



Neutral Citation Number: [2021] CA (Bda) 20 Civ

Case No: Civ/2020/8

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
THE HON. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2018: No. 376**

Sessions House
Hamilton, Bermuda HM 12

Date: 22/12/2021

Before:

**THE ACTING PRESIDENT, JUSTICE OF APPEAL ANTHONY SMELLIE
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER
and
JUSTICE OF APPEAL CHARLES-ETTA SIMMONS**

Between:

ST JOHN'S TRUST COMPANY (PVT) LIMITED

Applicant

- v -

**(1) MEDLANDS (PTC) LIMITED
(2) THE ATTORNEY GENERAL
(3) ROBERT THERON BROCKMAN
(4) BERMUDA TRUST COMPANY LIMITED
(5) HSBC PRIVATE BANK (C.I.) LIMITED
(6) MARTIN LANG
(7) GROSVENOR TRUST COMPANY LIMITED
(8) EVATT ANTHONY TAMINE
(9) DOROTHY BROCKMAN**

Respondents

Edward Cumming QC, instructed by Mark Deil and Katie Tornari of Marshall Deil & Myers for the Appellant

Robert Ham QC instructed by David Kessaram of CHW Ltd for the First Respondent.

Shakira Dill-Francois, Deputy Solicitor General and Lauren Sadler-Best, Crown Counsel for the Second Respondent.

Keith Robinson of Conyers Olsen (Bermuda) Limited for the Fourth and Seventh Respondents

Steven James White and Sam Riihiluoma of Appleby (Bermuda) Limited for the Fifth Respondent

John Machell QC, instructed by Lewis Preston of Kennedy Chudleigh for the Sixth Respondent.

David Brownbill QC, instructed by Paul Harshaw of Canterbury Law Limited, for the Intervening Respondent.

Francis Treager QC, instructed by Sarah-Jane Hurrion of Hurrion and Associates Ltd, for the Ninth Respondent.

Hearing dates: 25th, 26th and 27th January 2021

APPROVED JUDGMENT

SMELLIE JA:

1. The Appellant, St John's Trust Company (PVT) Limited ("**SJTC**"), acting at the directions or behest of the Intervening Respondent Mr Evatt Tamine ("**Mr Tamine**"), appealed against orders of the Supreme Court (per Subair Williams J), made in trust administration proceedings in Cause 2018: No. 376 instituted by the Appellant itself, then acting by Mr James Gilbert ("**Mr Gilbert**") as its sole director ("**the Administration Proceedings**"). The orders under appeal were made on 1 November 2019 and 19 December 2019 (respectively the "**November**" and "**December**" **Orders** or together "**the Orders**").
2. Among other things, by the Orders the learned judge ordered that SJTC be replaced as trustee of a very valuable trust known as the A. Eugene Brockman Charitable Trust, ("**the Brockman Trust**") by Medlands (PTC) Limited, the 1st Respondent ("**Medlands**").
3. Upon SJTC's appeal coming on for hearing, the Court, having read the Record of Appeal and the written submissions of all parties, invited the parties to address at the outset an issue which had been articulated in an email sent on behalf of the Court on 22 January 2021, in the following terms:

"The Court is concerned to be clear about what it is that the Appellant really seeks to achieve by the appeal, given that even if it succeeds in setting aside the November and December Orders, it has been resolved by the human beneficiaries of the Trust [charity also being a beneficiary] that another trustee shall be appointed in any event. Accordingly, at the start of the hearing, the Court intends to consider whether (the Court) should not simply proceed to make an order of the kind proposed by Mrs Brockman (the 9th Respondent) in the New Proceedings [(those filed by her on 3 December 2020 in Cause 2020:No. 476)] in keeping with section 8 of the Court of Appeal Act and as proposed in the 6th Respondent's (Mr Lang's, the Trust Protector's) Notice and Submissions".

4. The order proposed both by the 6th Respondent, Mr Lang (the Protector of the Brockman Trust) and Mrs Brockman, is one appointing a new professional trustee, to be regarded objectively as independent and experienced, to take over the trusteeship of the Brockman Trust. In Cause 2020:No. 476 in the Supreme Court ("**the New Proceedings**"), Mrs Brockman had also applied for such an order and to be herself appointed to represent the interests of the human beneficiaries of the Brockman Trust.
5. Arguments were heard over the course of three days on the 25, 26 and 27 January 2021 and, on 2 February 2021, judgment was delivered in the following terms:

"It is HEREBY ORDERED that:

1. *The appeal against the Orders of Subair Williams J dated 1 November 2019 and 19 December 2019 be dismissed, with reasons to follow.*
2. *Medlands (PTC) Limited shall be discharged as trustee of the Trust and replaced as trustee by BCT Limited, Incorporation Number 368764, whose registered*

office address is PO Box 309, Uglan House, Grand Cayman, KY1-1104, Cayman Islands with effect from a date and on such terms as to BCT Limited's appointment and Medlands (PTC) Limited's discharge as may be directed by Subair Williams J, upon hearing from such of the 1st, 2nd, 3rd, 6th and 9th Respondents and BCT Limited as wish to appear (but with no other party to this appeal having standing to appear or present evidence or submissions in relation to the matter) at a hearing in the proceedings pending before the Supreme Court of Bermuda in Civil Jurisdiction Case No 2020: 476 to be fixed at a time as soon as practicable which is convenient to Subair Williams J.

3. *The Court will hear the parties as to costs of the appeal by way of written submissions, not exceeding 15 pages, to be submitted within 14 days of the delivery of reasons for judgment.*

4. *...*

6. These are the reasons for our previous order.

Background to the appeal

7. This appeal arises against a background of litigation in a number of jurisdictions, including Bermuda, the United States and England. In Supreme Court Cause 2019: No. 447 the action is between, on the one hand SJTC, Mr Tamine, Mr Glenn Ferguson ("**Mr Ferguson**") and Mr James Watlington ("**Mr Watlington**") and, on the other hand, Medlands and Mr Gilbert. ("**the Corporate Proceedings**").

8. In the Corporate Proceedings, there is a dispute over control of SJTC and its role in relation to the Brockman Trust and ultimately over control of the Brockman Trust itself. However, it is a dispute which is relevant to this appeal, only insofar as it goes to the authority of Mr Gilbert to have acted on behalf of SJTC, by instituting the Administration Proceedings before Subair Williams J. which led to the making of the November and December Orders. As mentioned above, the Orders resulted, among other things, in the removal of SJTC and its replacement by Medlands as trustee of the Brockman Trust.

9. SJTC's complaints which inform its grounds of appeal in this action are, to the effect, that Mr Gilbert had no authority to act on its behalf in the Administration Proceedings; that consequently it was not properly a party to those proceedings; that the Orders were therefore made in breach of its constitutional rights to a fair hearing; and were therefore made in breach of natural justice and should be set aside. In this regard, SJTC lays great store by the fact that Mr Gilbert was ultimately later found by the learned Chief Justice in his judgment of the 26 March 2020 in the Corporate Proceedings, to have lacked authority to commence the Corporate Proceedings on 1 November 2019 on behalf of SJTC and to represent SJTC, not only in those proceedings but in the Administration Proceedings as well (see [87] of his

Judgment)¹. It is therefore submitted that, by implication, Mr Gilbert also lacked authority acting alone as he did, to represent SJTC at any time after 25 October 2019 (when Messrs Watlington and Ferguson were appointed as directors of SJTC) in the Administration Proceedings.

10. This all developed in a context where SJTC itself, purportedly acting by Mr Gilbert, had instituted the Corporate Proceedings to obtain, and had obtained ex parte on 6 November 2019, an injunction to prevent Messrs Ferguson and Watlington from purporting to act as directors of SJTC. By the writ instituting the Corporate Proceedings, SJTC acting by Mr Gilbert, also sought declarations that the appointment of Messrs Ferguson and Watlington as directors of SJTC, although purportedly effected by written resolution of Cabarita as the sole shareholder of SJTC on 25 October 2019, was void and of no effect and that Messrs Ferguson and Watlington had no authority to act on behalf of SJTC. By his judgment of 26 March 2020, the learned Chief Justice rejected those claims and ordered instead that the writ be struck out and that the ex parte injunction of 6 November 2019 restraining Messrs Ferguson and Watlington from acting as directors of SJTC, be discharged.
11. A specific consequence of the judgment of the 26 March 2020 for which SJTC contends on this appeal, in relation to the Administration Proceedings after 25 October 2019 when Mr Gilbert acted in them without the knowledge or approval of Messrs Ferguson and Watlington, is that SJTC was not properly a party to those proceedings and so should not be bound by the Orders which, as we have seen, were made in them after that date.
12. To the extent that further consideration of the dispute in the Corporate Proceedings will be of significance to the present appeal, it will be discussed below.
13. At this juncture, the foregoing juxtaposition of the Corporate and Administration Proceedings sets the context for the framing of the first essential question for consideration on the appeal, which was whether SJTC as trustee (whether *de jure* or *de son tort*)², may seek to set aside orders otherwise validly made in the context of trust administration proceedings in exercise of the

¹ It is emphasized that at all material times the byelaws of SJTC stipulated that its directors can only act by a majority. On 25 October 2019 the sole member of SJTC, Cabarita (PCT) Ltd (**Cabarita**) (acting by Mr Tamine its sole shareholder) had appointed Mr Watlington and Mr Ferguson as directors alongside Mr Gilbert. The validity of all steps taken subsequently by Mr Gilbert acting alone in the Administration Proceedings are therefore impugned. However, for reasons which will become apparent below, the timing of steps taken in the Administration Proceedings is of some significance.

² This question about SJTC's true status as trustee arises in the context of historical issues in the administration of the Brockman Trust which were also raised for resolution in the Administration Proceedings and addressed in the Orders. As those historical issues are of tangential significance here, there will be no need to consider them in detail. It will suffice at this juncture to note that a detailed opinion from Mr Dakis Hagen QC and Emma Hargreaves of counsel ("**the Hagen/Hargreaves Opinion**") was obtained and presented in the Administration Proceedings. As Mr Gilbert explains at [24] to [29] of his affidavit, the need for it arose as a result of the discovery of various constitutional issues arising from documents disclosed by Mr Tamine pursuant to orders made against him in proceedings in England. The Hagen/Hargreaves opinion was presented to Justice Subair-Williams and helped to inform the provisions of the Orders granted by her to address those issues and hence the appointment of Medlands as trustee to replace and resolve any uncertainty about the status of SJTC's appointment as trustee.

longstanding supervisory jurisdiction and discretionary powers of the court and intended to protect and affect not SJTC's but the interests of the beneficiaries, on the basis that in those proceedings, its own rights as trustee (whether *de jure* or *de son tort*) to proper representation and a fair hearing, were allegedly breached.

14. However, a second and perhaps even more fundamental issue arose, and that which most directly led this Court to adopt the course it did at the outset, which was whether, if in any event, SJTC could not properly (and did not itself propose on this appeal that it should) be reappointed as trustee, there was any worthwhile purpose to be served in allowing it to prosecute this appeal, potentially at the expense, and to the detriment, of the proper ongoing administration of the Brockman Trust. It appeared to this Court, that even if SJTC could establish that it had a right to be heard in the Administration Proceedings which was breached, the real question nonetheless for this Court, this being an appeal from those proceedings, would be whether it is in the paramount interests of the beneficiaries of the Trust, rather than those of SJTC itself, for the Orders to be set aside as SJTC proposed.
15. By way of further background, it is also very relevant in this regard to record, that, in light of Mr Tamine's potential control of SJTC through his company Cabarita (as will be discussed further below), there are serious and ongoing proceedings against Mr Tamine himself (in Cause 2018: No. 390, "**the Tangarra Proceedings**"), for misappropriation of trust funds. On 6 November 2018, SJTC (acting through Mr Gilbert in his then undisputed capacity as sole director of SJTC) commenced the Tangarra Proceedings against Mr Tamine.
16. The allegations underlying the claim – allegations which Mr Tamine denies - are that he committed fraudulent breaches of fiduciary duty and/or breaches of trust by (among other things): (1) in March 2016, causing USD 5.395 million to be transferred from the Brockman Trust to his personal company, Tangarra Consultants Limited ("**Tangarra**"); (2) in August 2018, causing a further USD 16.8 million to be transferred from the Brockman Trust to Tangarra; and (3) in October 2018, failing to return USD 5 million of the Trust's money purportedly paid under SJTC's Bye-laws (when SJTC was trustee *de jure* or *de son tort*) into an account held by Mr Tamine's English solicitors. This Court was informed that Mr Tamine and Tangarra have agreed, on a without prejudice basis, to repay the sums referred to above (totalling USD 27.195 million).
17. While it was not necessary for resolution of this appeal for this court to pass comment upon the merits of the claim in the Tangarra Proceedings, it is worth noting Mr Tamine's assertion (at [13.1] and [67] of his Defence therein), that he caused USD15.4 million of the USD16.8 million payment referred to above to be paid "*as an advance in relation to services that it was envisaged [he] would provide in future (over a period of 6 years)*". As Mr Tamine had resigned as a director of SJTC on 28 September 2018, even on his pleaded case it is likely that SJTC (assuming it will continue to press the claim in light of the developments to be next discussed) and through it the Trust, will have a clear case for return of at least the bulk of these payments.
18. Cabarita is the sole shareholder of SJTC and Mr Tamine is Cabarita's sole shareholder. As the owner and controlling mind of the parent of SJTC, there were concerns raised by Mr Gilbert before Subair Williams J (and emphasized before this Court by both the Protector, Mr Lang and Mrs

Brockman) that Mr Tamine, although not himself a director, retains ongoing control of SJTC. As mentioned above, on 25 October 2019, Mr Tamine had procured Cabarita to appoint Mr Ferguson and Mr Watlington as additional directors of SJTC. While there are no imputations raised against these two professional men of good standing, the real concern, should SJTC be reappointed as trustee, is that Mr Tamine would retain the ability to remove them and appoint other directors who would do his bidding thereby, in effect, retaining control of SJTC.

19. In this regard, it is therefore important to note that the third paragraph of the December Order records that Subair Williams J was of the opinion that SJTC was not a proper and appropriate candidate for appointment as trustee of the Brockman Trust and that *“any new trustee should be an entity unrelated and unconnected to Mr Tamine (against whom the new trustee of the Brockman) Trust will, if so advised, be continuing the current proceedings 2018:No. 390).”* That view clearly lead to her decision to remove SJTC and to replace it with Medlands.
20. Also by way of background, the Court notes that there is an ongoing investigation by the United States Department of Justice (“DOJ”) and Internal Revenue Service into allegations of tax fraud, relating to the way in which the Brockman Trust was operated at a time when SJTC was the trustee. Indeed, as the Appellate Record shows, the DOJ submitted to the Chief Justice in the Corporate Proceedings that SJTC was at the heart of the alleged fraud (see Judgment of 26 March 2020 at [15])³. Mr Tamine is a co-operating witness in the investigation, having testified before a Grand Jury in terms which may be regarded as opposed to the interests of the Brockman Trust.
21. Finally, by way of background most relevant for present purposes, while the Brockman Trust has members of the Brockman family among its discretionary beneficiaries, significant distributions have been made only in furtherance of its charitable activities. These are extensive and involve ongoing commitments. It is averred by Mrs Brockman in her affidavit in the New Proceedings (which was also presented to this Court on the Appeal), that the current circumstances are impeding the proper operation of the Trust and, in particular, its charitable activities. Her stance taken on this appeal (through Counsel) is that the appeal is a waste of time, money and court resources.
22. She describes the monthly rate of expenditure by the Trust on legal fees as “eye-watering” and submits that, while the appeal arises in trust litigation, the issues raised by the Appellant SJTC are of no direct interest or benefit to the Trust and the relief sought by SJTC promises nothing but uncertainty for the beneficiaries (as the outcome which SJTC seeks would return affairs to the status quo ante the November and December Orders), further legal costs and the promotion of only the interests of SJTC and Mr Tamine.
23. The Court has paid particular regard to certain passages in Mrs Brockman’s affidavit, together with the contents of the Notice by the Sixth Respondent filed pursuant to Order 2, Rule 13, in

³ More especially, the DOJ alleges that the assets of Point Investment Limited (PIL), a company within the Trust structure formerly controlled by SJTC with assets worth some USD1.3 billion, in fact belong to Mr Robert Brockman and that he failed properly to report them to the United States Internal Revenue Service in evasion of tax obligations. Mr Brockman entered a plea of not guilty to the Indictment on 15 October 2020 (See affidavit of Dorothy Brockman filed in the New Proceedings at [34].

relation to the issue which the court required to be addressed at the outset of the hearing. Significant passages from Mrs Brockman's affidavit are the following; they address the purpose of the application made by her in the New Proceedings and the purposes and current state of affairs of the Brockman Trust itself:

"5. I am a discretionary beneficiary of the Trust, and I swear this affidavit in support of the orders applied for in the Originating Summons in my capacity as a discretionary beneficiary of the Trust for the replacement of the First Defendant, Medlands, as trustee of the Trust with BCT Limited (BCT), a wholly owned controlled subsidiary of Maples FS Limited (Maples FS), which is a well-regarded, regulated and professional institutional trustee.

6. As described in more detail herein, I make this application in the vital interests of the Trust. Over the last two years, the Trust has become embroiled in costly, complex and acrimonious litigation culminating in, at its essence, a dispute over which, as between the current trustee, Medlands, and (SJTC), is the proper trustee of the Trust.

7. As to Medlands, they were appointed as trustee pursuant (to the December Order) which was issued by Mrs Justice Subair Williams and which is under appeal. Also, and as I explain further below, on 2 December 2020, Medlands gave 90 days written notice of its resignation as trustee of the Trust to Martin Lang in his capacity as the Protector of the Trust (and the Third Defendant in these proceedings)(the Protector). Medlands' resignation is effective on 2 March 2021.

8. As to SJTC, the circumstances leading up to the appointment of Medlands caused the individual human beneficiaries of the Trust to consider SJTC unsuitable as a trustee for the future. It is sufficient for these purposes to refer to the indictment against my husband, Robert Theron Brockman [(a copy of which she exhibits to her affidavit and which bears out the concerns about SJTC mentioned at [19] above)].

9. This complicated situation has left the Trust in a state of illiquidity, jeopardizing its charitable operations and the overall management of the Trust's substantial assets. Having identified BCT to be a fit, proper and willing institutional trustee candidate to operate under the Maples FS global brand, I make this application to appoint BCT Limited to replace Medlands.

10. BCT is a controlled subsidiary of Maples FS, which is a licensed trust company in the Cayman Islands and subject to the regulations of the Cayman Islands Monetary Authority (CIMA) and as such is authorized by CIMA to act as a trustee. BCT will be able to draw on the personnel, expertise and infrastructure of Maples FS. I understand that BCT can properly be considered as a part of Maples FS and to be fit to act as the trustee and as a fit and proper entity to be the trustee. As ([confirmed by letter from BCT which she exhibits] BCT is ready willing and able and has consented to act as trustee of the Trust.

11. The First Defendant, Medlands, is, I understand [(an understanding confirmed to this Court by Counsel Mr Robert Ham QC appearing on the appeal for Medlands)] supportive of the application and has agreed to assist in the transition to BCT of the administration of the Trust, if BCT is appointed as trustee.

12. The Second Defendant, the Attorney General, is named in the proceedings in view of the potential charitable beneficiaries of the Trust. My Bermuda attorneys, Hurrion & Associates Ltd (Hurrion), wrote to the Attorney General by letter dated 18 December 2020 inviting her to agree to the appointment of BCT as trustee of the Trust in place of Medlands. (exhibiting a copy of that letter.) On 22 December 2020, the Attorney General confirmed that she did not object to the application but, due to the narrow role the AG has in the proceedings, neither did she consent. (a copy of the Attorney General's letter is also exhibited). [(At the hearing of the appeal Counsel appearing on behalf of the Attorney-General confirmed that the AG maintained the neutral position taken from the outset in the Administration Proceedings and had no objection to the appointment of BCT subject to assurances as to the independence of the MapleFS appointee being obtained)].

13. The Third Defendant, Martin Lang in his capacity as Protector of the Trust, is, I understand, supportive of the application and entirely endorses the suitability and appointment of BCT. [This understanding was confirmed to be correct at the hearing of the appeal by Mr John Machell QC on behalf of Mr Lang]. Given that Mr Lang's appointment as Protector is being challenged by SJTC and Mr Evatt Tamine (a former director of SJTC) in the current appeal in the (Administration Proceedings), I make this application for the Court to appoint BCT as the new trustee in place of Medlands rather than ask Mr Lang to exercise the protector's power to appoint a new trustee. If Mr Lang were to exercise his protector power to appoint BCT as the new trustee, that might simply open a further front of further litigation by SJTC and/or Mr Tamine.

14. ... at a recent hearing in the (Corporate Proceedings), counsel [(Mr Edward Cumming QC)] for James Watlington and Glen Ferguson (appointed by Mr Tamine as new directors of SJTC) accepted in principle – but without committing his clients to that course – that it was possible that “the best outcome is a properly regulated independent professional trust company to come in (in appropriately open considered circumstances. I commit my clients not at all in that regard, but one can see the obvious sense of it)” See page 377 of the transcript for that hearing....

...

Representative Beneficiary

16. On 26 May 1981, A Eugene Brockman executed a Trust Indenture with Bermuda Trust Company Limited pursuant to which he settled assets on trust and created the trust which is the subject matter of these proceedings. The Trust is a discretionary trust and is governed by the laws of Bermuda. Bermuda Trust Company Limited was the original trustee...

17. The beneficiaries of the Trust are designated in Article V A of the Trust Deed as being "Robert Theron Brockman, Dorothy Kay Brockman, Thomas David Brockman, Victoria Brockman, and any organization qualifying as a charitable organization under the laws of Bermuda, the United States, or Great Britain."

24. Then follows Mrs Brockman's account of her discussions with her fellow beneficiaries on the issue of their participation in the New Proceedings and her election to represent them in such proceedings, with her averment that, while some were not inclined to become involved, others had expressed their wishes that she represent them, the basis, as she also avers, for her application to the Supreme Court in the New Proceedings for the making of a representation order. She was eventually, on 7 August 2020, appointed in the New Proceedings to represent them.
25. Her affidavit then turns to discuss the Trust's assets and distributions in terms which also helpfully explain the impact of the litigation as a consideration for the timely disposition of this appeal:

"25. The assets of the Trust are significant and worth billions of US Dollars.. A significant portion of the assets of the Trust structure is its indirect holding of close to 100% of the shares in United Computer Systems Holdings (UCSH), a holding company of a computer software and professional services company which may be worth in the region of US\$5 billion.

26. The Trust also owns 100% of the common shares (but not the sole management share) in an investment fund called Point Investment Ltd (PIL). PIL invested in a number of structured investments, and the assets controlled by PIL may be worth in the region of US\$1.3 billion. The Trust structure also holds various amounts in bank accounts in Bermuda, Switzerland and Singapore. The accounts in Switzerland hold approximately US\$1.4 billion and the accounts in Singapore approximately US\$15 million. It appears from what I have been told by my legal advisers that in response to the uncertainty over the proper trustee of the Trust and its subsidiaries, these accounts were frozen and Medlands has been unable to draw funds from them for many months.

27. The Trust also has accounts with the Bank of NT Butterfield. Those accounts hold only approximately US\$2.5 million in liquid assets, which, I am told, will not be sufficient to satisfy the Trust's expenses in even the short term. I understand that the Bank of NT Butterfield recently gave the Trust 90 days' notice of its intention to close the accounts.

28. To the best of my knowledge, all or nearly all of the Trust's distributions have been to charitable beneficiaries. The Trust has two charitable programs under the banner of the Brockman Foundation (which is a name and not a separate entity). The Brockman Scholars Program at Texas A&M University firstly provides academic scholarships in the fields of science, technology, engineering, mathematics and medical research to Texas A&M University students. The program is a merit-based full scholarship for five years of study at the University. The scholarship program currently supports 149 Brockman Scholars with funds from the Trust. The scholarships

cost the Trust approximately US\$5 million in 2020 and the program was expected to add 50 students for each of the next two academic years.

29. The second significant philanthropic program is the medical research grants awarded to scientists with universities and eminent medical institutions. The Trust provides roughly US\$10 million per year in grants for leading-edge medical research, especially innovative, preventative, therapeutic and interventional research. The operation of the Brockman Foundation involves significant operating expenses in the form of staff costs and the costs of expert advisers. In the past, the Trust has also supported other philanthropic endeavors in Bermuda and has significant philanthropic contributions to capital projects at universities in the United States. Without a change in circumstance, these important charitable programs will not be able to continue, let alone grow.”

The arguments and their analysis

26. The arguments for the Appellant SJTC may be summarized as follows, as taken from the speaking notes of counsel Mr Cumming QC:
- *SJTC seeks to set aside the November and December Orders to allow “proper judicial consideration and determination of the issues which they purport to resolve”*
 - *Why does SJTC seek to achieve that?*
 - (i) *To safeguard properly the interest of all those who may be beneficially interested in the assets connected to the Trust (not just Mr and Mrs Brockman) particularly given the interests of charity, and in circumstances where the A-G does not support the course for which the hostile respondents contend. [Mr Cumming’s contention here was clearly mistaken in light of the A-G’s position actually taken on this appeal as explained above]*
 - (ii) *To ensure that matters that have (at the moment) purportedly been judicially determined are actually properly determined in accordance with the principles of natural justice.*
 - *This is particularly important in the context of the DOJ investigation, and consequent indictment of Mr Brockman. The DOJ opposes Mrs Brockman’s proposed change of trustee. By contrast, the DOJ has no problem with SJTC or its directors.*
 - *The matters purportedly decided by the November and December Orders need proper judicial scrutiny. The miscarriage of justice that took place at the hearings before Subair Williams J in November 2019 and December 2019 should be undone, and the matters she*

purportedly decided should be remitted for the proper scrutiny that they merit and demand at first instance."

27. Mr Cumming in his submissions then proceeded to scrutinize the respective provisions of the November and December Orders to suggest that various findings in them were wrong in fact or principle, procedurally and substantively flawed and/or needed to be sent back to the Supreme Court for "proper scrutiny". He submitted that these findings included: (i) whether the proper law of the Brockman Trust had not in fact been effectively changed by the Deed of Retirement and Appointment and Indemnity ("DORA") of 1993 to that of Guernsey, although so decided at [2] of the November Order; (ii) whether Mr Lang had been properly appointed as Protector pursuant to declaration 17 and [27(2)] of the December Order; (iii) whether declaration 1 of the December Order- that the 1994 DORA was invalid and which carried the consequence of the validity of SJTC's subsequent appointment as successor trustee pursuant to the 1995 DORA being doubted at declaration 3 - was wrong; (iv) whether the discharge of SJTC and the appointment of Medlands to replace it as trustee at [18] of the December Order, and regarded by Subair Williams J as appropriate, among other things, to relieve the Brockman Trust of the historic uncertainties over doubtful appointments in the past, was nonetheless improperly premised.
28. It must be emphasised that the Orders were made in the Administration Proceedings in which all interested parties were notified or joined, including the Attorney General as protector of the charitable interests, as well as the former trustees whose past involvements with the Brockman Trust may have been clouded by uncertainty.
29. It was therefore immediately apparent that the submissions presented on the part of SJTC could hardly be regarded as presented in the interests of the beneficiaries of the Brockman Trust. If acceded to, the Orders would be set aside, SJTC would be restored however temporarily, as trustee and the Brockman Trust would be plunged back into to its former state of uncertainty. Accordingly, it was apparent that the arguments were being deployed, not in furtherance of perceived fiduciary obligations, but to buttress SJTC's primary complaint about breach of its right to a fair hearing in the Administration Proceedings, and thus, as the basis for the reconsideration by the Supreme Court in those proceedings of its removal and replacement by Medlands as trustee. It is trite law that a trustee does not have an entitlement to prolong his retention in his office as a trustee in his own interest.
30. Moreover, apart from SJTC's complaint about breach of its rights, there was no basis for any complaint that Subair Williams J, in the exercise of her otherwise undoubted jurisdiction validly invoked in the Administration Proceedings, had reached determinations which were other than properly open to her to reach. Rather, it was recognized and accepted that the learned judge had read, considered and was guided, not only by the submissions of all interested parties but also by the detailed and comprehensive Hagen/Hargreaves Opinion, which concluded in the following salient advisory terms:

"Next Steps

140. In light of our conclusions herein that (among other things) SJTC is likely to be a trustee de son tort of a settlement which is (most probably still) a Bermuda trust, and

given the further question as to the identity of the beneficiaries thereof and its protector, we have recommended that SJTC apply to the Supreme Court of Bermuda to obtain appropriate declarations, directions and other relief such as to place the trust on a proper and sustainable footing, and if acceptable to the court, to seek its appointment as trust. The scope and nature of that relief will be set out in the pleadings, evidence and argument advanced on the application in question.”

31. As mentioned above, Subair Williams J had clear and compelling reasons for not affirming the appointment of SJTC as trustee, including the implications of Mr Tamine's ongoing ability to control SJTC (without, it must be noted, expressing any conclusions as to impropriety on his part). Indeed, SJTC had itself, through its counsel Mr Cumming, not proposed that it should be re-appointed, arguing instead that its “summary removal⁴” was wrong in principle, (citing *Lewin on Trusts, 20th ed* [14-084] and the case authorities discussed there) and that, like the other issues decided by the Orders, this subject also requires “proper scrutiny”. And further, that it would be inappropriate without first instance adjudication by the Supreme Court, and beyond the statutory jurisdiction of this Court, for this Court to appoint BCT to replace Medlands, as proposed by Mrs Brockman with the support of the Protector and Medlands itself.
32. Other concerns were raised *in arguendo* on behalf of Mr Tamine and SJTC about the suitability of BCT to be appointed trustee, such as whether it was sufficiently capitalized to meet the standards for appointment set in the Trust Deed and whether it physically carried on business in Bermuda so as to satisfy the domiciliary and governing law requirements of the Trust Deed and the concerns of the DOJ. These concerns, to the extent relevant for disposition of the appeal, were found by this Court to have been satisfactorily answered.
33. For instance, it was explained by the BCT representatives, that trust administration would actually be carried out in Bermuda by Maples Trustee Services (Bermuda) Limited to comply with the strict requirements of the governing law provisions and in keeping with obligations arising under Bermuda law, including any which may arise as owing to the United States Government. Already, Mr Peter Goddard, a senior officer of Maples FS had offered, through U.S attorneys Cravath, Swaine & Moore LLP, to make himself available for interview by the DOJ, an offer to which, as at the date of the hearing before this Court, the DOJ had not yet responded. Against that background, the Court does not regard the issue of BCT's suitability for appointment as requiring further discussion here.
34. And so, to the extent that it could complain in its own right (rather than seek to detract from the merits of BCT's appointment), the high-water mark of SJTC's arguments, was that its appeal should be allowed on the basis that Mr Gilbert had no authority to act on its behalf in the Administration Proceedings and on the basis also of its proclaimed right to a fair hearing in those Proceedings having been breached.

⁴ Itself a patent mischaracterization of the process undertaken by Subair Williams J, involving as it did, hearing from all interested parties and the terms of the Orders having the support of all the parties (with the A-G maintaining a neutral stance). All of which is confirmed by a written ruling delivered by Subair Williams J on 23 July 2020 in the Administration Proceedings.

35. In this regard, Mr Cumming presented rather fulsome arguments, citing authoritative and well-known (and indeed uncontroversial) dicta from the case law, only some examples of which it is necessary to mention here, and at that, only for the purpose of explaining the arguments themselves and considering the Respondents' in return. It was in the recognition of this true nature of SJTC's appeal, that this Court presented the issue to be addressed at the outset and those questions which we regard as being, in reality, engaged upon this appeal, as set out above at [13] and [14].
36. Mr Cumming stressed that the right to a fair hearing is a cardinal principle of natural justice and that it is hard to conceive of a more fundamental right, or one that the courts are more careful to safeguard and vindicate. That any proposed interference with the principle merits exacting scrutiny and any determination tainted by a breach of natural justice should be set aside. Indeed, that it is a right which is enshrined at section 6(8) of the Constitution of Bermuda⁵. Further, that natural justice, and this constitutional right, mandates at its core, and as a bare minimum, that a party be afforded the opportunity to hear and, if it wishes to do so, rebut the case made against it.
37. Reliance was placed upon Lord Neuberger's explanation of these facets of this right in *Al Rawi v Security Service* [2012] 1 AC 531 at [12], describing them as "*inherent*" in the principle of natural justice (emphasis added):

"Under the common law a trial is conducted on the basis that each party and his lawyers sees and hears all the evidence and all the argument seen and heard by the court. This principle is an aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair; it is inherent in one of the two fundamental principles of natural justice, the right to be heard (or audi alterem partem, the other rule being the rule against bias or nemo iudex in causa sua). As the Privy Council said in the context of a hearing which resulted in the dismissal of a police officer, in Kanda v Government of Malaya [1962] AC 322, 337: "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to contradict them."

38. And further, upon Lord Kerr's explanation of the importance of the right to a fair trial and the effectiveness of the judicial task, also from *Al Rawi* at [93]:

"To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept

⁵ Section 6(8) provides: "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."

of a fair trial. However astute and assiduous the judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable” [as emphasized by Mr Cumming].

39. Noting that this important dicta from *Al Rawi* has been endorsed and applied by this Court (per Kay JA) in *Minister of Finance v AD* [2015] CA (Bda) 18 Civ (12 June 2015), Mr Cumming then proceeded to urge its application to the present case, in the following terms from his written submissions, as the basis for setting aside the Orders:

“Kay JA’s and Lord Kerr’s concerns [(to ensure that a party affected has access to all relevant evidentiary material)] have obvious parallels to the present case. Plainly, as the Appellant was not before the Court at either of the hearings, the Appellant had no opportunity to (1) adduce evidence which it considered to be in the best interests of the Brockman Trust, or in its own interest, or (2) make any submissions of its own at the hearings at which the Orders were made or to respond to or scrutinize the material advanced before the Court by Mr Gilbert and/or Conyers [(who were joined as the former advisers to another predecessor trustee or trustee de son tort)] or the other parties before the Court for the benefit of both the Appellant, the Brockman Trust, and the Court” [emphasis added]

40. Leaving aside for present purposes any question of whether the right of any other party to a fair hearing might have been impaired (none complains), this proposition that SJTC’s right to a fair hearing in the Administration Proceedings was breached, pivots narrowly - as the words in emphasis immediately above reveals - upon the proposition that Mr Gilbert participated only in his personal capacity, rather than on behalf of SJTC itself, in those proceedings. This is properly described as a precarious proposition on which to depend for the simple reason that (as Mr Machell QC submitted and this Court accepted), as at the date when the Administration Proceedings were commenced by summons issued by SJTC under Order 85 of the Rules of the Supreme Court (22 July 2019), it did so acting through its then sole director Mr Gilbert and at a time when he unquestionably had the requisite authority. Mr Gilbert became the sole director of SJTC on 28 September 2018, after Mr Tamine’s resignation of the same date.
41. The jurisdiction of the Supreme Court was, therefore, validly invoked and the 22 July 2019 summons was before the Court at the hearings on 1 November 2019 and 1 December 2019 when the Orders were made. This is in fact the case notwithstanding that the relief sought by way of removal of SJTC and its replacement by Medlands, was specifically the subject of a separate summons filed by Mr Gilbert on 10 December 2019, then purportedly acting on behalf of SJTC and even while failing to disclose his actions to Messrs Ferguson and Watlington (who had been by then appointed as directors of SJTC on 25 October 2019).

42. And so, while this Court appreciates why the learned Chief Justice was troubled by Mr Gilbert's seemingly clandestine conduct⁶, this Court could not accept that SJTC was not itself properly and effectively enjoined before the Supreme Court in the Administration Proceedings because Mr Gilbert's status as a director of SJTC (whether sole or together with Messrs Ferguson and Watlington), was subsequently brought into question by the determinations in the Judgment of 26 March 2020, as discussed above.
43. SJTC, having effectively instituted the Administration Proceedings by Mr Gilbert on 22 July 2019, was bound by the outcome, which included the Orders. This must be so whether Subair Williams J was acting in those proceedings in the exercise of the statutory jurisdiction under the Trustee Act 1975, (the "**Trustee Act**") or the inherent jurisdiction for the supervision of trusts, as will be examined below.
44. This conclusion could be sufficient to dispose of SJTC's appeal, narrowly premised as this Court found it to be, upon the alleged breach of its right to a fair hearing. But there is more that needs to be said, if only briefly, given the true nature of the Administration Proceedings and the questions raised about the jurisdiction of this Court on an appeal from such proceedings.
45. The issues of concern which prompted the institution of the Administration Proceedings were those discussed in the Hagen/Hargreaves opinion. The issues concerned (i) the true identity of the trustee of the Brockman Trust (ii) the proper law of the Trust and (iii) the true identity of the protector of the Trust. It was therefore clearly imperative that the uncertainty about those issues be resolved.
46. That uncertainty was resolved by the Orders by the exercise of the Supreme Courts' supervisory jurisdiction over trusts and, as regards the removal of SJTC and its replacement by Medlands, the statutory jurisdiction was also engaged. In considering this appeal against the Orders, this Court is also exercising similar jurisdiction over trusts and submissions to the contrary made on behalf of Mr Tamine by Mr Brownhill QC, were misplaced, for reasons to be further explained below. In arriving at the decision not only to dismiss the appeal but also to appoint BCT as trustee in place of Medlands, this Court considered that the following arguments, as presented by Mr Machel QC, on behalf of the Protector, Mr Lang, and Mr Treagear QC, on behalf of Mrs Brockman, were persuasive.
47. By virtue of section 31(1) of the Trustee Act the court may, "*whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, make an order appointing a new trustee or new trustees..*" And, by section 31(2), the court "*may make an order appointing a new trustee in substitution for a trustee who is incapable... of exercising his functions as trustee ... or who for any reason whatsoever appears to the court to be undesirable as a trustee.*"

⁶ Including, as the Chief Justice expressed, for the reason that the immediate commercial result achieved by the removal of SJTC and its replacement by Medlands appeared to be that Mr Gilbert would continue in his role as before but by means of his control of Medlands of which he was, at the time, the sole director and sole shareholder. See in this regard, the findings of the Chief Justice at [34] of his judgment of 14 December 2020 in the Corporate Proceedings.

48. Under section 49 of the Trustee Act an application for an order appointing a new trustee may be made “*on an application of any person beneficially interested*” or “*on the application of any person duly appointed trustee*”.
49. These are the provisions invoked by Mrs Brockman in seeking the appointment of BCT by this Court on the basis that, in the circumstances of this case, it is obviously difficult and impractical for a new trustee to be appointed without the assistance of the Court for the purposes of section 31 of the Trustee Act. This is submitted to be so especially because the power to appoint new trustees lies with a resigning trustee (article VII-A) of the Trust Deed or the Protector (article VII-B). The appointment of the current trustee, Medlands, is challenged by the Appellant SJTC, as is the appointment of the Protector, Mr Lang. The only way to achieve the appointment of a trustee whose appointment puts the Trust on an unshakable footing and provides a solid datum point for the proper administration of the Trust going forward is, submitted Mr Tregear, by an application under section 31.
50. The circumstances presented here, in the view of the Court, justify the invocation of the statutory power. This is a power which has been invoked on several occasions in the past in this jurisdiction; the authorities show that, in order to make an appointment, the court requires it to be demonstrated that the exercise of the power is “*expedient for the trust as a whole*”. See, for instance *In the Matter of the C Trust* [2019] SC (BDA) 44 App (22 July 2019) per Hargun CJ at [17] and the cases cited there.
51. The Court also has an indisputable inherent jurisdiction as part of its supervisory jurisdiction over trusts and which extends to the appointment and removal of trustees – see *The Supervisory Jurisdiction over Trust Administration* by Daniel Clarry⁷, for an in depth commentary on the origins and evolution of the jurisdiction. The principles developed in the case law are instructive.
52. In the exercise of the supervisory jurisdiction, the Court’s principal duty is to see that the trusts are properly executed for the welfare of the beneficiaries. This has been settled principle for at least 137 years: see the judgment of the Privy Council in *Letterstedt v Broers* (1884) 9 App. Cases 371, a case in which the question was whether the court should exercise its equitable supervisory jurisdiction to remove and replace trustees.
53. The supervisory jurisdiction has been more recently reaffirmed at the highest level by the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, such that its existence ought now properly to be regarded as indisputable - the court has an inherent jurisdiction to supervise and, if necessary, intervene in the administration of trusts, (per Lord Walker at [51]).
54. Accordingly, this appeal might not have been allowed by the Court to proceed as being only about SJTC’s personal interests: trustees exist for the benefit of those to whom the creator of the trust has given the trust estate: see again *Letterstedt v Broers* (at 386) where the trustee was removed, not because allegations of fraud were found to be substantiated but because a history of friction

⁷ Oxford University Press, First Edition.

with the beneficiaries was deemed likely to impede the proper administration of the trust. And, as was immemorially stated by Lord Nottingham in *Uvedale-v-Ettrick* (1682) 2 Ch Cas 130; 22 ER 880, addressing the recalcitrant trustee who seeks to cling to office against the wishes of the beneficiaries, as SJTC might be perceived to be doing here: “*I like not that a man should be ambitious of a Trust, when he can get nothing but trouble by it.*”

55. And so the real question – indeed, the governing principle whenever the supervisory jurisdiction is invoked– is what is required for the welfare of the beneficiaries: *Letterstedt v Broers* at 389. See also, as so concluded in this jurisdiction in *Re X Trust [2018] SC (Bda) 56 Civ (12 July 2018) per Kawaley CJ* at [24] and [25] and in England and Wales in *The Pensions Regulator v Dalriada Trustees Ltd and others [2013] EWCH 4346 (Ch), [2013] WL 6229578* per Nugee J, at [28].
56. It is also to be emphasized that the dispute enjoined in the Administration Proceedings is not ordinary adversarial litigation: see again, for instance *The Pensions Regulator v Dalriada* at [28]-[30]. And, from *Schumacher v Clarke* [2019] EWHC 1031 (Ch) per Chief Master Marsh at [18] in terms which this Court is content to approve and adopt: “*The jurisdiction is quite unlike ordinary inter partes litigation in which one party, of necessity, seeks to prove the facts (of) its cause of action against another party.*”
57. And further, as to the *sui generis* nature of trust proceedings, from *Schumacher v Clarke* at [21(i)]: “*The claim is between the executors and trustees and the beneficiaries, but it is only in part about them. It is primarily about the estate, seen separately from the persons who are the custodians and the beneficiaries. As I have said, the claim is not an ordinary in personam claim.*”
58. The procedure to be adopted in trust administration proceedings is in the discretion of the Court and informed by the interests of the beneficiaries. The Court proceeds in a pragmatic way. This will mean avoiding what may fairly be regarded as an expensive and protracted battle, given the history of litigation attending the Brockman Trust. See *Schumacher* at [20] and [24], citing the decision of Lawrence Collins J (as he then was) in *Green and Others v Gaul and Others* [2005] WTLR 1325 at [199] and Evans-Lombe J in *Dobson v Hayman* [2010] WTLR 1151 at [26]. And further from *Schumacher* at [33] and [34]: “*As to the mode of trial, it hardly needs to be emphasised that it is for the court to control the way in which claims are disposed of, whether at a trial or a more limited hearing. It is not open to the parties to demand a full trial, or to demand a certain number of days for a trial... When dealing with such issues, the court firmly has in mind the provisions of the overriding objective. These include, of course, the importance of the case and its complexity. These also include, however, the desirability of expedition and the need for fairness.*”
59. Taking the foregoing principles in mind, I can fairly summarise the realities in the present case as follows:
 - a. There was a protracted litigation or a “battle royal” between, on the one hand, SJTC, Mr Tamine, Mr Ferguson and Mr Watlington and, on the other, Medlands and Mr Gilbert enjoined in the Corporate Proceedings. Given the questions raised over the validity of Medlands’ appointment as trustee, it was clearly in the interests of the Trust and its

beneficiaries as a whole that Medlands be replaced. Medlands agreed with this proposition.

- b. There are serious and ongoing proceedings by the trust against Mr Tamine for misappropriation. Yet, if SJTC were reinstated as trustee of the Brockman Trust, Mr Tamine, despite being obviously conflicted, could potentially regain control of SJTC through his control of Cabarita.
- c. There is also the DOJ investigation into tax fraud that includes matters relating to the way in which the trust was operated at a time when SJTC was the trustee. The DOJ submitted to the Chief Justice in the Corporate Proceedings that SJTC was at the heart of the alleged fraud. Mr Tamine is encamped against the interests of the Brockman Trust in the investigation.
- d. The current circumstances are impeding the proper operation of the Trust and its charitable activities, as explained by Mrs Brockman.
- e. Objectively, the situation cried out for the appointment of a new independent professional trustee. As Mr Machell QC on behalf of the Protector, Mr Lang, and Mr Treager QC on behalf of Mrs Brockman, submitted, that was what the welfare of the beneficiaries demands. The contrary was not properly arguable. Indeed, it was notable that, throughout, SJTC was conspicuously silent about its own reappointment. Nor was it likely to be more assertive in this regard, in light of the concessionary tone of Mr Cumming's remarks before the Chief Justice on 3 November 2020 in the Corporate Proceedings, recognizing even then, that a new appointment would be in the best interests of the Trust.
- f. As a matter of record, it should be noted as well that the human beneficiaries support BCT Limited's appointment - Mrs Brockman, who as mentioned above, was eventually appointed to act as representative by order in the New Proceedings, speaks for them.
- g. BCT Limited is a subsidiary of Maples FS, a well-regarded, regulated international trust and corporate management business: this, as shown above, is as averred by Mrs Brockman in her first affidavit. On her behalf, Hurrion & Associates wrote to Marshall Diel & Myers (who act on behalf of SJTC) on 30 December 2020, giving notice of the New Proceedings (without prejudice as to whether SJTC was entitled to such notice) in the following terms:

“You will see [(from the enclosed pleadings)] that our client makes the application in her capacity as a discretionary beneficiary of the Trust for the replacement of the First Defendant, Medlands, as trustee of the Trust with BCT Limited (BCT). BCT is a company incorporated in the Cayman Islands and is a controlled subsidiary of Maples FS (Maples FS). Maples FS is a well-regarded, regulated and professional institutional trustee licensed in the Cayman Islands and subject to the regulation of the Cayman Islands Monetary Authority (CIMA). The Protector and the Attorney General have also been joined as Defendants. Your client has not been joined because it is a stranger to the Trust. Without prejudice to that fact, we will provide you with reasonable notice of the hearing date for our client's application.

We have previously invited your client to take a realistic position in relation to this application and we now urge your client to accept and agree that the appointment of BCT is overwhelmingly and obviously in the best interests of the Trust. The Trust is presently in a state of illiquidity. This jeopardises its charitable operations and the overall management of the Trust's substantial assets. The position needs to be rectified as quickly as is reasonably possible. Now that BCT has been identified as a fit, proper and willing institutional trustee to operate under the Maples FS global brand, it is demonstrably in the best interests of the Trust for our client's application to proceed consensually. We do not consider there could be any reasonable basis on which your client could object to such an appointment.

Without prejudice to the fact that your client's views as to the identity of a replacement trustee are immaterial, we nevertheless request confirmation that your client supports or, at least has no objection to the appointment of BCT as trustee of the Trust. In the unlikely event that your client does object to BCT, we request that you provide a detailed explanation and legal basis for the objection. Obviously, a mere desire by your client to cling to its office and be reappointed as trustee would not constitute a reasonable or principled basis for objection to BCT. As we have previously explained, there are no circumstances in which our client could consent to your client having any future connection of any kind with the Trust."

60. At the hearing, the Court was informed by Mr Machell QC that, up until then, SJTC had not stated a position despite having received that letter.
61. The Court proceeded on the basis that, in all the attendant circumstances, it had the jurisdiction to determine that it is in the interests of the beneficiaries that BCT Limited is appointed as trustee and to do so without having to find one way or the other whether SJTC (or for this purpose Mr Tamine or Medlands itself), has acted inappropriately.
62. The Court determined, especially in light of the following, that it was clearly not appropriate that SJTC be the trustee in the circumstances which have arisen:
 - (i) It is contrary to the interests of the beneficiaries for Mr Tamine to have any control or influence over the trust. This would be possible, despite his protestations and undertakings (belatedly proffered in these proceedings in his 3rd affidavit at [9]), not to interfere with the appointments of Mr Ferguson and Mr Watlington. Mr Tamine has control or at least influence over SJTC, and the fact that Mr Ferguson and Mr Watlington its current directors, are professionals of good standing is, the Court accepted, beside the point. Mr Tamine, through Cabarita, has control or influence over hiring and firing and remuneration, and, as sole director of Cabarita (SJTC's shareholder), he remains in a position where he could expect to discuss trust matters with Mr Ferguson and Mr Watlington and be provided with information. An undertaking of the kind very belatedly proffered does not meet the fundamental issue of Mr Tamine's potential influence.
 - (ii) In any event, as the Court also accepted, Messrs Ferguson and Watlington are simply

strangers and newcomers to the trust, having no relevant experience or knowledge. As a new trustee had to be engaged to administer the trust, it was clearly better that they are independent and uninfected by the “battle royal”.

63. And further as regards Mr Tamine personally:

- (i) There are outstanding claims against him in the Tangarra proceedings, which puts him in a position of hopeless conflict of interests.
- (iii) It is understandably a matter of concern to the Protector and Mrs Brockman, that, on his own evidence filed in the Administration Proceedings, he would regard his actions formerly taken in the administration of the affairs of the Brockman Trust (when he was director of SJTC) as having lacked independence for having been taken at the behests of Mr Brockman and so bringing into question SJTC's independence as trustee and perhaps implicitly, the true discretionary nature of the Trust: see his 1st affidavit, for example at paragraphs 62, 78, 97, 99 and 142.

64. With the foregoing conclusions explained, it remains only for the Court to address the issue of jurisdiction as raised by Mr Brownbill QC on behalf of Mr Tamine. He did so, despite the well-known and settled principles discussed above, in the following terms taken (albeit excerpted only in part) from his written submissions:

“No jurisdiction to entertain an application to appoint a new trustee

- 1. Even if there had been a properly constituted application supported by evidence made to this Court for the appointment of a new trustee, this Court has no jurisdiction to entertain that application.*
- 2. When is s 8(1) [f the Court of Appeal Act] engaged and what is its purpose? The section provides as follows:*

“Subject to this Act and any Rules, in the determination of appeals before it, the Court of Appeal shall have all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction.” [Mr Brownbill's emphasis]

- 3. The wording of the subsection makes it clear that although the range of powers that may be exercised by the Court of Appeal is just as broad as those which may be exercised by the Supreme Court, the jurisdiction to exercise those powers is being granted for a specific purpose and is not entirely at large.*
- 4. Thus, the exercise of the powers defined in section 8(1) arises only “in the determination of appeals before it”. The powers can be used only for the purpose of determining the instant appeal. In the present case, if the appointment of BCT were to go ahead in the manner proposed, the Court of Appeal would not be*

determining the appeal but avoiding it.

5. *It follows that the powers conferred on the Court of Appeal by section 8(1) must be exercised for matters which are ancillary and incidental to the particular appeal before it. The section does not provide an unlimited jurisdiction for the Court of Appeal to take control of and determine any issue which might arise generally in the proceedings giving rise to the appeal.*
6. *The jurisdiction has not been granted to enable the Supreme Court to be bypassed or to avoid having to consider the substance of an appeal, which is what Mr Lang and Mrs Brockman are asking the Court of Appeal to do [(by way of appointing BCT now)].”*

65. Mr Brownbill QC then cited a judgment of the English Court of Appeal in **Ocean Software v Kay** [1992] QB 583 (CA) dealing with the revocation and remaking of ex parte injunctions, a case which this Court regarded as having no bearing on the appeal. The reason will be apparent from the very summary of that decision provided by Mr Brownbill himself at [23] of his submissions:

“In Ocean Software v Kay the plaintiff successfully appealed the refusal of its application for an ex parte injunction, and obtained the injunction, ex parte, from the Court of Appeal. Thereafter, the plaintiff made a further application to the Court of Appeal for additional injunctive relief and the respondent applied directly to the Court of Appeal for a full discharge of the injunction. The Court of Appeal refused to entertain either application on jurisdictional grounds and also for reasons of practicality”.

66. And further, from the judgment of Scott LJ given on behalf of the Court of Appeal:

“Where the Court of Appeal has granted an injunction, whether ex parte or inter partes, it may very well be necessary for one or other of the parties to the appeal to come back to the Court of Appeal for some point of clarification or variation of the terms of the order that has been made. I would suppose that the Court of Appeal’s jurisdiction to deal with such matters falls within section 15(3) of the [(Supreme Court)] Act. But, on the other hand, an application for relief which arises out of an order that the Court of Appeal has made but which is not strictly ancillary to the appellate function that the Court was exercising in making the order and which cannot be described as either the amendment or the execution or the enforcement of the order ought not, in my opinion, to be made to the Court of Appeal. In such a case the Court of Appeal, as it seems to me, would not have jurisdiction to entertain the application.” [emphases added by Mr Brownbill QC].

67. The words from Lord Justice Scott’s judgment emphasized by Mr Brownbill QC above, explain why the issue engaged and the reasoning in the case has no applicability upon this appeal. What this Court is engaged upon, is not an application for relief arising from an earlier order of the Court itself which is “*not strictly ancillary to the appellate function*”, but an appeal from determinations

below in the Supreme Court taken in the context of the exercise of the special and unique jurisdiction of the Courts for the supervision of trusts. As regards the appointment of BCT, the question is whether this Court has the jurisdiction to make that appointment while otherwise dismissing the appeal.

68. The position contended for by Mr Brownbill QC on behalf of Mr Tamine would be one where, although this Court would undoubtedly have the jurisdiction to dismiss SJTC's appeal, (as it did), it would be obliged to do so while leaving Medlands in place as trustee because of a supposed lack of jurisdiction to appoint a new trustee (BCT). This would be so even while Medlands had given notice of its resignation and even while, as Mr Tamine himself contends, it would be inappropriate to do so while Mr Gilbert, himself embroiled in the battle royal in the Corporate Proceedings, remained in charge of Medlands.
69. Such an outcome would clearly be untenable and not at all in the interests of the Trust and its beneficiaries in whose interests the supervisory jurisdiction ought properly to be exercised.
70. And so, for the sake of completeness and in final answer to this jurisdictional argument, it is to be noted that under section 8 of the Court of Appeal Act 1964, this Court, (like the English Court of Appeal under the Supreme Court Act of 1981) in the determination of appeals before it, has all the powers and duties conferred or imposed on the Supreme Court in the exercise of its original or appellate jurisdiction.
71. The manner of the exercise of the powers is explained by Court of Appeal Rules, rule 25:

*“The Court shall have power to give any judgment or make any order that ought to have been made, and **to make such further or other order as the case may require** including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and **may also be exercised in favour of all or any of the respondents or parties**, although such respondents or parties may not have appealed from or complained of the decision.”* (Emphases added)
72. The Court therefore accepted that it could - as both Mr Machell QC and Mr Treager QC argued - determine that it is in the interests of the beneficiaries and the Trust as a whole, for BCT to be appointed as trustee in place of Medlands and made the appointment order, to that effect in exercise of the trust supervisory jurisdiction as well as the powers under the Trustee Act.
73. The Court also concluded that SJTC had been effectively removed as trustee of the Brockman Trust by the 19 December 2019 Order and became a stranger to the Trust having no further right of audience or relief thereafter in the Administration Proceedings. SJTC could not therefore properly invoke the jurisdiction of this Court on an appeal from those proceedings for the vindication of personal rights to a fair hearing which it claims were breached in those proceedings for want of effective representation in them – a claim which, in any event, was found to have no basis in fact.

74. Accordingly, these are the reasons for our dismissal of the appeal and our previous order. We have previously directed that we will hear the parties as to costs of the appeal by way of written submissions, not exceeding 15 pages, to be submitted within 14 days of the delivery of these reasons.

GLOSTER JA:

75. For the reasons expressed by my Lord the Acting President, I agree.

SIMMONS JA:

76. I also agree.