

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV2005/0001

BETWEEN:

[1] ANDREW POPELY

Claimant

and

[1] AYTON LIMITED
[2] CORPORATE DIRECTORS LIMITED
[3] ST. VINCENT TRUST SERVICES LIMITED
[4] LEX SERVICES LIMITED

Defendants

Appearances:

Mr. S. John and Ms. K. Peters for the Claimant

Mr. Parnell Campbell QC and Ms. R. Frederick for the Defendants

2012: February 14-24
October 31

JUDGMENT

[1] **THOM, J:** In 1998 the Jeeves Group an Offshore Company with its headquarters in Lichtenstein acting on the instructions of Mr. John Henry Popely set up the Blue Ridge Trust "BRT" an International Trust registered pursuant to the International Trust Act 1996 Laws of Saint Vincent and the Grenadines. The claimant along with his brother Mr. John Anthony Popely and any living grandchildren of John Henry Popely and his wife Ann Patricia Popely were named as the beneficiaries of BRT.

[2] Ayton Limited "Ayton" is an International Business Company registered pursuant to the IBC Act 1996 Laws of Saint Vincent and the Grenadines and is wholly



owned by BRT.

- [3] Corporate Directors Limited "Corporate Directors" is the sole Director of Ayton.
- [4] St. Vincent Trust Services Limited "SVTS" is the trustee of BRT and registered agent of Ayton.
- [5] Lex Services Limited "Lex" is the nominee settlor of BRT and a subsidiary of SVTS.
- [6] Corporate Directors, SVTS and Lex are all managed and controlled by the Jeeves Group whose chairman is Mr. Bryan Jeeves. The Managing Director is Mr. Alexander Jeeves.
- [7] The assets of BRT comprise:
 - (a) 100% shareholding in Ayton.
 - (b) 30% shareholding in Casterbridge Properties Limited "Casterbridge" an International Business Company incorporated under the International Business Company Act of Saint Vincent and the Grenadines.
 - (c) 30% shareholding in Resort Holdings Limited "Resort" another Saint Vincent and the Grenadines registered International Business Company.
- [8] It is not disputed that the remaining 70% shares in Casterbridge and Resort and held by Mars Trust, a trust which was set up by the Jeeves Group on the instructions of Mr. Ronald Popely, the brother of Mr. John Henry Popely. The two brothers were business partners. Their relationship broke down around the year 2000.
- [9] The sole asset of Ayton is a freehold residential premise in Kent, England called "White Owl Barn". Ayton acquired White Owl Barn on October 6, 2000 for a total of £695,216.00. White owl Barn is used as a family home of Mr. John Henry Popely

and his wife Mrs. Ann Popely and the claimant. The defendants dispute whether Mr. Andrew Popely resides at White Owl Barn.

- [10] Mr. John Henry Popely and his brother Mr. Ronald Popely participated in several business ventures together. Several companies were used for their businesses including Casterbridge.
- [11] In August 2000 the UK Secretary of State for Trade and Industry petitioned the UK Court for the winding up of Casterbridge and Resort.
- [12] Initially Corporate Directors the sale Director of Casterbridge and Resort did not oppose the winding up order. On 15th December 2000 the UK Insolvency Services wrote to Mr. Bryan Jeeves in his capacity as Director of Corporate Directors requesting him to complete a questionnaire in relation to the affairs of Casterbridge. An order was subsequently made by the UK High Court requiring Mr. Bryan Jeeves to attend a public hearing in England. This order was opposed by Mr. Bryan Jeeves. Corporate Directors decided to oppose the winding up of Casterbridge. Mr. John Henry Popely was informed of the decision to oppose the winding up of Casterbridge and he disagreed. He was in favour of Mr. Jeeves attending the hearing.
- [13] On 19th September 2000 Ms. Phelan at that time the Legal Counsel for the Jeeves Group wrote to Mr. John Henry Popely requesting him to pay fees of £12,500 towards the legal cost to oppose the winding up of Casterbridge.
- [14] On 26th April 2001 Mr. John Henry Popely wrote to Ms. Phelan objecting to any liability or responsibility for costs incurred in the winding up proceedings of Casterbridge.
- [15] In November 2001 Mr. John Henry Popely as settlor of BRT sought to remove SVTS as the trustee of BRT. Ms. Phelan indicated SVTS had no objections to

being removed but requested payment of the fees owed to SVTS.

[16] On 16th January 2002 a legal charge was placed on White Owl Barn. The secured liabilities clause of the legal charge reads as follows:

“Secured Liabilities” means all or any sums owed to the chargee by the chargor in respect of services rendered or to be rendered by the chargee to the charger or to the chargor’s shareholding trust BRT a trust formed under the laws of and registered in Saint Vincent and the Grenadines and whether now due and payable or arising in the future or for the costs of the chargee in asserting its rights hereunder or under contract between the chargor and the chargee.”

[17] The claimant disputes the fees that SVTS claims are due and payable to SVTS for services rendered to Ayton and to BRT.

[18] Mr. Andrew Popely instituted these proceedings initially against Ayton and Corporate Directors. On 8th June 2006 the parties by mutual consent agreed to dispense with the Arbitration proceedings referred to in Clause 17 of the BRT Deed dated 19th March 1998. This was made an Order of Court and several consequential orders were made including the joining of SVTS and Lex as Defendants and leave to amend the Statement of claim and leave for the defendants to file Defence and Counterclaim and or an Amended Defence and Counterclaim. An amended Statement of Claim was duly filed by the claimant on 18th July 2006 in which several reliefs were sought. However at trial Mr. Andrew Popely only pursued the following reliefs:

- (1) An order that the powers of the directors of the First Defendant Company are being or having been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the beneficiaries of the BRT which is the sole shareholder of the First Defendant.
- (2) An order appointing the claimant and Mr. John Oxley or any other person or persons whom the court thinks fit as directors of Ayton Limited in addition to or in place of the second defendant.
- (3) A declaration as to what sums if any are due to the Third Defendant from the Beneficiaries of BRT and/or from BRT in respect of monies rendered

and expenses incurred by it as Trustee of BRT in relation to Casterbridge Properties Ltd and/or Resort Holdings.

- (4) An order that the Third Defendant indemnify the Beneficiaries of BRT and or BRT in respect of any sums which are found to have been incurred on behalf of BRT in relation to resisting the public examination of Mr. Bryan Jeeves in respect of the affairs of Casterbridge.
- (5) An order that the Third Defendant do indemnify the Beneficiaries in respect of all sums if any due to the First Defendant from the Beneficiaries of BRT and/or from BRT in respect of all proceedings pursued by the First Defendant against any beneficiary of BRT and/or its real settlor respectively.
- (6) A declaration as to what if any assets of BRT were loaned to or paid to Mr. Ronald Popely or any entity in which he has an interest including but not limited to the transfer of assets from Casterbridge Properties Limited to a company called Pono Finance Limited and if any an order that the Third Defendant should indemnify the Beneficiaries of BRT against any losses to the BRT assets resulting therefrom.
- (7) An order that the Third Defendant in exercising its duties as Trustee of BRT as sole shareholder of the first Defendant has acted in breach of its fiduciary duties by refusing to compel the Second Defendant as sole director of the First Defendant to desist from registering and/or enforcing the said charge against the property known as White Owl Barn whereby the eviction of the claimant and other family members were procured with the intention of enforcing the said charge.

[19] The defendants in their defence contended that BRT is responsible for 30% of the expense of Casterbridge and Resort since BRT holds 30% of the shares in Casterbridge and Resort. The expenses included all expenses incurred by Mr. Bryan Jeeves in relation to the Casterbridge proceedings. The trustee of BRT, which is SVTS agreed that BRT should pay 30% of the Casterbridge costs.

[20] The defendants also contended that the charge over White Owl Barn was granted by Ayton for monies owed by Ayton and its shareholder BRT. These sums are still outstanding. Further SVTS acted in the best interest of the beneficiaries of BRT at all times. There has been no breach of fiduciary duties by SVTS.

- [21] The defendants further contended that the claim was an abuse of process. The claim is an abuse of process. It is frivolous and vexatious and tainted with issue estoppel and resjudicata and ought to be struck out in its entirety. Also the claimant does not have locus stendi, and if he has he can only maintain a claim against SVTS.
- [22] The defendants also made a counterclaim for a total of US\$227,940.12 with interest of US\$46.36 from the date of the claim until judgment or payment whichever is earlier. This sum represented costs awarded to the Defendants in various litigation in the United Kingdom.
- [23] On 14th April 2011 the International Financial Services Authority of Saint Vincent and the Grenadines which is the Regulatory Authority for all IBCs and International Trust registered in Saint Vincent and the Grenadines gave notice to SVTS that Ayton would be struck off the register for non-payment of the annual fees.
- [24] On 16th May 2001 SVTS as the trustee of BRT the sole shareholder of Ayton resolved to wind-up Ayton and Mr. Keiser was appointed liquidator of Ayton.
- [25] On the 29th September 2011 the claimant made an application for several interim reliefs. This application came on for hearing on the 28th October 2011. The court heard oral submissions on behalf of all parties on 1st November, 2011 and on 2nd November 2011 an interim injunction was granted to prevent any further action being taken in relation to the liquidation of Ayton until further order of the court. The court also ordered that the other interim reliefs sought which included appointment of Cosmos Trust Limited as trustee of BRT, restoration of BRT to the register, the assets of BRT vests in Cosmos Trust Limited be heard on written submissions.

ISSUES

- [26] The issues that arise for determination are whether:
- (a) The claim is statute barred.
 - (b) The claimant has locus standi.
 - (c) There was a breach of fiduciary duties by SVTS and Corporate Directors if yes whether this breach of duty resulted in loss to BRT.
 - (d) BRT and or Ayton is responsible for the fees incurred in the Casterbridge litigation.
 - (e) The actions of the defendants amount to oppressive conduct.
 - (f) Assets of BRT were transferred from Casterbridge to Pono Finance at any other entity and whether BRT has suffered any losses as a result of such transfer.
 - (g) The claimant is entitled to the reliefs sought in the application for interim relief.
- [27] Mr. Andrew Popely testified and called Mr. John Henry Popely as a witness. Ms. Phelan testified on behalf of the defendants.
- [28] The main area of difference in the evidence of the parties relates to ownership of the Long Beach Country Club (Gibraltar) and the finances of Casterbridge. Ms. Phelan has admitted in her affirmation dated 12th April 2007 that the sums claimed in the counterclaim have been paid in full.

SUBMISSIONS

Limitation

- [29] Learned Queen's Counsel Mr. P.R. Campbell submitted that the claim is statute barred. Learned Queen's Counsel based his submission on sections 42 and 43 for the International Trust Act 1996, and submitted that the legislation provides that a claim for breach of trust must be brought within two years of the alleged breach. The alleged breaches in relation to the UK official receiver occurred between 1st August 2000 and November 2004, and the alleged breaches in relation to payments made by Casterbridge to the benefit of Mars Trust were alleged to have taken place between 1997 and 1999.

[30] Learned Queen's Counsel agreed that many of the reliefs sought are primarily accounting issues.

[31] The relevant provision of Section 42 of the International Trust Act on which the defendants rely is subsection (i), it reads as follows:

"(i) No action or proceeding pursuant to this Act or at common law or in equity

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- (a) to set aside the creation or settlement of an international trust;
 - (b) to set aside any disposition to or by the international trust; or
 - (c) against a trustee for breach of trust,
- shall be commenced, unless such section or proceedings is commenced in the court before the expiration of two (2) years from –
- (d) the date of the creation of the international trust that is sought to be set aside;
 - (e) the date at the disposition to or by the international trust that is sought to be set aside; or
 - (f) the date of breach of trust by the trustee or trustees, as the case may be, except that in the case where a trust was originally created in another jurisdiction the period that has expired since the date of its creation in that jurisdiction shall be taken into account in determining whether any action or proceeding can be commenced.

[32] I agree with the submission of Learned Queen's Counsel that under the provision of section 42, an action for breach of trust by a trustee must be commenced within two years from the date of the breach of trust.

[33] As stated earlier Learned Queen's Counsel agreed that the reliefs sought at, (3), (4), (5) and (6) of paragraph 18 all relate to accounting matters. They are not matters of breach of trust. I find that the reliefs sought at (1) and (2) are also not matters of breach of trust. Further Corporate Directors, the Directors of Ayton is not a trustee within the meaning of section 42 of the International Trusts Act. I however find that the relief sought in paragraph (7) relates to a breach of trust by the trustee of BRT, SVTS. When the relief sought in paragraph 7 is examined

carefully it shows that the relief relates not only to the registration of the change which took place in January 2002, but to the enforcing of the change. Therefore I find that none of the reliefs being sought by the claimant are statute barred.

LOCUS STANDI

[34] Learned Queen's Counsel submitted that since the claimant and his family were merely discretionary beneficiaries of BRT which was the minority 30% shareholder of Casterbridge, and BRT has since been terminated, the claimant therefore has no locus standi. Also the claimant has no standing to bring a claim in relation to Casterbridge since he has no connection, interest, right, claim, or entitlement to the company. All rights of management were vested in the Directors and a discretionary beneficiary of a shareholding trust had no such right. Further breach of a director's duty of care and skill were wrong done to the company and it was the company who should sue. Learned Queen's Counsel referred to the rule in **Foss v Harbottle** and submitted that where a company does not institute proceedings then a shareholder can only bring an action on behalf of a company if he can bring himself within the fraud on the minority rule in **Foss v Harbottle**. This is also applicable in relation to allegation made of sums paid to Mars Trust. The rule in **Foss v Harbottle** prevents a discretionary beneficiary of a minority shareholding trust from purporting to exercise the right to challenge the actions taken by a company and or its directors.

[35] Learned Counsel for the claimant submitted that where the IBC Act does not expressly address a matter then the provisions of the Companies Act apply. Under section 241 of the Companies Act a proper person may institute proceedings where the business or affairs of the IBC have been conducted in a negligent manner or the powers of the directors have been exercised in a manner oppressive or unfairly prejudicial or disregards the interest of any shareholder of an IBC. A person is a proper person within the meaning of the section where he has a legitimate interest in the relief sought. The claimant as a beneficiary has a legitimate interest in the reliefs sought. The claimant together with the other

beneficiaries are entitled to be treated as though they were the registered shareholders in respect of the trust's shares. The claimant resides at White owl Barn and has a legitimate interest in the orders which are sought in these proceedings.

FINDING

[36] It is not disputed that the claimant is a beneficiary of BRT and the assets of the trust includes shares in Ayton, Casterbridge and Resort.

[37] Section 101 of the IBC Act provides as follows:

- (1) "Companies incorporated under this Act shall be governed hereby provided that to the extent this Act does not expressly address a matter arising in the ownership or operation of a company incorporated hereunder, provisions of the Companies Act shall apply to such a matter.
- (2) A company incorporated under this Act may, when making its application under section 3, or when incorporated other than under this Act. A company may by special resolution in general meeting of its shareholders elect not to be bound by one or more of the provisions of the Companies Act and from the time of passing of such resolution the company shall not be bound unless and until such time as the company rescinds such resolution by a special resolution in general meeting or unless such provision is mandatory and cannot be avoided under the express provision of the Companies Act.
- (3) In the event of any conflict between a provision of the Companies Act and of this Act with respect to any matter involving an international business company, the provision of this Act shall prevail."

[38] In my opinion the share provision should not be given a restrictive meaning. The phrase "operation of a company" in subsection (1) is very wide and covers all aspects of the operation of a company including litigation by or against the company in relation to its operation.

[39] Section 241 of the Companies Act reads as follows:

- "(1) A complainant may apply to the court for an order under this section.
- (2) If, upon an application under subsection (1), the court is satisfied

that in respect of a company or any of its affiliates.

- (a) any act or omission of the company or any of its affiliates affects a result,
- (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a negligent manner; or
- (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is aggressive or unfairly prejudicial to or that unfairly disregards the interest of any shareholder or debenture holder, creditor, director officer of the company, the court may make an order to rectify the matters complained of."

[40] A "complainant" is defined in the definition section of this Part of the Act in section 238 as follows:

"complainant" means –

- (i) a shareholder or debenture holder or a former holder of a share or debenture of a company or any of its affiliates.
- (ii) a director or an officer or former director or officer of a company or any of its affiliates,
- (iii) the Registrar, or
- (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Part."

[41] I agree entirely with the submissions of Learned Queen's Counsel on the legal principles laid down in **Foss v Harbottle** but in my view the above definition of "complainant" is very wide. I am in agreement with the submission of Learned Counsel for the claimant that the claimant is a 'proper person' within the meaning of sub paragraph (iv). The claimant is a beneficiary of a trust that is the sole shareholder of a company where the allegation is that the powers of the director of the company are or have been exercised in an oppressive or unfairly prejudicial manner disregards the interest of any shareholder. In this case the allegation is that the powers of the Director of Ayton are or have been exercised in a manner oppressive or unfairly prejudicial to or unfairly disregards the interest of System's sole shareholder BRT. In this case the Trustee of BRT which is SVTS would also be regarded as complainant within the meaning of section 238 (b) (i) and (iv). The trustee SVTS is an affiliate of the Director of Ayton Corporate Directors and both SVTS and Corporate Directors are controlled by the same mind the Jeeves Group.

I am of the view that having regard to the nature of the proceedings, the claimant being a beneficiary of the sole shareholder of the company I find that he is a proper person to institute these proceedings. The reliefs which are sought at sub paragraph (1) and (2) of paragraph 18 are orders which the court could make under section 241 of the Act. The claimant also has locus standi to seek the reliefs sought in relation to SVTS trustee of BRT, the claimant being a beneficiary of BRT. As indicated where Learned Queen's Counsel for the defendants agreed in his submission that the relief sought against SVTS were accounting matters.

- [42] While I agree entirely with the submissions of Learned Queen's Counsel on the legal principles laid down in **Foss v Harbottle** but in my view the conjoin effect of the statutory provisions of section 101 of the IBC Act and section 241 of the Companies Act allow the claimant to institute these proceedings. Further the claimant is a beneficiary of BRT.

CASTERBRIDGE FEES

- [43] Learned Queen's Counsel for the defendants submitted that the defendants did nothing wrong in resisting the actions taken by the UK official Receiver. The fees were properly incurred. Learned Queen's Counsel relied on section 44 of the IBC Act and submitted that SVTS is entitled to be indemnified for all legal fees incurred in relation to the Casterbridge litigation. Further a meeting had been held and the Director of Ayton Corporate Directors and SVTS, the Trustee of BRT and Mars Trust agreed to resist the actions of the UK Official Receiver and that the costs of the litigation would be borne by Mars Trust and BRT in the proportion of their shareholding in Casterbridge. It was further agreed that Ayton would use its assets to secure payment of BRT's portion of the fees. Neither the Director of Ayton, nor the Trustee of BRT were required to get the approval of the beneficiary of BRT before agreeing to do so.

[44] Learned Counsel for the claimant agreed that Corporate Director as Director of Ayton was entitled to receive from Ayton all its proper expenses incurred in the discharge of its duties as director. Learned Counsel submitted that this principle only applied where the director has acted in good faith with a view to the best interest of the company. To be entitled to be indemnified for fees, the statutory requirements of sections 43 and 44 of the IBC Act must be fulfilled. There is no evidence of approval or ratification by the only shareholder of Ayton, BRT via its trustee SVTS. Alternatively, the primary liability for the fees and expenses lies with Casterbridge. The claimant has not been provided with any information that Casterbridge is unable to pay the fees. Further there is no legal basis for a company or a director of a company to require a shareholder of the company to pay the company's debts. Learned Counsel relied on section 7 of the IOC Companies Act and section 56 (1) of the IOC Amendment and Consolidation Act 2007. Further the fees were incurred by Mr. Bryan Jeeves and or Corporate Directors. The fees are therefore owed by Casterbridge to Corporate Directors and or by Corporate Directors to Mr. Bryan Jeeves as its Director. The fees were not incurred for any services rendered to BRT. The indemnity given by the trustee SVTS to pay a portion of Casterbridge fees was not properly given since there was no advantage to BRT.

[45] Having reviewed the evidence I find that the Casterbridge litigation involved Mr. Bryan Jeeves as Director of Corporate Directors which was in turn the Director of Casterbridge. I therefore agree with Learned counsel for the claimant that the expenses incurred by Mr. Jeeves in so far that they are receivable are the expense of Casterbridge. These are not the expense of the shareholders of Casterbridge nor the real settler of BRT Mr. John Henry Popely nor the real settler of the Mars Trust Mr. Ronald Popely, nor the beneficiaries of BRT.

[45] Section 44 of the IBC Act reads as follows:

“(1) subject to subsection (2) and to the by-laws, an international business company may indemnify against all expenses, including legal fees, and against all judgments, fines and amounts paid in

settlement and reasonably incurred in connection with legal administration or investigative proceedings against any person who –

- (a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative by reason of the fact that the person is or was a director, an officer or a liquidator of the company; or
 - (b) is or was, at the request of the company, serving as a director, officer or liquidator of, or in any other capacity is or was acting for, another company or a partnership, joint venture, trust or other enterprise.
- (2) Subsection (1) only applies to a person referred to in that subsection if the person acted honestly and in good faith with a view to the best interests of the company and, in the case of criminal proceedings, the person had no reasonable cause to believe that his conduct was unlawful.
 - (3) The decision of the directors as to whether the person acted honestly and in good faith and with a view to the best interests of the company and as to whether the person had no reasonable cause to believe that his conduct was unlawful, is in the absence of fraud, sufficient for the purposes of this section, unless a question of law is involved.
 - (4) The termination of any proceedings by any judgment, order, settlement, conviction or the entering of a nolle prosequi does not, by itself create a presumption that a person did not act honestly and in good faith and with a view to the best interests of the company or that the person had reasonable cause to believe that his conduct was unlawful.
 - (5) If a person referred to in subsection (1) has been successful in defence of any proceedings referred to in subsection (1), the person is entitled to be indemnified against all expenses, including legal fees, and against all judgments, fees and amounts paid in settlement and reasonably incurred by the person in connection with the proceedings."

[46] Section 44 does make provision inter alia for a director to be indemnified for legal fees incurred in civil litigation relating to the company. Subsection (5) makes it very clear that a director who has successfully defended proceedings is entitled to be

indemnified for all legal fees reasonably incurred. The argument of the Defendants is that the Casterbridge litigation was successful in that the UK Official Receiver found nothing wrong and therefore pursuant to subsection (5) the Director of Casterbridge ought to be indemnified for the legal fees incurred in the Casterbridge litigation. The real question however is who should indemnify the director. Under section 44 it is the company who must indemnify the director. In this case it is Casterbridge. The defendants submission that it is standard practice where the company does not have sufficient funds for the shareholders to cover the cost of action taken by the directors is not applicable since section 7 of the IBC Act which deals specifically with the issue of the personal liability of a shareholder of an IBC such as Casterbridge, provides that a shareholder is not liable for any debts of the company. Section 7 reads as follows:

“Subject to section 41, no shareholder, director, officer, agent, or liquidator of a company incorporated under this Act shall be liable for any debt, obligation or default of the company unless specifically provided in this Act or in any other law for the time being in force in the state, and except in so far as he may be liable for his own conduct or acts under general principles of law applicable to the same.”

[47] Section 41 deals with the standard of care of directors, offices or agent in liquidation of an IBC. Section 56 (1) reads as follows:

- (1) The liability of a shareholder to the company, as shareholder, is to
 -
 - (a) any amount unpaid on a share held by the shareholder;
 - (b) any liability expressly provided for in the articles or by-laws of the company; and
 - (c) any liability to repay a distribution under section 47 (4)

[48] There is no law in Saint Vincent and the Grenadines which makes a shareholder of an IBC liable for the debts of the company.

[49] There is no legal basis on which SVTS as trustee of BRT could agree for BRT to pay a portion of the fees for the Casterbridge litigation. Ms. Phelan in her testimony stated categorically that the purpose of the Casterbridge litigation was

for the protection of the reputation of Mr. Bryan Jeeves and the Jeeves Group. There was no benefit to BRT in the Casterbridge litigation. The settlor of BRT and the beneficiaries of BRT were not in agreement with the Casterbridge litigation, they opposed the litigation. Indeed Ms. Phelan in her testimony stated that prior to any action taken by the Official Receiver, the Director of Casterbridge had decided that Casterbridge should be wound up and its assets distributed among the shareholders. Ms. Phelan also testified that at the commencement of the Casterbridge litigation Casterbridge had no funds.

- [50] Having regard to all of the circumstances I find that the expenses of the Casterbridge litigation are the expenses of Casterbridge and not the shareholders of Casterbridge. There is no legal basis for BRT to reimburse the Director of Casterbridge for any portion of the expenses incurred in the Casterbridge litigation. I agree with the submissions of Learned Counsel for the Claimant on this issue.

OPPRESSIVE CONDUCT

- [51] Learned Counsel for the Claimant submitted that the placing of the charge on Ayton asset 'White Owl Barn' was oppressive conduct on the part of the Director of Ayton. The charge was entered into for an improper purpose, merely to secure to SVTS fees which were not due to SVTS being the fees incurred in the Casterbridge litigation. Both Corporate Directors and SVTS are controlled by the same mind the transaction was plainly void. Further there was no resolution passed by Ayton's shareholder approving it, this was contrary to Section 43 of the IBC Act. By July 2001 both Corporate Directors and SVTS were aware that the real settlor and beneficiaries of BRT were desirous of severing relationship with them.
- [52] Learned Queen's Counsel for the Defendant submitted that the UK Courts having determined that BRT only owned the shares in Ayton and not Ayton's property, the beneficiaries of BRT have no right to prevent Ayton from dealing with its property as it sees fit. It therefore cannot be said that Corporate Directors had exercised it

powers as directors of Ayton in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the beneficiaries of BRT. Further the purpose of the charge was not motivated by a desire of the Defendants to act in any way to the detriment of the Claimant, but rather to responsibly, legitimately secure debts that were owed to SVTS.

FINDING

[53] Section 32 of the IBC Act provides that the Directors of the Company have all the powers of management of the company save those powers that are reserved to shareholders of the company under the Act or the by-laws of the company. While Section 41 of the Act outlines the standard of care with which a director of a company must exercise this power. Section 41 reads as follows:

- (1) Every director, officer, agent, and liquidator of an international business company, in performing his functions, shall act honestly and in good faith with a view to the best interest of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- (2) No provision in the articles of by-laws of an international business company or in any agreement entered into by the company relieves a director, officer, agent or liquidator of the company from the duty to act in accordance with the Articles of by-laws or from any personal liability arising from his management or the business and affairs of the company.

The conduct complained of by the Claimant is the placing of a charge on "White Owl Barn" for a sum limited to £500,000 by Corporate Directors in favour of its affiliate SVTS for the debts of the company and its shareholder BRT to SVTS.

[54] In the Privy Council case referred to by Learned Queen's Counsel **Howard Smith Ltd v Ampol Petroleum** [1974] 1 A.C. p. 821, Lord Wilberforce at p 832 and 835 outlined the approach which should be taken by the court when considering whether the power of a director has been properly exercised as follows:

"The court ... is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra

insubstantial an alleged requirement may have been. If it finds that a particular requirement though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions or individual that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.”

And at p.835:

“... it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained on a fair view, the nature of this power and having defined as best done in the light of modern conditions --- or some limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose of which it was exercised, and to reach a conclusion whether that purpose was proper or not.”

[55] I will adopt this approach.

[56] It cannot be disputed that Corporate Directors as sole Directors of Ayton had the power to execute a charge over Ayton's property "White Owl Barn". The secured liabilities of the charge covered sums owed or that may arise in the future to SVTS for services rendered or to be rendered by SVTS to Ayton or to Ayton's shareholder BRT. The evidence of Ms. Phelan is that Corporate Directors agreed with SVTS that Ayton would charge its property to secure BRT's portion of the Casterbridge litigation fees. The Casterbridge litigation had no relation to Ayton. The beneficiaries of BRT had opposed the Casterbridge litigation. Moreover there is no provision in the Laws of Saint Vincent and the Grenadines which makes a company liable for the debts of its shareholders. I agree that the expenses properly incurred by a trustee are recoverable out of the trust fund. It has been determined by the UK Courts that "White Owl Barn" is beneficially owned by Ayton not BRT. It is agreed that the government fees and administrative fees owing to SVTS by Ayton were nominal. The amount did not exceed US \$3000, but the sum secured was limited to £500,000. Having regard to evidence in the case the substantive purpose of the exercise of the power of director by Corporate Directors to execute a charge on Ayton's property was to enable SVTS to be paid the fees

for the Casterbridge litigation which the beneficiaries had opposed and refused to make any contribution towards payment of the fees. I agree that the exercise of the power of director was not in the best interest of the company, they did not exercise the standard of care required by Section 41 of the IBC Act. I agree with the submission on behalf of the Claimant that Corporate Directors exercised its power in a manner that was oppressive.

DISTRIBUTION OF THE ASSETS OF CASTERBRIDGE

[57] Casterbridge was in the business of buying and selling timeshares. It is not disputed that Casterbridge purchased timeshares from Long Beach Gibraltar for the sum of £3.67 million. It is also not disputed that £3.67 million from Casterbridge was settled into Mars Trust which as indicated earlier was set up by the Jeeves Group on the instruction of the real settler Mr. Ronald Popely.

[58] Learned Counsel for the claimant submitted that the assets of BRT are not merely the share certificates but they include whatever is owed to the Trustees of Blue Ridge Trust out of the distributable assets of Casterbridge since BRT was the 30% shareholder of Casterbridge. The £3.67 million paid out by Casterbridge to the Mars Trust should not have been paid because Ronald Popely is not the 100% shareholder of the Long Beach Country Club (Gibraltar). Learned Counsel referred the Court to Ms. Phelan's letter of the 15th February 2001 where she confirmed that Casterbridge was the 100% shareholder of Long Beach Country Club (Gibraltar). Learned Counsel acknowledged that Ms. Phelan had since retracted the letter but submitted that Ms. Phelan has not produced any evidence for the Court to view the true ownership of Long Beach Gibraltar. BRT being 30% shareholder of Casterbridge, SVTS is obliged to account to the BRT beneficiaries for 30% of the £3.67 million being £1.1 million. SVTS is holding this sum in trust for BRT. This sum should be paid to the new trustee of BRT.

[59] Learned Queen's Counsel for the Defendants submitted that neither the claimant nor BRT provided any funding for Casterbridge. The £3.67 million was a debt owed by Casterbridge to Long Beach Gibraltar which was 100% owned by Mr. Ronald Popely. The £3.67 million paid to Mars Trust are monies that Ronald Popely was entitled to settle into Mars Trust since the sum was owed to Long Beach Gibraltar.

FINDING

[60] The evidence of Mr. John Henry Popely and Ms. Phelan differ on who owned Long Beach Gibraltar. Learned Counsel for the Claimant agreed that if Long Beach Gibraltar is owned 100% by Mr. Ronald Popely then the £3.67 million settled in the Mars trust would be correct.

[61] The question therefore is who owned Long Beach Gibraltar when the timeshare weeks were sold to Casterbridge.

[62] The evidence of Mr. John Henry Popely is that the sole beneficial owner of Long Beach Gibraltar is Casterbridge. Mr. Popely referred to the letter of Ms. Phelan dated February 15, 2001 in which Ms. Phelan in dealing with the ownership of Long Beach Gibraltar stated in part as follows:

"In reaching our conclusion on this issue we have not only considered the views and correspondence presented to us by both parties but also the following document:

.....

- Long Beach Country Club share certificate dated 28th March, 1997. The company number states: Registered in Gibraltar No. 62485. The shares are registered in the name of Casterbridge Properties Limited of Trident Chambers, Wickham Cay, Road Town Tortola, British Virgin Islands.

- Assignment Document between Casterbridge Properties Limited (BVI) and Long Beach Country Club Limited (Gibraltar). This agreement states with effect from 30th July 1988, Casterbridge properties Limited succeeded Long Beach Country Club Limited as vendor of the Long Beach Country Club.

.....

- We have come to the conclusion that although the share in the Long Beach Club Ltd (Cyprus) were at one time held by Onel Limited, these same shares were transferred to Long Beach Gibraltar which in turn was wholly owned by Casterbridge Properties Limited (BVI). Although Casterbridge Properties Limited was continued in St. Vincent and indeed registered there on 3rd April 1988, the Assignment Document states that Casterbridge properties Ltd (BVI) became the vendor of the Long Beach Country Club in accordance with the provisions of the Rules of Occupation. When Casterbridge Properties Limited was continued under St. Vincent law and registered on 3rd April 1988, the St. Vincent Company must have become the vendor of the Long Beach Country Club, as well as the shareholder. Casterbridge Properties Limited (BVI) was discontinued on 18th November 1998.

.....

- We therefore do not accept Ronald Popely's submission that Long Beach Country Club Limited, the Gibraltar Company was set up by the timeshares trustee for the resort for the sole benefit of himself, it is clear that any

funds derived from the sale of weeks of Long Beach are due to Casterbridge Properties Limited

.....

- Although entries have previously been made in the draft Casterbridge Properties Limited's accounts that do not reflect the conclusions as aforesaid we accept that the Casterbridge Properties Limited accounts will now have to be amended in order to reflect the correct situation.
- It should be noted however that we have not been provided with evidence of John Popely's approximate 50% ownership of Long Beach Country Club Limited. We assume that John Popely is referring to the shareholding that he previously had in the Cyprus Company, before the shares were transferred to Long Beach Country Club Limited (Gibraltar) which in turn became wholly owned by Casterbridge Properties Limited. This means that rather than personally holding a particular number of shares, the shares are held by Casterbridge Properties Limited.
- John states in his fax dated 6th December 2000 that I am concerned at two of the transactions. The first one is with Long Beach Club Limited. It appears that the accounting entry was dated 3rd April 1998 but is then backdated to take effect from 1st December 1997. The purchase cost of the property rights at Long Beach total £3.67 million. This money has not actually been paid to Long Beach but has been included in your accounts as an amount of money that is due to the Mars Trust. This is important because I have no interest in Mars Trust but I do have an interest in

Long Beach. My interest is just below 50% of that company and it has not received any money for the sale of the property rights to Casterbridge. To extent that Ron Popely owns the balance of Long Beach and the Mars Trust. I am happy for his share to be treated in the way you have in the draft accounts.

- In fact the confusion surrounding this is not merely to do with the flow of funds, but rather, also with the dates involved. The date of 1st December 1997 was taken as we were supplied with an invoice by Ron Popely on headed paper from Long Beach Country Club Limited. The invoice was in the amount of 3.67 million. The only detail provided was sale of 2005 weeks of occupation rights as described. We were only provided with this invoice by way of fax on 13th September 2000. It is not addressed to any party in particular. This has been relied upon when compiling the accounts of Casterbridge Properties Limited. What has however made things a little more confusing and unclear is that we have been supplied with a second invoice in this regard by John Popely. This invoice is on the letterhead paper for Long Beach Country Club Limited and is addressed to Casterbridge Properties Limited. This invoice is also dated 1st December 1997, and is also in the amount of £3.67 million. There are however, additional details of this invoice, including weeks at Passage House UK; weeks at Vera Beach Spain; and weeks at Peeblo Caneiro Spain.

-
- We had been led to believe that Ron Popely is the sole ultimate beneficial owner of Long Beach Country Club Limited. As a result of faith and trust put into Ron Popely's version of events, and with no documentary evidence to rebut Ronald Popely's version of events we not only signed an Acceptance of Additional Trust fund dated 2nd October 1988 to take effect from 30th July 1998 as Trustee of Mars Trust, to accept the contribution allegedly being made by Ron Popely, (the alleged 100% shareholder and Director of Long Beach Country Club Limited) of the funds received by Long Beach Country Club Limited from the sale of the weeks in the aforesaid resort, to the trust fund of Mars Trust but we also issued a Power of Attorney to Mr. Mark Agornbar, Ron Popely's solicitor to perform all legal acts as authorized representative invested with full powers of single signature rights in relation to the sale of weeks and vendor rights in Long Beach Country Club (Cyprus). The Deed dated 7th October 2000 relating to the sale of rights of occupation and vendor rights at Long Beach Country Club was indeed signed by Mark Agomber acting as attorney for Pono Finance Limited which we had been led to believe owned the entire shares in Long Beach Country Club Limited. We acted in good faith when issuing this Power of Attorney. The Acceptance of Additional Trust Fund is also incorrect for the reason that Ron Popely was not the owner of Long Beach Country Club Limited and therefore had no right to contribute them to the trust fund of Mars Trust. We did not have sufficient documentation or information at that time to

have any cause to believe that the version of events given to us by Ron Popely was incorrect in any way. Any remedial action necessary will of course, be taken.

- Indeed heavy reliance was placed upon information supplied to us by Ron Popely in this regard. Documentation over the foregoing years and contact with any party other than Ron Popely has been such that no other version of events or status of affairs could be ascertained from the documentation and the information that we did actually have on our files. We have acted in good faith at all times in this regard, however, as a result of being misled by Ron Popely we have unfortunately assisted him in achieving a flow of funds which we do now consider to be correct. This will of course be remedied and all other necessary action taken in order to rectify the situation.”

[63] Learned Counsel for the claimant submitted that the above evidence shows that Long Beach Gibraltar was not wholly owned by Mr. Ron Popely but by Casterbridge and therefore BRT was entitled to 30% of the £3.67 million.

[64] Learned Queen's Counsel for the Defendants submitted that the evidence shows that on 12th August 1997 Long Beach Country Club Limited was incorporated through Hutchinson and Co. Trust Company Limited (Hutchinson). The 100% beneficial owner was Ronald Popely. On the 1st December 1997, Long Beach country Club Limited (Gibraltar) sold timeshare weeks in Long Beach Resort to Casterbridge and Casterbridge was invoiced in the sum of £3.67 million. As the 100% beneficial owner of Long Beach Country Club Limited (Gibraltar) the vendor of the timeshare weeks, Ronald Popely settled those timeshare weeks sale proceeds to Mars Trust. This was evidenced by a Trustee Resolution of Mars

Trust, dated 2nd October 1998, accepting the monies as trust fund.

[65] On 30th July 1998, 8 months after the sale to Casterbridge of Long Beach timeshare weeks for the amount of £3.67 million on 1st December 1997, Casterbridge succeeded Long Beach Country Club Gibraltar as vendor of the timeshare weeks in Long Beach Resort. This did not affect the amount payable by Casterbridge to pay to Long Beach for the timeshare weeks it purchased on 1st December 1997.

[66] Learned Queen's Counsel further submitted that the transactions entered into by Casterbridge were agreed by the shareholders. The £3.67 million was settled into the Mars Trust since Mr. Ronald Popely was the 100% beneficial owner of Long Beach Gibraltar at the time of the sale of the timeshare weeks to Casterbridge. The original request from Hutchinson to Millennium shows services to incorporate the company shows that Long Beach Gibraltar was to be owned 100% beneficially by Mr. Ronald Popely. Ms. Phelan also testified that she has the documents in her possession.

FINDING

[67] It is not disputed that Mr. Ronald Popely is the owner of the Resort Hotel. Long Beach Gibraltar sold the timeshare weeks in Resort Hotel to Casterbridge on 1st December 1997 for the sum of £3.67 million. The question that arises is who owned Long Beach Gibraltar on 1st December 1997 at the time when the timeshares in Resort Hotel were sold to Casterbridge by Long Beach Gibraltar for £3.67 million. In the letter of Ms. Phelan's of 15th February 2001 on which the Claimant relies, Ms. Phelan stated that the share certificate of Gibraltar dated 28th November 1997 shows that the shares are registered in the name of Casterbridge properties Limited (BVI) which was subsequently continued in St. Vincent and the Grenadines. Ms. Phelan in her testimony did testify that she had the original documents requesting incorporation of Long Beach Gibraltar which shows it was to be 100% owned by Mr. Ronald Popely. The company was set up on 12th August

1997. However as stated earlier these documents were not put before the court. Further what is important is that the share certificate dated 28th November 1997 shows that timeshares are registered in the name of Casterbridge.

[68] Ms. Phelan at no time in her evidence testified that the share certificate of which she referred to in her letter of 15th February 2001 was not correct, or that the shareholding in Long Beach Gibraltar had changed between 28th November 1997 and 1st December 1997 when the timeshares were sold by Long Beach Gibraltar to Casterbridge.

[69] Under examination in chief Ms. Phelan stated that the reason for the retraction of the 15th February letter was that Mr. Ronald Popely had disputed the contents. He demanded a meeting at which he also brought two lawyers. Additional documents were presented to her and she was authorized by Ronald Popely to speak with independent parties. Ms. Phelan stated that she was misled by Mr. John Henry Popely. One of the main errors was that John Henry Popely and his accountant Mr. John Harris had led her to believe that funding for a chateau was provided by Casterbridge. Secondly she also did not fully understand the Long Beach structure, she was mixed up between Long Beach Cyprus and Long Beach Gibraltar and the loan of £3.67 million. She did not realize the Long Beach timeshare weeks were sold to Casterbridge. Casterbridge had to pay for the timeshare weeks. Ms. Phelan stated these two matters were the main things that she got wrong. Ms. Phelan clarified that she did not issue a letter of retraction to the parties. It was during the litigation before Master Moncaster in the UK that she learnt that Mr. John Popely was trying to use the 15th February letter as evidence that she indicated that she no longer stood by the letter. In view of the evidence I find that at the time when the timeshares were sold to Casterbridge by Long Beach Gibraltar, Long Beach Gibraltar was wholly owned by Casterbridge.

LIQUIDATION

- [70] On 16th May 2011 SVTS as trustee of BRT and sole shareholder of Ayton passed a resolution signed by Mr. Bryan Jeeves to wind up Ayton. Learned Queen's Counsel submitted that the claimant has no locus standi to challenge the winding up of Ayton. Only the members of Ayton can resolve to take Ayton out of a members voluntary winding up and they have not done so. Learned Queen's Counsel relied on the provisions of section 168 of the Companies Act.
- [71] Learned Queen's Counsel also submitted that the claimant was not within the rule in **Foss v Harbottle**. There is no fraud on the minority or at all. Ayton did not pay its annual fees for 2010 or 2011. Also Ayton owed SVTS more than £500,000. This includes costs in relation to legal procedures SVTS funded for Ayton. Ayton being insolvent its shareholder SVTS decided that it was better to wind up the company than have the company struck off the Register. The affairs of Ayton, and its property White Owl Barn would be better dealt with by the process of liquidation.
- [72] Learned Counsel for the claimant submitted that the resolution for dissolution of Ayton purportedly passed by SVTS as sole shareholder of Ayton is illegal, void and of no effect. SVTS exercised the power of shareholder of Ayton by virtue of its power as trustee under the BRT Deed. This is a fiduciary power and is only to be exercised properly for the purposes for which it was conferred, and not unreasonably, capriciously or spitefully. This power of trustee was exercised in the face of John Henry Popely's letter to Lex of 6th December 2006 and the ruling of this court of 13th October 1008, and SVTS ought to have recognized Cosmos Trust Limited as trustee of BRT. SVTS ought not to have exercised any power of trustee save in accordance with instructions given to it by Cosmos Trust Limited.
- [73] Learned Counsel also submitted that the resolution for winding up of Ayton was done to effect a sale by Ayton acting by its liquidator of "White Owl Barn." This is a breach of the undertaking given by Ayton to the court. Learned Counsel urged the

court to set aside the resolution to liquidate and declare it void abinitio.

FINDING

[74] Ms. Phelan under cross-examination testified that the fees for which Ayton is placed in liquidation are the very fees which are the subject of the present litigation. This is referred to in the resolution as demanded for payment from additional creditor. Ms. Phelan also agreed that the purpose of the winding up was to sell White Owl Barn.

[75] In 2005 on the hearing of an application for an interim injunction by the claimant against Ayton, at that time the parties to these proceedings were the claimant and Ayton and Corporate Directors, an undertaking was given to the court, clause 2 of which reads as follows:

“(2) Ayton further undertakes that it will not mortgage, sell, or alienate the said property until final resolution of the issues in contention or until further Order of the Court.”

[76] It is settled law that an undertaking given to the court has the same force and effect as an Order of Court. All parties who are aware of an Order of the court are required not to act in breach of the Order of the court. The sole shareholder of Ayton is required to act in accordance with the undertaking of Ayton. It is irrelevant that the shareholder was not a party to the proceedings. The act of the shareholder of putting Ayton into liquidation so that “White owl Barn” could be sold is in breach of the undertaking. Ms. Phelan further agreed that the fees for which Ayton was put into liquidation were the very fees the subject of this litigation. The evidence shows that immediately prior to 2010 the annual government fees for Ayton were paid by the claimant. Ms. Phelan agreed in her testimony that when the notice of 14th April 2011 was given by the Regulatory Authority that if payment was not made within thirty days Ayton would be struck from the Register, neither the claimant, nor Counsel was made aware of the notice.

[77] In putting Ayton into liquidation, SVTS was exercising its powers as trustee of BRT. Having regard to the above evidence I find that this was an improper exercise of the powers of the trustee SVTS. There is no evidence of any demand for the £500,000 being fees owing by Ayton to SVTS. The fees are disputed by the claimant. All cost orders were paid by the Popely's. The principal purpose was to sell White Owl Barn to recover fees allegedly owed to it. The beneficiaries had objected to the incurring of the expenses relating to the Casterbridge litigation and further instituted these proceedings for a determination whether BRT was liable for the said fees.

[78] Learned Queen's Counsel also submitted that an order to set aside the resolution to liquidate Ayton was not one of the reliefs claimed; the claimant is therefore not entitled to the relief. I agree that this is not included as a head in the substantive relief. However having regard to the fact that the events relating to the liquidation occurred just prior to the commencement of the trial and the court had ordered that the application for interim relief would be determined at the trial and an order was made for submission, I am of the opinion that the relief could be granted under the general provision in paragraph 14 which states "such further or other relief as this Honourable Court may think just. Having regard to all the circumstances, the fees being the subject of this litigation I am of the opinion that it is just for court to grant relief in relation to the issue of the liquidation.

REMOVAL OF SVTS AS TRUSTEE AND APPOINTMENT OF COSMOS TRUST LTD AS TRUSTEE OF BRT

[79] Mr. John Henry Popely by letter dated 6th December instructed Lex the nominee settlor of BRT to give notice to SVTS pursuant to clause 12 (b) of the BRT Deed removing SVTS as trustee of BRT. On the hearing of a preliminary issue in these proceedings this court ruled on 13th October 2008: "That Lex Services as the Nominee Settlor of the BRT Deed is and has at all material times since December 6, 2006 been obliged to act in accordance with the instructions of John Henry Popely as outlined in his letter of December 6, 2006 to Lex Services and

accordingly Lex Services is and has since December 6, 2006 been obliged to remove St. Vincent Trust Services Limited as Trustee of BRT and to appoint Cosmos Trust Limited in its place.”

[80] It is not disputed that Lex has not acted in accordance with the instruction of Mr. John Henry Popely nor given effect to the ruling of the court. Ms. Phelan during her testimony stated that even if Lex did give the notice pursuant to clause 12 (b) SVTS would not act on such notice.

[81] Learned Counsel for the claimant submitted that in view of the above evidence it was appropriate for the court to appoint Cosmos Trust Limited as trustee of BRT and to order SVTS to deliver up immediately all of BRT assets to Cosmos Trust Limited including the bearer share certificate for Ayton, the 30 bearer shares in Casterbridge. Learned Counsel also submitted that the court should appoint Mr. Andrew Popely and his brother John Anthony Popely as Directors of Ayton in place of Corporate Directors.

[82] Learned Queen's Counsel relied on his earlier submission that the Statement of Claim was not amended to include this relief. The court therefore cannot grant this relief.

[83] Learned Queen's Counsel also submitted that SVTS has at all material times, been the trustee of BRT. SVTS was entitled to remain trustee of BRT even though Mr. John Henry Popely requested that Cosmos Trust Limited became the trustee in place of SVTS. No order was made to appoint another trustee and no order was made removing SVTS. SVTS is has a lien on the trust property until its fees had been settled in full. Further the trust has been terminated since BRT was unable to pay its fees and had not paid annual Government fees for 2010 and 2011 and since SVTS was not willing t o pay any more fees on its behalf. In the circumstances it was not just to keep the Trust registered. The only option open to the SVTS was to terminate BRT. BRT was terminated on July 18, 2011 and the registration of BRT as an international trust was cancelled on 19th July, 2011.

SVTS as Trustee of BRT has not acted in contravention of any provision of the International Trust Act. or to any provision in the BRT Deed in terminating the trust and canceling its registration. Since BRT has been terminated it is not possible to re-register it. There is no provision for re-registration or cancellation of registration under the International Trust Act.

[84] Learned Queen's Counsel also submitted that Ayton having been put into liquidation and a liquidator appointed, the Court cannot make an order for the appointment of Directors of Ayton.

FINDING

[85] Section 35 of the International Trust Act gives the Court wide powers to determine any matter relating to an international trust registered under the Act. Section 35 reads as follows:

“The Court has jurisdiction in respect of any matter concerning an international trust where –

- (a) the proper law of the trust, as determined by the Act, is the law of the State;
- (b) a trustee of the trust is a resident;
- (c) any part of the administration of the trust is carried on in the State, or
- (d) the trust registered under this Act.”

[86] The International Trust Act does not make provision for the termination of a trust by the trustee, nor does the BRT Deed. The BRT Deed in paragraph 4 provides that the trust is irrevocable and its duration is limited to a period of 100 years.

[87] It is not disputed that the registration of BRT was cancelled on July 19, 2011 by the Regulatory Authority in St. Vincent and the Grenadines after notification by the trustee SVTS that the trust was terminated. I agree with the submission of Learned Counsel Mr. Evans that deregistration does not affect the underlying rights and obligation of the trust. In view of the ruling of the court on the Preliminary issue and the failure of Lex Services to issue the notice under Clause 12(b) to SVTS. I am of the view that it is appropriate for the Court to make an

order removing SVTS as trustee and appointing Cosmos Trust Limited as trustee.

[88] There is no evidence before the court from Mr. John Andrew Popely that he is desirous of serving as a director of Ayton. In any event the trustee of BRT being the sole shareholder of Ayton could remove Corporate Director as director of Ayton pursuant to section 90 of the IBC (Amendment and Consolidation) Act 2007 and appoint new Directors.

[89] In conclusion I find that the claimant's claim succeeds and I make the following orders and declarations:

- (1) That the powers of the director of Ayton Limited have been exercised in a manner that is oppressive and that unfairly disregarded the interest of the beneficiaries of the Blue Ridge Trust which is the sole shareholder of the First Defendant.
- (2) No sums are due to the Third Defendant from either the beneficiary of the Blue Ridge Trust or from the Blue Ridge Trust in respect of services rendered and expenses incurred by the Third Defendant as Trustee of the Blue Ridge Trust in relation to Casterbridge Properties Limited. Neither the Blue Ridge Trust nor the beneficiary of the Blue Ridge Trust are liable for any of the expenses incurred in the Casterbridge Property Limited litigation.
- (3) the third Defendant must account and indemnify the Blue Ridge Trust 30% of the distributable assets of Casterbridge properties Limited including 30% of the £3.67 million settled by Mars Trust Limited by the Third Defendant and 30% of the price of the timeshare weeks that were transferred by Casterbridge Property Limited to Pono Finance Limited.
- (4) The Third Defendant is hereby removed as Trustee of the Blue Ridge Trust with immediate effect.
- (5) Cosmos Trust Limited is appointed Trustee of the Blue Ridge Trust with immediate effect and all assets of Blue Ridge Trust are hereby vested in Cosmos Trust Limited with immediate effect.

- (6) The resolution to wind up Ayton Limited is set aside.
- (7) The sum of £15,000 which report security for the Defendant's costs and is held at the Scotia Bank, Kingstown, Saint Vincent and the Grenadines be forthwith to the claimant.
- (8) The Second, Third and Fourth Defendants shall pay the claimant cost. Such costs to be prescribed costs.



Gertel Thom

HIGH COURT JUDGE