly afterwards on 19 th January, 2017, GB Trustees, Mr Heinrichs, his wife and Ms Heinrichs commenced proceedings in Ontario against the first to third respondents and other connected persons and entities:–

(i) To enforce the orders made by this Court on 16 th June, 2016, in particular for the transfer of the assets of the Brazilian Trusts to GB Trustees, and on the 30 th September, 2016, in relation to costs.

(ii) For an account of their administration of "the Brazilian Trust".

(iii) For an order requiring them to deliver up all records of "the Brazilian Trust".

(iv) For damages for breach of fiduciary duty, breach of trust, fraudulent breach of trust, fraudulent misrepresentation, negligence, negligent misrepresentation and other intentional and unintentional torts in the amount of CAD$50M.

(v) For further and/or alternative relief.

49 The statement of claim in the Ontario proceedings appears to treat the 1977 Brazilian Trust and the 1984 Brazilian Trust as one trust, which is consistent with the way the representation before this Court is framed, paragraph 15 of the representation being in these terms:–

*"It is averred that the 1984 declaration and the 1977 settlement are and have always been treated by the Trustee and beneficiaries (and it is averred now fall to be treated by the court) as the same Trust; the Brazilian Trust."*

The position of the representors has now changed, in that they maintain that the 1984 Brazilian Trust is a sham, to be ignored by GB Trustees.

50 The first to third respondents are challenging the jurisdiction of the courts of Ontario in respect of the proceedings brought by GB Trustees and the Heinrichs family, on the grounds *inter alia* that they are not domiciled in Canada, do not carry on business in Canada, have no assets in Canada, the alleged unlawful acts did not occur in Canada, "the Brazilian Trust" is not a trust located in Canada, nor does it have assets there, the majority of the documentary evidence is either in Jersey or Panama, but not in Canada, and the Jersey court had implicitly judged, they say, that the accounting in regard to "the Brazilian Trust" should take place in Panama. No date has been fixed for the hearing of this application.

51 This Court, in its judgment of 12 th January, 2017, *Heinrichs v Pantrust and Ors* [2017] JRC 006 had questioned why advice had not been taken by the representors on whether an account could be sought from the first to third respondents in Panama, where they are based and to the jurisdiction of whose courts they are subject, but they have chosen Ontario and the Court acknowledges that:–

(i) the known assets of the Brazilian Trusts are in Ontario, namely the sale proceeds of a property, the benefit of a judgment against Mr Heinrichs, life insurance policies on the lives of Mr and Mrs Heinrichs and shares in an Ontario corporation.

(ii) Mr Heinrichs and his family live in Ontario.

(iii) Advocate Langlois, for the first to third respondents, had argued before this Court that the courts of Ontario, not Panama, were the most appropriate forum for all of the relief sought in the representation (see paragraph 42 of the judgment of 16th June *Heinrichs v Pantrust and Others* [2016] JRC 106A.

(iv) There are serious concerns over the practicality of trust proceedings in Panama. Mr Heinrichs puts it this way in his affidavit at paragraph 135:–

> *"In the later Jersey judgment of January 2017 there is some implicit criticism at paragraph 7 that neither we nor the trustee have pursued our rights against Richard in Panama or Ontario.* I do not think that criticism is particularly fair. My family and I have and continue to be put through a hellish ordeal to defend ourselves from Richard's chicanery who is a law unto himself. I (and the Jersey court) was advised first by Hatstones Panama and subsequently by the Panamanian lawyer David Mizrachi that it is near impossible to obtain even basic relief before the Panamanian courts in anything approaching a reasonable time. As it turns out from evidence Richard has filed in the Ontario proceedings that he never had control of the assets he claimed to have to both us and the Jersey court. Chasing Richard down in Panama would have been pointless and I have no desire to spend my later years battling through interminable legal proceedings in Central America."

(v) There are already four other sets of proceedings on foot in Ontario involving the same parties, including claims by the first respondent and others against Mr Heinrichs and others for the repayment of alleged loans in the sum of CAD$16m.

**Decision**

**Declaration**

52 It is unusual, in our view, for a court to be asked to declare that a trust is valid because of the strong presumption that a trust is properly constituted and that the parties to it intended to be bound by its provisions, as per Neuberger J in *National Westminster Bank plc v Jones* at paragraph 59 quoted above. That presumption of validity remains in place until a court of competent jurisdiction determines otherwise.

53 It is also a more complex issue than it might appear in that the intention of the settlor and the trustee have to be examined on every occasion that a settlor settles assets. From the limited documentary evidence we have seen and from the evidence of Mr Heinrichs, the

1977 Brazilian Trust has been extremely active. We were shown a copy of a handwritten ledger for the stockbroking account of Curitiba Holdings Limited for the year 1985 (Curitiba was listed in the Barclaytrust ledger as an asset of the 1977 Brazilian Trust in 1980), which show regular and substantial cash movements.

54 A declaration now that the 1977 Brazilian Trust *"is valid"* would therefore purport to extend to and cast a mantle of legitimacy over numerous transactions into and out of the trust of which the Court has no knowledge.

55 Mr Heinrichs and Ms Heinrichs seek such a declaration for use in the proceedings brought by them, together with GB Trustees, in Ontario, but from an examination of the statement of claim, the application challenging the jurisdiction of the courts of Ontario and the evidence filed by Mr Richard Wigley in support, the validity of the 1977 Brazilian Trust is not a live issue there, and so it is not at all clear to the Court what purpose a declaration as to its validity would serve or what the practical consequences would be. Because it is not a live issue, it cannot be argued that without such a declaration the representors will not obtain the fullest justice before the courts of Ontario.

56 The jurisdiction of the Court to make declaratory judgments has to be exercised with caution, particularly as, in this case, the Court is on notice that it is required for the purpose of foreign proceedings, and the Court is not prepared to exercise that jurisdiction in circumstances where:–

(i) the validity of the 1977 Brazilian Trust is not a live issue in those foreign proceedings;

(ii) the Court is not clear as to the practical consequences of making the declaration sought in those foreign proceedings in advance of trial there; and

(iii) because its validity is not a live issue in those foreign proceedings, it cannot be said that the representors will not obtain the fullest justice from the courts of Ontario without it.

**Directions**

57 Whilst GB Trustees supports the application by Mr Heinrichs and Ms Heinrichs for a declaration, we note that it has not itself sought that relief or the assistance of the Court in its supervisory jurisdiction over a Jersey trust. However, the second part of the relief sought by Mr Heinrichs and Ms Heinrichs constitutes a direction to GB Trustees as to the administration of the Brazilian Trusts and that does bring into play the Court's supervisory jurisdiction.

58 We think we can assist GB Trustees in relation to the administration of the 1977 Brazilian Trust in this respect. As per Neuberger J in *National Westminster Bank plc v Jones*, the

presumption is that a trust is properly constituted and that the parties to it intended to be bound by its provisions. In the case of the 1977 Brazilian Trust, the presumption is that it was properly constituted on 9 th December, 1977, between the named settlor Alan Kimble and Barclaytrust and that assets were subsequently properly vested in it. We have seen no evidence to rebut that presumption. Once properly constituted and vested with property, the trust cannot subsequently become a sham (as per Munby J in *A v A* at paragraphs 42 and 43).

59 Whether the 1977 Brazilian Trust exists today as a trust depends upon whether there are currently trust assets comprised within the trust fund and that is an evidential issue on which we cannot comment. However, at the very least, it would seem that the trust fund comprises causes of action against those who have administered it in the past.

60 The 1977 Brazilian Trust should therefore be administered by GB Trustees on the basis that it was properly constituted in 1977 and, to the extent that it has trust assets, is presumed to be valid today.

61 The position in relation to the 1984 Brazilian Trust is more difficult. It is regarded by Mr Richard Wigley, who caused it to be declared by La Hougue Boëte, as a sham, because that was, he said, his intention and that of Mr Heinrichs in 1984 when he says it was created. Mr Heinrichs denies any such intention or indeed any knowledge of the 1984 Brazilian Trust until he came across it in 2015, and it would follow that he would not knowingly have settled assets upon it. He regards it as a sham, because he says it was executed in 1995 and back-dated to 1984. Advocate Sharp described it as a forgery, which inevitably involves dishonesty in its creation. The Court is not asked to make a finding as to its validity, but it would be difficult on the evidence provided to us to declare it a sham on the basis that it was back dated, without finding that Mr Heinrichs was involved in that back dating.

62 However, we question whether it is wise for GB Trustees to be directed to ignore the 1984 Brazilian Trust completely. There is a dearth of evidence as to what assets, if any, were purported to be vested in it, or indeed about its administration generally. The communication from Mr Richard Wigley to Mr Seabrook of 6 th March, 1991, indicated that it was to hold two companies at least, namely Quetzel and Willowtree, but we have no evidence as to whether the shares in these companies were ever purportedly added.

63 If assets were purported to be added to the 1984 Brazilian Trust, then there seems to us to be two possibilities:–

(i) If the 1984 Brazilian Trust is valid, as it is still presumed to be, then those assets constitute assets of that trust, of which GB Trustees is now the successor trustee.

(ii) If the 1984 Brazilian Trust is found to be a sham, then whoever holds those assets

holds them as bare trustee for whoever purported to settle them.

64 The fact is that GB Trustees has been appointed trustee of the 1984 Brazilian Trust by the Court on the basis that it is a validly constituted trust and will remain so until determined otherwise-see paragraph 50 of the judgment *Heinrichs v Pantrust and Others* [2016] JRC 106A, of the 16th June 2016. The Court has not been asked to determine otherwise and until it does so, GB Trustees has duties as trustee which in the circumstances the Court acknowledges are difficult to perform and which bring with them potential liabilities. We would be minded to give directions to GB Trustees therefore that would limit those duties, so as to protect GB Trustees to the extent that it is proper and just to do so — for example a direction to take no steps as trustee of the 1984 Brazilian Trust unless and until directed by the Court to do so. We therefore invite GB Trustees to draft directions to that effect for our consideration when this judgment is handed down.

**Conclusion**

65 In conclusion the Court declines to give the declaration sought, but in the exercise of its supervisory jurisdiction over Jersey trusts it is prepared to give directions to GB Trustees limiting its duties as trustee of the 1984 Brazilian Trust.