THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
A.D. 2018

CLAIM NO. NEVHCV 2016/0137

BETWEEN:

SPAS DIMITROV ROUSSEV
DILIANA ROUSSEV
CHRISTA ROUSSEV

Applicants/Claimants

and

LEMAN NOMINEE COMPANY LIMITED
TENEBAT LIMITED

Respondents/Defendants

APPEARANCES:

Alan Gourgey QC, Brian Barnes and Dia Forrester for the Applicants
Gilead Cooper QC and Dahlia Joseph Rowe for the First Respondent.
Second Respondent unrepresented

2018: April 23rd and 24th
April 24th

DECISION

[1] **Smith J**: This the second part of the hearing of two applications, namely, the Applicants' (Claimants) Notice of Application dated 21st December 2017 ("the December Application") and their Notice of Application dated 23rd February 2018 ("the February Application"). These applications seek a number of substantive and procedural orders. At the hearing of these applications on 21st March 2018,

counsel for Applicants, with the acquiescence of counsel for the Respondents (Defendants), proposed that the applications be heard in two parts. This was in order to allow service on another party, Tenebat Limited ("Tenebat") which was not then a party to the proceedings. Tenebat, it was said, was connected to Leman Nominee Company Limited ("Leman") and would need time to file evidence so that it could participate in the hearing of the second part where relief is sought against it, if it so wished. The Court consented to that approach to dealing with the applications. The orders made by this Court at the hearing of the first part are set out in its order dated 21st March 2018. In that order, the Court fixed the 23rd and 24th April 2018 as the dates for the hearing of the second part.

[2] In this second part of the application, the Applicants seek orders: (1) declaring that the steps taken by Leman and Tenebat to replace Leman as the trustee of the GB trust with Tenebat and to change the governing law of the trusts to the law of the British Virgin Islands (BVI), are void; (2) appointing Triesta Trustees Limited ("Triesta") as the trustee of the GB Trust settled by the Applicants and for which Leman was appointed as trustee; (3) preventing Leman and/or Tenebat (as applicable) from taking any steps to prevent Triesta from making an application to the Courts of the BVI to terminate or otherwise stay the liquidation of Digital Wings Limited ("DWL"), a BVI company, which owns a property in St. Vincent and the Grenadines ("SVG") called Ocean Breeze which forms part of the trust property.

[3] Tenebat, though served in accordance with the order of this Court dated 21st March 2018 did not acknowledge service and did not put in any evidence. Tenebat, however, in a letter dated 19th April 2018 to counsel for the Applicants and copied to the Court, advised that it was taking advice from its solicitors in the BVI since the governing law of the GB Trust was the BVI and that it intended to apply to the BVI Court for directions. Given those circumstances, Tenebat stated that it was not in a position to file an acknowledgement of service and reserved its rights in that regard.

Background

[4] Before turning to the issues raised in this second part of the application, it is necessary to set out a brief summary of the background to the litigation in order to appreciate the origin and nature of the dispute and the issues thrown up for determination. This case has many features, is highly complex, both factually and legally, and is attended by many volumes of evidence. Since, however, the main issue is the interim appointment of a trustee to replace Leman/Tenebat, and since, given the interlocutory nature of the application, I need only be satisfied that the Applicants have an arguable case, there is no need for the kind of deep and detailed examination of the facts that would be required at the hearing of the substantive claim.

[5] In their substantive claim, the Applicants seek certain relief in relation to two trusts, namely, the Global Business Trust ("GB Trust") and the SCEDart Trust. The events that have given rise to these applications are primarily concerned with the GB Trust and its principal underlying asset, Ocean Breeze, located on the island of Mustique in Saint Vincent and the Grenadines ("SVG").

[6] The GB Trust was settled by a Declaration of Trust dated 31st January 2001 with the law of Jersey as the governing law. By a deed dated 12th December 2005 the governing law of the GB Trust was changed to that of St. Kitts and Nevis, and Leman (a company incorporated in St. Kitts and Nevis) was appointed as the trustee. It is not in dispute that Jocelyn Bennett (Ms. Bennett) is the principal director of Leman and also of the corporate trust vehicles owned by Leman.

[7] At the heart of the litigation is a dispute that has arisen between Ms. Bennett and the Applicants over loans which it is said were lent by Leman to DWL, a company which according to BVI law (but not SVG law) was part of the GB Trust, pursuant to loan agreements and supplementary loan agreements of various dates between 2014 and 2016.

[8] The Applicants dispute the validity of those loan agreements, save for the first one entered into dated 26th May 2014. They say that a significant conflict has arisen as a result of attempts by Leman and Ms. Bennett, acting through her various corporate vehicles, to enforce these purported loans which were fraudulently backdated, were never made with DWL, and are unenforceable having been entered into in breach of trust.

[9] They further contend that, notwithstanding this conflict, Ms. Bennett, Leman and Tenebat have used their position of influence over the GB Trust to secure payment of the disputed loans, including attempting to enforce over trust assets, purporting to change the governing law of the GB Trust and seeking to appoint a liquidator over DWL. As such, they seek to remove Leman/Tenebat as trustee and have a new trustee appointed who will act in the interests of the beneficiaries of the GB Trust rather than in the interest of Leman.

[10] The Applicants wish to ensure that the dispute between the parties as to the validity and enforceability of the loans said to be due to Leman are the subject of judicial determination and that Ms. Bennett is not able to secure their payment, without such judicial determination, by abusing her position. They also wish to ensure that DWL which (according to BVI law but not SVG law) is owned by the GB Trust, and which was put into liquidation in December 2017, does not remain in liquidation and to ensure that its prime asset, Ocean Breeze, is not subject to a forced sale.

[11] The hearing and determination of this second part of the application takes on urgency given that the liquidator has applied to the SVG Court for recognition and that application is scheduled to be heard on 25th April 2018. The liquidator cannot take steps in relation to Ocean Breeze without first being recognized in SVG. There is no need at this interlocutory stage to set out why the Applicants say that DWL is governed by SVG law while Leman says it is governed by BVI law. The outcome of this second part of the applications may therefore have considerable

impact on the SVG proceedings. Since this decision is required overnight, the Court will have to be succinct in its treatment and analysis of the voluminous material that has been placed before it.

[12] Leman, for its part, contends that the original purpose of the loans was to enable DWL to discharge a mortgage on Ocean Breeze without which Ocean Breeze was at risk of forfeiture by a certain mortgagee. Later, this purpose was extended to enable the general financing of the Trusts (which would otherwise have been insufficient for its needs) and the lifestyle of the Applicants.

[13] Leman says that in fact it was merely an intermediary in the loans and that the money was raised from four outside lenders who lent money to Leman, which in turn provided the loans to DWL. This, they say, was known to the First and Second Applicants ("the Roussevs") at the time the loans were made and that DWL received the loan, which has been repaid in part. There is, however, an on-going dispute as to whether further sums remain due. Subsequently, the outside lenders assigned their rights to recover to another company, Tristar Management Limited ("Tristar").

[14] Leman states that in July 2017 it appointed a Belize company, Tenebat, as an additional trustee and then retired from the trusteeship. On 30th July 2017, Tenebat changed the governing law of the GB Trust to that of the BVI and on 15th August 2017 the Applicants made an application to amend their claim to add Tenebat and to claim various additional relief.

Issues

[15] The issues for the determination of the Court are as follows:

(1) Whether the Applicants have *locus standi* to bring the application;

(2) Whether the Court has jurisdiction to appoint/remove the trustee of the GB Trust;

(3) Whether the Court should remove/replace the current trustee of the GB Trust;

(4) Who should the Court appoint as a replacement trustee.

(5) Should the Court order disclosure of the documents set out in the Notice of Application.

Locus Standi

[16] The Respondents contend that the Applicants have no standing to bring the claim based on the following arguments – which I have sought to distill to their essence, hopefully without diluting the force of the submissions: (1) none of Applicants have ever been named beneficiaries either in the original Trust Deeds or thereafter; (2) the Letter of Wishes relied upon by the Applicants is non-binding, incomprehensible and appears to be referring to another trust deed; (3) even if the trustee wished to act on such a wish letter, they would first have had to exercise their powers to add them as beneficiaries which has not been done; (4) **Civil Procedure Rules** ("CPR") 67.2 (1) applies to claims for "the execution of a trust under the direction of the court" which this claim is not; (5) the reference in the CPR to "a person claiming to have a beneficial interest" cannot mean that just anybody can assert, on no arguable basis, that he or she is a beneficiary; (6) **Schmidt v Rosewood Trust** [2003] UKPC 26 is of limited assistance since that was a case about disclosure of trust documents and not one in which a non-beneficiary is seeking to remove a trustee; (7) references in correspondences from the trustee describing the applicants as beneficiaries amount merely to a mistaken belief by the trustee that they were beneficiaries and cannot constitute an accidental exercise of a power to add them as beneficiaries.

[17] The Applicants, in response, contend that they do have *locus standi* since a party may have standing to seek relief in relation to trusts: (1) under the inherent jurisdiction of the Court: **Schmidt v Rosewood Trust**; (2) under CPR 67.2; (3) furthermore, the Trust Deeds provide that the beneficiaries shall be those persons named in writing by the trustees and the First and Second Applicants have repeatedly been named in writing as beneficiaries by the trustee in correspondence with banks and have also received very substantial payments

from the trusts for their benefit; and (4) the letter of wishes is relevant to the exercise of the Court's discretion because it is indicating who was intended to be the primary beneficiaries.

Locus Standi under the CPR

[18] CPR Part 67.1 1b provides that:

> "*This Part deals with …claims to determine any question or grant any relief relating to the administration of the estate of a deceased person or the execution of a trust*".

This appears to be sufficiently wide in scope to encompass the case at bar, especially when read with CPR 67.2 (2) which provides that such claims may be brought by:

> "*any person having or claiming to have a beneficial interest in the estate of a deceased person or under a trust*".

[19] Mr. Cooper argued that CPR 67.1 should be interpreted as being applicable to non-contentious administration and trust claims. Claims involving substantial disputes of fact are dealt with on claim form, he submitted, in which there are pleadings, witness statements and the opportunity to cross-examine to resolve disputes of fact. Since proceedings under Part 67 are required to be brought by fixed date claim form, Mr. Cooper contends that Part 67 was therefore not designed to deal with claims involving dispute of facts best settled by claim form.

[20] While there is at first blush a certain attractiveness to this argument, on closer scrutiny it cannot, I think, hold prevailing force. Firstly, Part 67.1 is not at all limited in scope and includes any claim involving questions as to the execution of any trust. Secondly, even though the matter was commenced by fixed date claim form, form 2, which is the applicable form for fixed date claims, provides that a defendant may file a defence if served with a statement of claim or alternatively, file an affidavit in reply if served with an affidavit.

[21] Thirdly, the case management order of Williams J in these proceedings made on the 20th March 2017 directed that the affidavit evidence filed shall stand as evidence in chief of each witness and that such witness attend at the hearing of the claim for cross-examination. Fourthly, as pointed out by Mr. Gourgey, to succeed on his interim application he need only to establish that there is a dispute, not to prove any aspect of the dispute, and to demonstrate that there is a conflict of interest, therefore the matter for resolution of the court at this stage does not call for resolution of any dispute of fact. I think this must be right. The Respondent does not deny that there is dispute. In any event, the court has the general power under CPR Part 26.9 to rectify matters where there has been a procedural error and to direct that a matter commenced by way of fixed date claim continue as if begun by claim form.

[22] I therefore conclude that CPR Part 67.1 offers a clear path to the Applicants to bring this claim. They have *locus standi*. I will nevertheless go on to consider the other arguments put forward on locus standi since they formed a crucial part of the Respondent's opposition to the application.

Locus Standi under the Trust Deed

[23] Under the GB Trust deed, "Beneficiaries" means "all and any of the persons described in Part 3 of the Schedule" and "any other person who has been declared a Beneficiary under the terms of this Settlement". Part 3 of the Schedule under the rubric "Beneficiaries" states "Any charitable purpose" and "Any person who has been appointed by the Trustee in writing to be an additional Beneficiary under this Trust".

[24] Mr. Gourgey's argument, that the numerous correspondences from Leman to the bank describing the Roussevs as the beneficiaries of the GB Trust show that the Roussevs have been appointed in writing for the purposes of Part 3 of the Schedule, faces a formidable obstacle in clause 6 of the GB trust deed. Clause 6 is headed "Addition and Exclusion of Beneficiaries" and provides as follows:

> "6.1 The Trustees shall have power at any time or times during the Trust Period to add as Beneficiaries such person or class of persons whether or not ascertained (not being Excluded Persons) as they in their absolute discretion determine and any such addition shall be by written instrument revocable or irrevocable signed by the Trustees and shall:-
>
> (a) Name or describe the person or class of persons to be added; and
>
> (b) Specify the date (not being earlier than the date of the instrument but during the Trust Period) from which such person or class of persons shall be added."

[25] It is clear that the Roussevs have never been appointed beneficiaries in accordance with clause 6.1 of the trust deed. Mr. Cooper therefore submitted that, notwithstanding that significant sums were advanced by Leman to the Roussevs over the years, that had been done under the mistaken belief that the Roussevs were beneficiaries. Since they were never appointed beneficiaries, Mr. Cooper submitted, they have no standing to bring this claim and in fact Leman would be entitled to institute a claim for the recovery of sums advanced to them on that mistaken belief. This was a case in which there was a total failure by Leman to exercise its power to appoint additional beneficiaries. In such a case, Mr. Cooper, relying on **English v Keats,**[1] submitted that while equity could rectify the defective exercise of a power, it could not remedy a failure to exercise the power. **Breadner and others v Granville-Grossman and others**,[2] to somewhat similar effect, held that, while the court might undo something trustees had done, it would stop short of doing something they could have but had not done.

[26] While the Court feels the persuasive force of that argument, it is surprisingly that, given its importance to the Respondent's case, no where in the ten affidavits filed by Leman is there even an oblique reference to that mistake having been made or any explanation of how that mistake came to be made. The absence of any such evidence blunts the force of the argument. In any event, **Schmidt** seems to be clear authority that this court has an inherent jurisdiction to recognize the Applicants' standing to bring this claim.

---

[1] [2018] EWHC 637 (Ch).
[2] [2001] Ch 523.

Locus Standi under inherent jurisdiction of Court

[27] In **Schmidt**, the petitioner sought disclosure of documents relating to two settlements of which his late father had been a co-settlor and under which he claimed discretionary interests both in his own capacity and as the administrator of his father's estate. The respondent trustees opposed disclosure on the ground that the petitioner was not a beneficiary under the settlements and his father was never more than an object of a power and as such had no entitlement to trust documents or information. As in the instant case, Mr. Schmidt was never a named beneficiary and had never been added as a beneficiary. His father had however written to the trustee a letter of wishes indicating that in the event he were to die prior to the termination of the trust he would wish that his share of trust property be given to his son. In a letter of wishes dated 9th September 2009, Spas Roussev asked of Leman than it hold the trust fund for the benefit of his wife, Diliana; his daughter, Christa-Maria and his son, Evgeni.

[28] Notwithstanding that wish letters are non-binding, the Privy Council in **Schmidt**, in a judgment delivered by Lord Walker of Gestingthorpe, held as follows:

> "33. In relation to the Everest Trust the appellant in his personal capacity is no more than a possible object of the very wide power to add beneficiaries conferred by clause 3.3. The Everest letter provides clear evidence of Mr. Schmidt's wishes and confirms (as would in any case be fairly evident) that the appellant may have a particularly strong claim on the trustees' discretion. But neither the Everest letter nor any other document put in evidence had any further effect on his status as a possible beneficiary …
>
> 51. Their lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court's discretion…"

[29] It seems to me that although, **Schmidt** was a case involving disclosure of trust documents, that the finding – that the right to seek the court's intervention does not depend on entitlement to a fixed or transmissible beneficial interest and that the object of a mere power may also be entitled to protection from a court of equity – is a principle of broad application and is not limited to cases where disclosure of trust documents is sought. It is saying that the mere object of a power who has no proprietary right or any fixed or transmissible beneficial interest may nevertheless invoke the court's inherent and fundamental jurisdiction to supervise and, if appropriate, intervene in the administration of a trust, including a discretionary trust. It is clear that such a person may seek the protection of a court of equity. What relief he might get, if any, is a matter for the discretion of the court based on the circumstances of the case.

[30] Mr. Cooper observed that since Schmidt was decided in 2003, some fifteen years ago, there is no known case of a claim being brought to remove trustees by persons not within the defined class of persons. His argument was, I think, that this supported his contention that **Schmidt** should be viewed narrowly. His observation may be true but cannot prevail over what I consider to be the *ratio* of **Schmidt** as set out above.

[31] **Lewin on Trusts** (19th ed) at 29-304 contains the following note:

> "**Who can complain**
>
> *Powers of appointment and other dispositive powers*
>
> Where the power is a power of appointment, any of those interested in default of appointment are undoubtedly entitled to challenge the exercise of the power. Indeed, it has been said that the limitations in default of appointment are to be regarded as embodying the primary intentions of the donor, to be defeated only by a *bona fide* exercise of the power for the purpose for which it was given. In many modern discretionary settlements, especially offshore settlements, it is not accurate to say that the limitations in default embody the primary intentions of the donor, since the taker in default, usually a charity, is often included merely to ensure that the settlement is properly constituted and there is no expectation that the charity will benefit substantially, if at all. Nonetheless, those entitled in default of appointment always have standing to complain of a fraud on the

> power. But a person who has merely a *spes* or expectancy, as being prospective next-of-kin entitled in default of a valid appointment, has no standing to complain."

[32] Mr. Cooper relied on the last sentence of that note to posit that the Applicants in this case have a mere *spes* or expectancy and therefore have no standing to complain. I think that that sentence must be read in its proper context, that is, cases dealing with powers of appointment. I do not read it as being applicable to circumstances in which the object of a power invoke the equitable jurisdiction of the court for the exercise of its discretion.

[33] Any lingering doubt as to the scope and application of **Schmidt** might be dispelled by the authors of **Lewin on Trusts,** heavily relied on by both Mr. Cooper and Mr. Gourgey, which provides at 39-073:

> "An object of a discretionary trust or fiduciary power has no right to the present or future entitlement to trust income or capital, whether contingent or defeasible, unless and until the discretion is exercised in his favour. Such an object does, however, have a right to require the exercise of discretion in the case of discretionary trust and a right to require the consideration of an exercise of discretion in the case of a fiduciary power, and though that right gives the beneficiary no more than an expectation of benefit, it is an expectation which is protected by the right conferred by the beneficiary and to that extent is more than a mere hope. The traditional approach of the court was to draw a line between discretionary trusts and fiduciary powers. Objects of discretionary trusts had *locus standi* to bring an action to secure the trust fund and their rights in it, while objects of fiduciary powers had *locus standi* to seek removal of trustees who failed to give due consideration to an exercise of their fiduciary powers, but none to seek any other kind of relief, with the possible exception of a claim to enforce the exercise of the power in special circumstances. In our view, following the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd, locus standi* does not depend of the distinction between discretionary trusts and fiduciary powers. And objects of both discretionary trusts and fiduciary powers have *locus standi* to seek relief for the protection of their rights, though the court has a discretion to determine what relief, if any, should be granted."

Excluded Beneficiaries?

[34] The final argument to be addressed on the standing issue is whether the Roussevs were validly excluded as beneficiaries by Leman. By a resolution dated

19th October 2016 made in accordance with Leman's powers set out at clause 6.2 of the trust deed, the Roussevs were excluded as beneficiaries. Was this a valid exercise of Leman's powers?

[35] In the Bahamian High Court case of **Weber v First Alliance and Capital Invest**, Winder J found that the power changing the proper law and jurisdiction of the trust was exercised for the improper purpose of divesting the Bahamian court of jurisdiction and to confer a litigation advantage on the Defendant. In reaching that conclusion, Winder J stated as follows:

> [34] …Whilst the power to change the governing law exists it is a power which ought to be exercised with caution and only after due and careful consideration for the appropriate purposes …I find that the decision to amend the Trust Deed was not made in the best interest of the Trust but rather to confer an advantage to the Trustee as against the Plaintiff…
>
> [35] I am satisfied therefore that the exercise of the power to amend in the circumstances which it was exercised by the Defendant was not appropriate and amounts to fraud on the power in the sense described by Lord Parker in **Vatcher v Paul**.[3] Ultimately, the Trustee as donee of the limited power did not exercise it bona fide for the end designed by the Settlor, which requires that the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which it was conferred.
>
> [36] The purpose for which the proper law was changed had little to do with the trust and everything to do with the desire of the Defendant to take advantage of the Plaintiffs error in naming the wrong defendant and thereby avoid the possibility of the injunctive relief being properly made against it."

[36] The editors of **Lewin on Trusts** note that although the classic formulations of the doctrine of fraud on a power are concerned with special powers of appointment, it applied in principle to all other limited powers (Lewin 29-307, et seq.). The principle is that a trustee must exercise his powers solely in the interests of his beneficiaries, fairly and honestly for the purposes for which the power was given

[3] [1915] AC 372

and not so as to accomplish any ulterior purpose. If a decision is taken for reasons other than in the interests of the beneficiaries that exercise is void in equity.

[37] I find that there appears to be no good grounds for removing the Roussevs as beneficiaries since such removal was not consistent with the purpose for which the GB trust was established and was inconsistent with the manner in which the trust had been operated for years since its settlement. The reason put forward by Joseph Rowe, attorney for Leman in a letter dated 17th January 2017, that "trustee considers that the exclusion of your clients could be revoked when your clients desist from seeking to misappropriate Trust assets and once all issues are resolved" does not appear to be a good ground. The "misappropriation" referred to steps taken by the Roussevs to prevent Leman from enforcing the disputed loans against trust assets before such claims were determined by the Nevis Court.

[38] I accept that the exclusion does more to bolster Leman's standing argument and deny the Applicants the possibility of future distributions from the trust than it does to safeguard assets of the trust.

[39] In any event, having now taken the position that the Applicants were never named as beneficiaries, it is doubtful whether the argument that they were excluded as beneficiaries is now available to Leman. I did not understand Mr. Cooper to be relying on this argument at all in either his oral or written submissions. However, even if the Applicants were validly excluded as beneficiaries, the court acting in its inherent jurisdiction can still recognize their standing.

Should Trustee be Replaced: Conflict of Interest?

[40] It is not in dispute that the court has the jurisdiction in the appropriate case to remove and replace a trustee. It is accepted by counsel for both parties that if this court is satisfied that an arguable case is made out that Leman is in a conflict of interest then the court may remove Leman and appoint an interim trustee pending

the determination of the substantive claim and without delving into the facts surrounding the disputed loans.

[41] Mr. Cooper contends that there is no conflict of interest and that Leman simply acted in accordance with its powers under the trust deed which contained the following relevant powers:

> **"(7) Borrowing**
>
> Power to borrow money in connection with the trusts of this Settlement including power to borrow for the purpose of acquiring investments as additions to the Trust Fund.
>
> **(8) Charging of trust property**
>
> Power to mortgage charge pledge or hypothecate all or any part of the Trust Fund and to vary the terms of the property comprised in any such mortgage charge pledge or hypothecation to the like extent and in the same unrestricted manner as if the Trustees were its absolute owners.
>
> **(16) Guarantees**
>
> Power to guarantee the payment of money and the performance of obligations and to give indemnities to or on behalf of any person in any form the Trustees think fit if the Trustees in their discretion consider that the giving of such guarantee or indemnity is for the benefit of the Settlement or any Beneficiary."

[42] Acting under these powers, Leman contends that it (1) borrowed money from other trust clients of Ms. Bennett; (2) lent the money on the same terms to DWL; and (3) procured DWL to provide a guarantee of the loan that Leman had taken out.

[43] Leman further contends that it made no profit out of the loans but merely passed on the same terms as those on which it had itself borrowed; it did so solely for the benefit of the Applicants or the trust; and no one made any commissions. The self-dealing rule does not engage at all. There is no reason why Leman should not enforce the loans against DWL and why Tristar (which has taken out an assignment of the loans to Leman, together with DWL's guarantee of those loans) should not proceed against DWL under the guarantee. The reason why the shares in DWL were transferred to the GB Trust in the first place was to enable Leman to give security, backed by Ocean Breeze, to enable Leman to borrow money on behalf of the trust.

[44] Based on this, Leman concludes that it voluntarily took on a liability in its own name for the benefit of the trust at the request of the Roussevs and is entitled to feel aggrieved that the Applicants, having enjoyed the full benefit of the transaction, are now seeking to leave Leman at the mercy of its own creditors without recourse to the security that was given.

[45] While the trust deed undoubtedly grants to Leman the power to borrow money in connection with the trust, I do not read it as authorizing Leman as trustee to borrow money from itself for the trust and then enforce those loans where there is non-payment of the loan. It is entirely a different matter if Leman exercises its power to borrow from a bank or third party source. If a dispute arises, Leman can then exhibit the loan agreement between itself and the bank or other third party source. In this case, the only agreements exhibited are between Leman and DWL. Leman says that while it appears as lender, the reality is that it had actually borrowed the monies lent to DWL from other of its clients and passed these on, on the same terms, to DWL in its agreement with DWL. The difficulty is that no evidence of these loan agreements between Leman and its other clients is in evidence before this court. In the absence of such evidence and in circumstances where the Applicants (1) dispute the loans, (2) dispute that they were made to DWL (except for the first loan), (3) allege that they were not entered into with the fully informed consent of the beneficiaries and (4) claim never to have seen the alleged back to back loan agreements or told of the rates of interest, I am inclined to the view that an arguable case has been made out that Leman in in a conflict of interest.

[46] When to this is added the fact that a liquidator has been appointed and is seeking to be recognized in SVG in order to enforce against DWL and its principal asset, Ocean Breeze, the court feels satisfied that an arguable case of conflict of interest has been made out and that an interim trustee should be put in place to replace Leman.

[47] I note that clause 14.2 of the GB trust deed provides that: "*Any Trustee not being a sole trustee may on his own account enter into any transaction with the Trustees or relating to the Trust Fund without being liable to account for any profit gain or advantage which may b derived directly or indirectly by himself or any other person from such transaction*." This clause does not assist Leman in any way since it was a sole trustee.

[48] **Lewin on Trusts** notes at 13-072:

> "In one case, a trustee resolutely insisted on being continued in office, though his co-trustees were unwilling to act with him, and Lord Nottingham L.C. said that he liked not that a man should be ambitious of a trust when he could get nothing but trouble by it, and without any reflection on the conduct of the trustee, declared that he should meddle no further in the trust. A trustee pressed to resign will often do so on a similar considerations, though his *amour propre* may be wounded. And in *Letterstedt v Broers* Lord Lord Blackburn said:
>
> > "As soon as all questions of character are as far settled as the nature of the case admits, if it appears that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties to the Court below, for, so far as their lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position."

[48] In **Letterstedt v Boers**[4], Lord Blackburn stated that:

> "In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case."

[49] In **Letterstedt**, the Privy Council declined to find that the executors had been dishonest, but found that it was impossible to suppose that they could 'really have thought themselves entitled to the sums charged by them'. In those circumstances, it was ordered that they be removed. In **Brudenell-Bruce v Moore and Cotton**[5] it was held that a breakdown in relations between a trustee and a beneficiary justified the trustee's removal because there would not be "a sufficient appearance of fairness." Plainly in this case there is a breakdown in trust and confidence between the intended beneficiaries of the trust (the Roussev family) and Leman.

[50] In **Monty Financial Services Ltd. and Another v Delmo**,[6] the Supreme Court of Victoria held that proof of actual misconduct is not necessarily required for the removal of a trustee and that a conflict of interest and duty may suffice. Ashley J stated:

> "It is convenient to note, before going on, that the statement of principle in Letterstedt has been adopted in Australia: Miller v Cameron (1936) 54 C.L.R. 572. Latham CJ made it clear at 575 that misconduct need not necessarily be present. Starke J. at 579 emphasized that "the only guide is the welfare of the beneficiaries". Dixon J said this at 580-1:
>
> > 'The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is

[4] (1884) 9 App. Cas. 371.
[5] [2014] EWHC 3679 (Ch).
[6] [1996] 1 VR 65, VicSC

not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised.'"

Disposition

[51] Applying the legal principles to the facts of this case, I find that there is an arguable case that Leman is in a conflict of interest and should be replaced by another trustee, on an interim basis, until the final determination of this matter.

[52] This court records the Claimants (Applicants) undertaking to the court that if the court later finds that this order has caused loss to the Defendants (Respondents) and decides that the Defendants should be compensated for that loss, the Claimants will comply with any order the court may make. The following orders are therefore made:

IT IS ORDERED THAT

1. Until further order of the Court and without prejudice to the parties' respective position as to whether Leman or Tenebat is the current trustee of the Global Business Trust ("**the Trust**"):

    (1) Meridian Trust Company Limited ("Meridian") is appointed as the trustee of the Trust in place of Leman and/or Tenebat; and
    (2) the property of the Trust shall vest in Meridian;

2. Paragraph 1 of this Order is conditional upon:
    (1) Meridian notifying the Court within 21 days of the date hereof that it accepts the said appointment as trustee of the Trust.
    (2) The Court having approved the terms for remuneration of Meridian within 21 days of the date hereof.
    (3) Evgeni Roussev unconditionally surrendering within 21 days of the date hereof a lease ("**the Lease**") granted to him dated 5 February 2017 over the property known as Ocean Breeze (the validity of which lease is

disputed by Leman). The Claimants shall notify the Court and the Defendants in writing when such surrender has been effected, providing a copy of the same.

3. The Claimants and the Defendants shall promptly comply with all reasonable requests for information made by Meridian for the purposes of deciding whether to accept the said appointment.

4. Insofar as any item of trust property does not vest in Meridian by operation of paragraph 1 of this order, Leman and Tenebat shall within 7 days of paragraph 1 becoming unconditional execute all documents necessary for the:

   (1) vesting of the trust property in Meridian as trustee;

   (2) the transfer of legal ownership of the said property to Meridian.

5. Leman and Tenebat shall take no steps to:

   (1) Dispose of any assets of the Trusts to any party other than Meridian;

   (2) Otherwise deal with the assets of the Trusts;

   until the vesting of the said trust property in Meridian or further order in the meantime.

6. Within 14 days of paragraph 1 of this Order becoming unconditional, Leman and Tenebat shall each file and serve an affidavit sworn by one of its directors on (a) the Claimants' Legal Practitioners and (b) Meridian, in which the deponent shall identify each and every item of property held on the trusts of each of Trust and where, by whom and on what legal basis it is held;

7. Meridian shall not without prior order of the Court (whether through its control of GBS Trustees Ltd or otherwise) take any of the following steps:

(1) sell, charge, lease or otherwise dispose of the property known as Ocean Breeze or any interest in it;

(2) sell, charge or otherwise dispose of the shares in Digital Wings Limited ("DWL");

(3) intentionally doing anything to substantially reduce the value of the assets of the Trust or any of them other than the payment of costs and fees incurred in the administration of the trusts;

and the powers of Meridian as trustee shall be limited accordingly notwithstanding the powers expressly conferred on the trustee under the Trust Deed dated 3 January 2001;

8. The parties shall be at liberty to disclose this order, the judgment of the Court, to the courts of the BVI and of St Vincent and the Grenadines in connection with any claims or disputes arising relating to or connected with the Trust or its assets (including DWL and Ocean Breeze);

9. Costs are awarded to the Claimants to be assessed.

10. Liberty to Meridian to apply for an extension of the time periods under paragraphs 2(1) and 2(2) of this Order.

11. In the event that it appears that paragraph 1 of this Order will not become unconditional, the parties be at liberty to apply to the court for the appointment of a different trustee. In that event, the Court will decide the identity of the new trustee on paper without an oral hearing.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar