IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE ESTATE OF ISRAEL IGO PERRY DECEASED

CAUSE NO. FSD 205 of 2017 (NSJ)

BETWEEN:

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs

and

(1) LOPAG TRUST REG.
(2) PRIVATE EQUITY SERVICES (CURACAO) NV
(3) FIDUCIANA VERW ALTUNGSANST ALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON (7) RON GREENSPOON (8) MIA GREENSPOON
(CHILDREN, by Hagai Greenspoon, THEIR GUARDIAN AD LITUM)
(9) ADMINTRUST VERWALTUNGSANST ALT

and

(1) ANDREW CHILDE
(2) CHRISTOPHER ROWLAND

Third Parties

Before: **The Hon. Mr. Justice Segal**

Appearances: **Ms. Tracey Angus KC instructed by Guy Dilliway-Parry of Priestleys appeared on behalf of the Fifth Defendant**

Mr. Graeme McPherson KC instructed by Campbells LLP appeared on behalf of the Trustees

Heard: **1-2 December 2022**

Hearing transcript provided: **23 December 2022**

Draft judgment circulated: **12 January 2023**

Further hearing: **16 February 2023**

Judgment delivered: **23 February 2023**

HEADNOTE

Claim that trustees under a Liechtenstein trust had acted in breach of a proprietary injunction granted by this Court by entering into a litigation funding agreement – contempt of court – the trustees' rights of indemnity, lien and retention under Liechtenstein law – interpretation and effect of the litigation funding agreement – interpretation of the injunction – standard of proof to be satisfied on application for declaration that the trustees had acted in breach of the injunction

JUDGMENT

Introduction

1. On 23 March 2022 the Fifth Defendant issued a Notice of Motion (the ***NOM***) seeking (in paragraph 6 of the NOM) a declaration that the First and Ninth Defendants (the ***Trustees***) breached the terms of a proprietary injunction made by this Court on 17 October 2017 (as subsequently amended) (the ***Injunction)*** by entering into a financing (litigation funding) agreement (the ***LFA***) with a litigation funder (the ***Funder***) on 22 June 2018 and/or by entering into any variation thereof (the Trustees entered into a deed of variation of the LFA dated 26 March 2021(the ***DOV***)). The Fifth Defendant also sought (in paragraph 7 of the NOM) an order pursuant to GCR O. 52 that the Trustees be fined for contempt of Court and an order (in paragraph 8 of the NOM) appointing receivers over certain bank accounts held by the Trustees as trustees

of the Ypresto Trust and prohibiting them from borrowing further funds in that capacity pursuant to the LFA (and any existing or future variations thereof). The evidence in support of the NOM includes the Fifth Defendant's Eleventh Affidavit, Twelfth Affidavit (***D5-12***), Thirteenth Affidavit (***D5-13***) and Fourteenth Affidavit (***D5-14***).

2. The background to the NOM is discussed in my judgments dated 31 May 2022 (the ***May Judgment***), 8 July 2022 (the ***July Judgment***) and 12 August 2022 (the ***August Judgment***). Reference should also be made to an earlier ruling of mine dated 26 July 2018 in FSD 98 of 2018 (the ***Champerty Ruling***).

3. On 8 July 2022 I made an order (the ***July Order***) *inter alia* directing (in [11]) that a further hearing be listed in the NOM for the purpose of considering and disposing of the Fifth Defendant's application for a declaration in paragraph 6 of the NOM. I also directed that the remainder of the NOM should be adjourned until after the determination of the application for a declaration.

4. The hearing took place on 1-2 December 2022. Ms Angus KC appeared for the Fifth Defendant and Mr McPherson KC appeared for the Trustees. At the end of the hearing, I reserved judgment. I now set out my decision. I have decided, for the reasons set out below, that the Fifth Defendant's application for a declaration based on the original NOM and her claim as formulated at the hearing should be dismissed. I consider that she has failed to establish, either by reference to the criminal or civil standard of proof, that the Trustees breached the Injunction by entering into the LFA or the DOV. However, this dismissal of the claim based on the original NOM is, as I explain in the Postscript below, without prejudice to the Fifth Defendant's right to proceed with her application for a declaration that the Trustees have acted in breach of the Injunction based on her alternative claim, relating to certain loans made by the Ypresto Trust to and security held by the Ypresto Trust over the assets of the Citizen Trust, pursuant to the amendments she intends, and has permission, to make to the NOM.

Background

5. By the July Order the Trustees were ordered to produce to the Fifth Defendant for inspection a copy of those parts (the ***Relevant Terms***) of the LFA and DOV (a) that require or permit the Trustees to have or give the Funder recourse to (or which give the Trustees or the Funder rights over) assets of the Ypresto Trust for the payment of sums due under the LFA and DOV (and the terms which condition and regulate those rights of recourse or rights over the Ypresto Trust assets) including not only the main operative provisions but related and relevant definitions and terms and (b) on which the Trustees rely in support of their case that the Trustees and the Funder do not have and cannot exercise rights of recourse to those assets until after the Injunction has been discharged. It was common ground that the assets of the Ypresto Trust were subject to the Injunction.

6. Following the July Order, the Trustees served the 12th Affidavit of Ms Natasha Partos (***Partos 12***). Ms Partos is a senior associate with Campbells, the Trustees' Cayman attorneys. Partos 12 exhibited redacted copies of the LFA and DOV. It also contained in Annex A a table setting out a summary of the reasons why the various redactions had been made. After service of Partos 12, Campbells sent to the Fifth Defendant's Cayman attorneys (Priestleys) by letter dated 22 July 2022 a revised version of Annex A.

7. The Fifth Defendant challenged the justification for many of the redactions and sought an order that the Trustees be directed to produce for inspection unredacted parts of the LFA and DOV. In the August Judgment I dismissed that application but directed (in paragraph 57 of the August Judgment) that if the Trustees wished to rely on the explanations contained in the revised version of Annex A (as they clearly did) the explanations must be given on oath and put in evidence.

8. The Trustees subsequently served the 13th affidavit of Ms Partos (***Partos 13***) in which Ms Partos quoted paragraph 57 of the August Judgment, annexed the revised Annex A and said (in paragraph 3) that "*At Annex A of this affidavit I set out in evidence the further particulars that*

were contained in the Campbells letter of 22 July 2022." The Fifth Defendant challenged whether the Trustees had complied with the direction I made and had properly sworn to the explanations and matters set out in the revised Annex A. In my view, Partos 13 is sufficient for this purpose. Ms Partos has stated on oath that the explanations and information provided in Annex A to her affidavit are the evidence, and represent statements made by or on behalf, of the Trustees.

9. The Trustees also filed, after the August Judgment, an affidavit (***Rebholz 1***) sworn by Ms Helene Rebholz on 17 August 2022 (Ms Rebholz is a partner in Paragraph 7, the Trustees' Liechtenstein law firm); an affidavit (***Zechberger 1***) sworn by Mr Florian Zechberger also on 17 August 2022 (another partner in Paragraph 7) and a further affidavit sworn by Mr Boehler on 26 August 2022, his Seventh Affidavit (***Boehler 7***). Rebholz 1 and Zechberger 1 dealt with the serious concern I had raised in the May Judgment (at [67] and [69]) as to submissions made to the Liechtenstein court by the Trustees' Liechtenstein lawyers to the effect that the LFA had been submitted to this Court "*for approval*" because it "*had to be seen as a disposal of the assets of the Ypresto Trust*."

10. Ms Rebholz' s explanation was as follows:

> *"17. My statement about the LFA Application in the Submission reflected my understanding at the time of the proceedings before the Grand Court. I do not recall why I had this understanding at the time, which, as has now been explained to me, was factually wrong.*
>
> *18. I now understand from Mr Zechberger and other lawyers acting for the Trustees that the application before the Grand Court was nothing to do with the Proprietary Injunction but related to the issue of maintenance or champerty in the Cayman Islands. I am unfamiliar with this concept as there is no equivalent doctrine of maintenance or champerty in Liechtenstein.*
>
> *19. I do not now recall exactly how I came to make the statement regarding the nature of the LFA Application. I was not involved in the Cayman litigation, including the LFA Application, and I had not read the LFA Application before filing the Submission on 2 July 2018. I had limited knowledge of the Cayman proceedings, but I did know that there was a Proprietary Injunction. I believe that I concluded*

that any application before the Grand Court relating to funding must have been related to the Proprietary Injunction.

20. I do not recall sending the Submission to the Trustees' Cayman and UK legal teams for their review and no communications with those teams on that subject have been identified. I did not believe that the subject matter of the dispute was relevant to proceedings outside Liechtenstein and would not have sought their input.

21. The combination of these circumstances meant that the Trustees unintentionally made a factually incorrect statement to the Princely Court, as I have explained above."

11. Mr Zechberger said as follows:

"5. On 2 July 2018, this firm filed a submission to the Princely Court in Liechtenstein, proceedings 07 HG.2018.36, responding to an application brought by Ms Yael Perry, seeking Judicial supervision measures to be issued over the Ypresto Trust by the Princely Court in its capacity as the Supervisory Court for Liechtenstein Trusts (the "Submission"). I have read the affidavit of Ms Helene Rebholz, a partner at Paragraph 7, which explains the circumstances in which the Submission was made.

6. The mistake in the Submission regarding the nature of the LFA Application was only discovered when the Trustees were served with a copy of Ms Perry's Eleventh Affidavit on 23 March 2022 ("Yael 11"). Until Ms Perry's affidavit was served, I do not recall that the Submission was ever sent to the Trustees' Cayman and UK legal teams, nor that it was discussed with them. No communications with those teams on that subject have been identified.

7. After I reviewed Yael 11, I obtained an accurate, certified translation of the relevant part of the Submission - see [FZS/002] (a full certified translation is exhibited to Ms Rebholz's affidavit). Having reviewed what I could clearly see was a mistake, I took the view that as this error did not form any part of the Judge's reasoning in the final judgment, there was no need to correct this error before the Princely Court. The Trustees therefore did not take any further action regarding the Submission before the hearing of 28 April 2022.

8. Following the 28 April 2022 hearing and the concern expressed by Justice Segal, I wrote to the Princely Court on 29 April 2022 to inform the Judge that the Submission incorrectly set out the nature of the application before the Cayman Court [FZS/004].

9. On 13 June 2022 Ms Perry's Liechtenstein lawyers sent a letter to Judge Rosenberger (the presiding judge in proceedings 07 HG.2018.36) (the "13 June Letter") [FZS/005]. In the 13 June Letter (sent in connection to related proceedings between Global PTC as applicants and the Trustees and the Protector as respondents (file number 07 HG.2020.27)), Ms Perry informed Judge Rosenberger about the incorrect description of the application before the Cayman Court regarding the LFA Application and the statements made by Justice Segal in his judgment of 31 May 2022 regarding the Submission. The 13 June Letter claims that the Trustees' Submission intentionally misled the Princely Court and it relies on this allegation in support of Ms Perry's position that: (i) she should be granted standing as a party in these proceedings; an, (ii) Lopag and Admintrust should be removed as trustees of the Ypresto Trust.

10. For the avoidance of doubt, the Trustees deny the allegations raised in the 13 June Letter, which will be explained to the Princely Court in the Trustees' response.

11. The Princely Court will now therefore have the opportunity to consider the issue of the error made in the Submission regarding the nature of the LFA Application, to consider whether the judge was misled and to determine whether any further orders should be made.

12. I reiterate the apology set out in Ms Rebholz's affidavit regarding the mistaken description of the LFA Application before the Grand Court and also for any delay in bringing this to the attention of the Princely Court."

12. In Boehler 7, Mr Boehler, in accordance with the directions I had given in the August Judgment, gave further evidence regarding the correction he wished to make to paragraph 23 of his Sixth Affidavit and as to whether a security or proprietary interest had been granted by the Trustees over the assets of the Citizens Trust. In Boehler 7, he said as follows:

My Sixth Affidavit

7. At paragraph 23 of my Sixth Affidavit, I stated:

"One specific point I will make is as to the position of the Ypresto Trust under the LFA. Even if the Cayman claim fails and it is confirmed that the Ypresto Trust assets are properly trust assets, the Funder only obtains a direct right to assets of the Ypresto Trust in circumstances where there has been a prior termination of the LFA by the Funder (either as a new trustee has been appointed without consent or if there has been a material breach of the agreement)."

> *8. This evidence reflected my understanding (at the time that my Sixth Affidavit was filed) of how the relevant Termination provisions of the LFA operated, and was based upon discussions with lawyers advising the Trustees on this issue. I now understand from the Trustees' lawyers that paragraph 23 is incorrect, and that no such right of the Funder arises following Termination. I do not waive any privilege in the advice referred to above.*
>
> *The Citizen Assets*
>
> *9. At paragraph 54 of the Judgment, Segal J has directed the Trustees to provide a brief explanation as to whether any security or other proprietary interest has been granted to the Funder over the Citizen Assets. I confirm that no security or proprietary interest has been granted to the Funder over the Citizen Assets."*

13. In addition, on 26 October 2022, Ms Boulton, a partner in the Trustees' London solicitors, swore her Tenth Affidavit (***Boulton 10***). I discuss the matters dealt with in Boulton 10 below.

14. Evidence from Liechtenstein law experts was served by both parties. Dr Matthias Niedermüller was instructed by the Fifth Defendant. He is an attorney in private practice who has been registered with the Liechtenstein Bar Association since 2006. Dr Mathias Walch was instructed by the Trustees. He is an assistant professor at the Institute for Private Law at the University of Innsbruck.

The applicable burden of proof

15. As I noted at paragraphs 28 and 29 of the July Judgment, the direction in paragraph 4 of the July Order (that the only issue to be dealt with at the hearing was the Fifth Defendant's application for a declaration that the Trustees had breached the Injunction) was a case management direction intended to ensure that the NOM was conducted in a cost-effective manner. In the event that the Trustees were successful in resisting the claim that they had acted in breach of the Injunction, there would be no need for the parties to adduce evidence on or for the Court to consider the further issues of whether to order sanctions for contempt or grant the further relief sought in paragraph 8 of the NOM. The decision as to whether there had been a breach of the Injunction

was therefore part of and relevant to the application for sanctions for contempt made in paragraph 7 of the NOM and the other relief sought in paragraph 8 of the NOM.

16. At the hearing, after some debate on the point, Ms Angus KC and Mr McPherson KC accepted that I should decide whether the alleged breach of the Injunction had been established to the criminal standard of proof (beyond a reasonable doubt), as well as whether it had been established to the civil standard (on the balance of probabilities). They accepted that it was convenient (and in accordance with the overriding objective) for me to decide the breach issue by reference to both standards so that my decision would relate both to the application under [6] and to the application under [7] of the NOM. In order to succeed in her application under [7] of the NOM for an order under GCR O.52 the Fifth Defendant had to show that all elements of the contempt claim were made out to the criminal standard, including the allegation that there had been a breach of the Injunction.

17. There was no substantial dispute between the parties as to what was meant by proving a breach to the criminal standard. The breach must be clear (see the judgment of Proudman J in *FW Farnsworth v Lacy* [2013] EWHC 3487 (Ch) at [17]). In my view, this means that the conduct complained of must clearly be an act of the type which is prohibited by the Injunction. If there is an ambiguity or uncertainty as to the meaning of the terms used in the Injunction, the Court must determine the correct interpretation of those terms and whether the act complained of was clearly within the scope of the prohibition as so interpreted.

The terms of the Injunction

18. The relevant part of the Injunction provides as follows:

> *" ... the Defendants must not in any way ... (ii) dispose of, encumber, or deal with any dividend or distributions in respect of such Shares or any asset or property representing such dividend or distribution or the proceeds of sale of such asset or property ... "*

Paragraph 6 of the NOM

19. Paragraph 6 of the NOM is in the following terms (underlining added):

> *"6. a declaration that, by entering into a Financing Agreement made between (1) Admintrust Verwaltungs Anstalt and Lopag Trust reg. as trustees of The Lake Cauma Trust, The Heritage Trust, The Damerino Trust, The Citizen Trust, The Ypresto Trust, The Thalassoma Trust, The Liza Trust, The Mola Trust, The Diodon Trust, The Girella Trust and The Ronquilus Trust, (2) BGO Foundation and (3) Gillham LLC ("**the Financing Agreement**") and/or any variation thereto in their capacity as trustees of the Ypresto Trust the First and Ninth Defendants breached the Proprietary Injunction made by this Court on 17 October 2017 (as subsequently amended) ("**the Injunction**") whereby the First and Ninth Defendants were enjoined, inter alia, from disposing of, encumbering or dealing with any dividend or distributions in respect of any shares or shares in Britannia Holdings (2006) Ltd ("BHO6") or any asset or property representing such dividend or distribution;*

The terms of the LFA

20. I set out below the key provisions in the LFA (as redacted by the Trustees):

> *2. PARAMOUNTCY OF CLAIMANTS' SPECIAL STATUS*
>
> *2.1 The Parties acknowledge and agree that:*
>
> *2.1.1 each Trustee has entered into this Agreement solely in its capacity as a trustee of the Trusts; and*
>
> *2.1.2 nothing in this Agreement shall in any way be construed as conflicting, fettering or otherwise impinging upon the Claimants' duties under Liechtenstein law in their capacities as trustees of the Trusts.*
>
> *5. FINANCING*
>
> *5.1 Subject to and in accordance with the terms of this Agreement (including the Conditions Precedent), the Fund agrees to invest in the Proceedings the amounts set out in and subject to and in accordance with Schedule 1 (Particulars) and remainder of this Clause 5*

13. SUCCESS IN PROCEEDINGS

13.1 Subject to Clause 17.4, the Fund shall be entitled to the Resolution Amount if:

13.1.1 any Success occurs; and

13.1.2 payment of the Resolution Amount would not result in Control over Assets representing an aggregate market value lower than USD 10,000,000.

13.2 "Success" shall:

13.2.1 be deemed to occur where a Claimant has, achieves, receives and/or otherwise directly or indirectly assumes, obtains, maintains, recovers, (re)affirms, (reasserts) or (re)gains Control over Target Assets meeting the Target Asset Threshold; and

13.2.2 for the avoidance of doubt, include circumstances where:

(a) any receiver appointed in connection with the Proceedings (including any receiver appointed by a Court in the Cayman Islands in connection with the Proceedings) is granted any right of distribution over any Assets resulting in Control over such Target Assets; and/or

(b). the SFPF or any of its Affiliates or any other entity or vehicle designed to expropriate Target Assets from a Trust is unwound and such unwinding directly or indirectly results in Control over any Target Assets.

13.3 The Resolution Amount shall be calculated in accordance with Schedule 2 (Resolution Amount).

14. RESOLUTION AMOUNT

14.1 For the avoidance of doubt:

14.1.1 where there are successive instances of Success, the duty under Clause 13 to pay a Resolution Amount to the Fund shall apply cumulatively to each such instance; and

14.1.2 the Resolution Amount may be paid in tranches subject to and in accordance with the terms of this Agreement.

14.2 The Claimants shall make all payments of the Resolution Amountdue to the Fund under Clause 13 within five (5) Business Days of an instance of Success giving rise to such payment. Each such payment shall be made without set-off, deduction or counterclaim.

16. NO SUCCESS IN PROCEEDINGS

If none of the Claimants Succeeds and no Termination Notice has been served by the Fund, the Resolution Amount shall not be payable to the Fund.

17. TERMINATION

17.1 If: [redacted] then the Fund shall be entitled to serve notice on the Claimants terminating all of its obligations under Clause 5.1 to meet the Claimants' legal costs in accordance with this Agreement (a "Termination Notice").

17.2 [redacted]

17.3 If any Success occurs after a Termination Notice served pursuant to Clauses 17.1.3 or 17.1.4 takes effect in accordance with Clause 17.2.1:

17 .3 .1 the provisions of Clause 13 as to the payment of the Resolution Amount shall apply as if this Agreement had continued in force, save that:

(a) all references in Clause 13.2 to "Target Assets" shall for these purposes be deemed to include both Target Assets and Special Assets; and

(b). the Target Asset Threshold shall not apply (that is, the words "Target Assets meeting the Target Asset Threshold" in Clause 13.2.l shall be deemed to be replaced with the words "any Target Assets or Special Assets"); and [redacted]

17.4 If the Fund services a Termination Notice pursuant to Clauses 17.1.1 or 17.1.2, then without prejudice to any right to the Resolution Amount accrued under Clause 13.l prior to such Termination Notice taking effect in accordance with Clause 17.2.1.1), the Fund shall not be entitled to the Resolution Amount.

Schedule 1

FINANCING

The Funded Amount shall be used solely to pay for [redacted] ("Claimant Costs") [redacted] ("Advisory Costs") [Redacted]

The aggregate sum of all amounts actually paid by the Funder hereunder excluding ... the Transaction Costs shall constitute the "Funded Amount".

ADVANCEMENT OF CLAIMANT COSTS

... Claimant Costs shall be advanced by the Fund as follows: [redacted]

Schedule 2

RESOLUTION AMOUNT

1. *The Funded Amount shall be provided to or paid on behalf of the Claimants on a non-recourse basis, and the Resolution Amount shall be computed on the basis and paid in accordance with the remaining provisions of this Schedule 2.*

2. *The "Resolution Amount" shall be equal to the aggregate of:*

   (i). *the Transaction Costs [defined to cover the Funders' costs of entering into the LFA]; plus*

   (ii). *The Funded Amount; plus [redacted]*

DEFINED TERMS

*"**Assets**" shall mean the Excluded Assets, the Target Assets and the Special Assets.*

*"**Claimants**" shall mean the parties identified in the introductory paragraph of this Agreement, as further specified in Schedule 1 (Particulars), and in each case including successors, Representatives, and any Eligible Assignee, as well as any party connected or affiliated with the Claimants as the words "connected" and "affiliated" are defined in sections 249 and 435 of the Insolvency Act 1986 as the context and circumstances may suggest.*

> ***"Control"*** *shall mean any actual control, in each case whether direct or indirect, any legal, equitable, beneficial, signatory or other control exercisable by or on behalf of a Claimant (whether alone or together with another Claimant), including any rights of distribution.*
>
> ***"Excluded Assets"*** *shall mean the assets specified in paragraph 1 of Schedule 5 (Assets).*
>
> ***"Proceedings"*** *shall mean the enforcement proceedings of which particulars are set out in Schedule 1 (Particulars), as the same may be varied or enlarged by the addition of claims and/or additional patties from time to time, and shall include, but not by way of limitation: [redacted]*
>
> ***"Resolution Amount"*** *shall mean, in the event of Success, Settlement, judgment or other resolution of the Proceedings or any receipt of Proceeds, the amount payable to the Fund calculated in accordance with paragraph 2 of Schedule 2 (Resolution Amount) and payable in accordance with Clause 13.*
>
> ***"Special Assets"*** *shall mean the assets specified in paragraph 3 of Schedule 5 (Assets).*
>
> ***"Success"*** *shall have the meaning given in Clause 13.2.*
>
> ***"Target Asset Threshold"*** *shall mean Target Assets representing an aggregate market value equal to or greater than [redacted]*
>
> ***"Target Assets"*** *shall mean the assets specified in paragraph 2 of Schedule 5 (Assets) and shall:*
>
> *(a) in addition, include any and all assets over which a Claimant had Control at any time in its existence prior to, but not on the date of, this Agreement; and*
>
> *(b) for the avoidance of doubt, exclude the Excluded Assets and (other than in the case of Clause 17.3.1 (a)) the Special Assets.*

21. As regards the definition of the Resolution Amount, in the Champerty Ruling at [23(e)(i)] I outlined the elements of that definition as follows:

> *"Leading Counsel for the Trustee noted that this was not a case where profits of 40% of the proceeds was contemplated. He explained the way the sums payable to the Funder (defined as the Resolution Amount) were calculated under the Funding Agreement, including the profit element payable above the sums invested and advanced by the Funder. The calculation of the Resolution Amount was set out in Schedule 2 to the Funding Agreement and involved a complex*

> *formula. The key elements of it were as follows. The Funder would receive from the date of the Funding Agreement interest on the total amount of its financial commitment, being the maximum amount that it had agreed to invest for the purpose of paying relevant costs relating to the Proceedings (which was a defined term). Interest ceased to be payable once the funds were disbursed and used to pay costs. In addition the Funder was entitled to recover the sums it had invested plus a profit element."*

22. I also dealt briefly in the Champerty Ruling at [23(b)] with the operation of the termination provisions:

> *"[Counsel to the Trustee] noted that the right to terminate was limited (and was not a right to terminate at will) and followed the approach set out in paragraph 11 of the UK Code of Conduct for Litigation Funders established by the Association of Litigation Funders in the UK (a self-regulatory but unofficial body set up by litigation funders) of which the Funder is a founding member (save that the Funder was also given a right to terminate the Funding Agreement if a new trustee was appointed without the Funder's prior written consent). During the hearing I noted that the right to terminate referred to a material breach of the Funding Agreement by "a Claimant" and that the definition of "Claimants" included not only the Trustee but also trustees of the Other Trusts. This meant that the funding available to the Trustee could be terminated even if the Trustee was not itself in breach."*

23. In D5-14, the Fifth Defendant explained that she had been given further details of the LFA by the third trustee of the Ypresto Trust, Global PTC (***Global***). Global had informed her that the LFA contained a provision to the effect that sums owed by the Trustees *qua* trustees of one trust to trustees of another trust were only payable after the Trustees had paid the Funder in full what it was owed under the LFA. I discuss further below the Fifth Defendant's claim that this evidence established a separate breach of the Injunction.

24. The Fifth Defendant also exhibited to D5-13 a copy of a memorandum dated 12 May 2020 from the Trustees' London solicitors, Byrne and Partners LLP (the ***Byrne Memorandum***). While her right to do so was challenged by the Trustees no application has been made to exclude the memorandum from the evidence. I would note that it deals with the termination provisions as follows:

"Under clause 17.3.1(a) the Special Assets only become available to [the Funder] in circumstances where:

(1) [the Funder] legitimately terminated the LFA for a material breach by the Trustees (or there was a change of trustee unsanctioned by [the Funder]); and
(2) Success occurs after the termination Notice served in respect of a material breach."

25. In addition, the Fifth Defendant had also exhibited to her Tenth Affidavit a copy of a letter dated 26 May 2021 from Withers, the English solicitors, to their client Solid Virgin Islands Limited (the ***Withers Letter***) which confirmed that Withers had examined a copy of the LFA and which summarised some of its terms. The Withers Letter, for example, identified the amount of the funding to be advanced by the Funder, the identity of the Funder, the amount of the Target Asset Threshold, the full list of the Special Assets and their value (including the value of the Ypresto Trust assets), the value of the Excluded Assets, summarised the terms of clause 17 of the LFA and the terms of the DOV. The Trustees once again challenged the Fifth Defendant's right to have a copy of and to put in evidence the Withers Letter but have not applied to exclude it. I have considered and make brief reference to the Withers Letter where it contains a summary of relevant terms of the LFA or DOV although in this judgment I have omitted references to financial information which in my view does not need to be included for the purpose of showing my reasoning. I have treated the matters disclosed and dealt with in the Withers Letter with some caution and adjusted the weight to be given to those matters since they have not been independently supported by witness evidence.

The terms of the DOV

26. The DOV was dated 26 March 2021. They most important provisions of the DOV for the purpose of the NOM are clauses 6 and 7. They were in the following terms:

6. SPECIAL PROVISIONS REGARDING CAYMAN ASSETS

(a) The Parties acknowledge and agree that:

(i) the Assets that are the subject of the Cayman Proceedings (including inter alia the accounts1ts held by Britannia Holdings (2006) Ltd. and Britannia Guarantee National Insurance Company, each as set out in Paragraph 2 of Schedule 5 to the Financing Agreement) (the "Cayman Assets") remain as at the date of this Agreement subject to a freezing injunction issued by the Grand Court of the Cayman Islands (the "Grand Court") in the Cayman Proceedings on 17 October 2017 (the "Freezing Injunction");

(ii) the Cayman Assets are subject to proprietary claims in the Cayman Proceedings as at the date of this Agreement;

(iii) if there is a discharge of the Freezing Injunction by the Grand Court, the Cayman Islands Court of Appeal (the "Appeal Court") or the Judicial Committee of the Privy Council (the "Privy Council") before the final determination of the Cayman Proceedings (including pursuant to any appeal to the Appeal Court and/or the Privy Council) (a "Final Determination" and a "Discharge"), then the Claimants shall take all reasonable steps promptly to grant, or procure the grant of, one or more pledges in respect of the ***Target Assets which are also*** *Cayman Assets on terms substantially similar to those of the [redacted] (subject to Clause 7(i)) (the "Cayman Pledges"); and*

(iv) provided the Claimants comply, and remain in compliance with, Clause 6(a)(iii), the Resolution Amount shall not be payable by the Claimants in respect of the Cayman Assets as a result of a Discharge except to the extent that a Final Determination upholds the Trustees' rights in the Cayman Assets.

7. OTHER

(a) With effect from the date of this Agreement and subject to Clause 9, the Financing Agreement shall be varied as set out in Clauses 7(b) to (g).

……

Proceedings

> *(d) The contents of Schedule 9 of the Financing Agreement (Proceedings) shall be replaced with updated schedule of Proceedings set out in Appendix 4 [appendix 4 redacted]*
>
> *.....*
> *No prior breach:*
>
> *(h). Each Party acknowledges and agrees that neither any Original Claimant nor the Fund has committed a breach of the Financing Agreement prior to the date of this Agreement or - to the extent that a breach has occurred – waives any and all rights hereunder in respect of any such breach.*
>
> *Discharge of Cayman Pledges:*
>
> *(i). the terms of each Cayman Pledge made pursuant to clause 6 of this Agreement shall provide that such Cayman Pledge shall cease to have effect over the Cayman Assets in respect of which it has been provided if the Final Determination of the Cayman Proceedings is such that no ~~Claimant~~ **Trust** is held to have any ownership interest in any of the share capital of Britannia Holdings (2006) Ltd.*

27. The words in bold and struck through in clauses 6(a)(iii) and 7(i) were, according to the Trustees, intended to be included and were agreed with the Funder at the time that the DOV was executed but were omitted in error. Ms Boulton in Boulton 10 (which erroneously referred to clause 6(a)(i)) exhibited a letter from her firm to the Funder dated 20 October 2022 (which was countersigned by the Funder on 21 October 2022) in which the error and the corrections were explained. The relevant parts of Boulton 10 and the 20 October letter (the ***20 October Letter***) are as follows:

> *Boulton 10*
>
> *"10. In early October 2022, during preparation for the forthcoming hearing before the Grand Court of Cayman on 1-2 December 2022, it was identified that although the amendments had been agreed during contractual negotiations, they had not been included in the executed version of the DOV. The executed version of the DOV did not therefore reflect the agreement between the parties and so needed to be rectified.*
>
> *11. To ensure no ambiguity or misunderstanding, PCB Byrne, on behalf of the trustees, raised the issue with the Funder. The Funder agreed that the DOV needed to be rectified. My firm and the Funder therefore confirmed in correspondence that the*

DOV did not reflect the agreement reached between the parties and confirmed that clauses 6(a)(i) and 7(i) should be rectified. This was by way of letter dated 20 October 2022, countersigned by the Funder on 21 October 2022."

The 20 October Letter

"During the contractual negotiations of the DOV, two amendments were proposed by the Trustees both of which were accepted by [the Funder] (the "Amendments') namely:

Clause 6(a)(iii):

"if there is a discharge of the Freezing Injunction by the Grand Court, the Cayman Islands Court of Appeal (the "Appeal Court') or the Judicial Committee of the Privy Council (the "Privy Council") before the final determination of the Cayman Proceedings (including pursuant to any appeal to the Appeal Court and/ or the Privy Council) (a "Final Determination" and a "Discharge'), then the Claimants shall take all reasonable steps promptly to grant, or procure the grant of, one or more pledges in respect of the Target Assets which are also Cayman Assets on terms substantially similar to those of the BGO Pledge (subject to clause 7(i)) (the "Cayman Pledges')"

Clause 7(i)

"The terms of each Cayman Pledge made pursuant to clause 6 of this Agreement shall provide that such Cayman Pledge shall cease to have effect over the Cayman Assets in respect of which it has been provided if the Final Determination of the Cayman Proceedings is such that no Trust is held to have any ownership interest in any of the share capital of Britannia Holdings (2006) Ltd."

In error, the version of the DOV executed by the parties did not include these agreed Amendments.

Please confirm by countersigning this letter that these Amendments were agreed and that this letter formally varies the written terms of the DOV.

We also confirm that it has always been the understanding of the Trustees that unless and until the Freezing Injunction (as defined in Clause 6(a)(i) of the DOV) is discharged, none of those parties have any right to any asset that is subject to the Freezing Injunction (including the assets of the Ypresto Trust). Please confirm by countersigning this letter that this is the understanding of [the Funder]."

28. The Withers Letter set out a summary of the purpose and effect of the DOV as follows:

"6.2 The intention of the parties to the Draft Deed of Variation is set out at Recital (E) of the Draft Deed of Variation. This provides that the Parties are willing:

(a) To increase the Claimant Costs to be made available under the Committed Capital by USD$10,000,000 to an aggregate maximum amount of USD$[redacted by me];

(b) To vary the calculation of the Resolution Amount in respect of the multiple payable on the portion of the Funded Amount constituting premia expended in respect of any ATE Insurance Policy - that is, to vary such multiple from 2x (two times) to 1.8x (one point eight times);

(c) To make provision for the despatch of Quarterly Updates (as defined in Clause 5(a)) by the Claimants to the Protector to assist the Parties in staying regularly apprised as to the utilisation of the Committed Capital and the quantum of the Resolution Amount: and

(d). To make special provision in respect of the Cayman Assets following a Discharge and prior to Final Determination of the Cayman Proceedings: that is, concerning the grant of the Cayman Pledges and the payment of the Resolution Amount."

The Liechtenstein law evidence

29. Both experts filed short written reports addressing the following six questions (which the parties had agreed to be the relevant issues governed by Liechtenstein law arising on the application):

(a) Question 1: As regards liabilities to the Funder owing under the LFA and/or DOV, are the Trustees entitled to have access or recourse to trust assets (or only to their own personal assets) for the purpose of discharging such liabilities? How if at all does (a) the Trustees' execution of the LFA and/or the DOV (b) the incurring of liabilities to the Funder under the LFA and/or DOV or (c) such liabilities becoming due and payable, affect the trust assets?

(b). Question 2: 'Does the Trustees' right of indemnity under Clause 14 of the Ypresto Trust Deed/Article 920(1) of the Persons and Companies Act ['PCA'] apply in respect of past, contingent, and future liabilities?

(c). Question 3: Assuming that the Trustees have a right to access or recourse to trust assets for the purpose of discharging liabilities under the LFA and/or DOV, is that right proprietary in the sense that the Trustees have an interest in the trust assets (if so, when does that interest arise – is it from the time at which the LFA and/or DOV is signed, when the liability under the LFA and/or DOV is incurred or when the liability becomes due and payable?), which interest is, or is not, capable of being binding on third parties who acquire or obtain security or other interest in the trust assets?

(d). Question 4: Does the Trustees' right of indemnity extend to any future or contingent liability such that the Trustees are entitled to retain the trust assets until any future or contingent liability has accrued or been discharged?

(e). Question 5: Does the lien conferred upon the Trustees by Clause 14.4 of the Ypresto Trust Deed provide the Trustees with a security or proprietary interest in the Ypresto Trust fund?'

(f). Question 6: What effect does the Proprietary Injunction have on any rights of the Trustees or the Funder over the assets of the Ypresto Trust in the event of success being achieved?

30. Clause 14 of the Ypresto Deed of Settlement (the ***Trust Deed***) (which is governed by Liechtenstein law) provides as follows:

> "….
>
> *14.2 The Trustees shall be entitled to charge the Trust Fund with all expenses of whatsoever nature incurred in respect of the creation operation and continuance of this Settlement.*

14.3 *The Trustees shall be fully indemnified for any liability they may be exposed to due to their engagement and acting as Trustees of the Settlement.*

14.4 *The Trustees shall be granted a lien upon the Trust Fund in respect of all sums to which they are entitled under this Clause."*

31. The following articles in the Liechtenstein Persons and Companies Act (***PCA***) are relevant and were referred to by the experts:

Article 910

The terms of the trust instrument…. shall be authoritative in the first place for the interpretation of the trust relationship between settlor, trustee and the beneficiaries. Where the terms of such a document are in conflict with mandatory regulations or the public order of the country, they shall be interpreted so as to be in accord therewith, insofar as the law or the document does not determine otherwise. Where the terms of the trust relationship between the participants and third parties cannot be determined from the trust instrument, the regulations of this chapter shall apply …. The interpretation and application of all regulations concerning the trust enterprise and all other trust provisions shall ensue pursuant to the principles of equity.

Article 915

In injunction proceedings or in the case of levy of execution and writ against or bankruptcy of the trustee, the trust property shall be regarded as separate property and the trustee's creditors shall therefore have no right to claim against the trust property where the trustee's remuneration and claims for compensation are not involved.

Article 916

The Trustee is personally liable without limitation, jointly and severally with possible co-trustees, for the debts incurred by him on behalf of the trust insofar as they cannot be met out of the trust property…"

Article 920 (1)

The Trustee is entitled to claim reimbursement for all necessary expenses and costs incurred by the trustee in the interest of the trust. The trustee is also entitled to be

indemnified against damage resulting from the trust property, to be released from obligations entered into on behalf of the trust or otherwise incurred and, furthermore, to appropriate remuneration for his services, insofar as the trust instrument or other legal relationship does not determine otherwise.
Article 921(2):

…… [The Trustee] may be reimbursed from the trust property in preference to the beneficiaries, and for this he may also set off the claims he may have against the settlor or beneficiary and may assert a lien on the assets of the trust property.

32. Dr Niedermüller's answer to question 1 was as follows (underlining added):

"The Trustees are entitled by law and according to the Trust Deed to have access or direct recourse to the trust assets of the Trust for the purpose of discharging liabilities under the LFA and/or DOV.

Answer Question 1 a): As soon as the LFA and the DOV had been executed and the Funder had provided funding pursuant to the LFA and DOV, the Trustees incurred contingent liabilities to the Funder and the trust assets of the Trust became affected by the Trustees' rights and lien arising under Art. 14 of the Trust Deed and Art. 920 PCA.

Answer Question 1 b): The incurring of liabilities towards the Funder under the LFA and the DOV such as by using the funding affects the trust assets of the Trust as according to the provisions of the Trust Deed (Art 14.4.) the Trustees have a lien on the trust assets to secure all of their liabilities entered into on behalf of the Trust. When the Funder provides funding for litigations of the Trustees, this creates contingent liabilities on the part of the Trustees against the Funder for the Resolution Amount. The Trustees have a right to be indemnified from the trust assets and a lien over the trust assets to the extent of this contingent liability.

Answer Question 1 c): When the contingent liabilities to the Funder for the payment of the Resolution Amount become due, this also affects the trust assets in the sense that the Trustees can then use the trust assets of the Trust to effect payment of the Resolution Amount.
Note: Even if the Trustees were prohibited from making a payment from the assets of the Trust because of the Injunction, the Funder to my opinion would still be able to enforce his claims for payment of the Resolution Amount directly into the entire trust assets of the Trust by applying to a court for seizure or attachment of the trust assets based on the claims the Funder has against the Trust under the LFA and DOV. Also, the Funder could obtain a freezing injunction in Liechtenstein on the trust assets in case he could, by showing that he has a contingent claim ant the payment of this claim is endangered.

33. Dr Niedermüller's answer to question 2 was as follows (underlining added):

> *"We conclude that the right of the Trustee for indemnity under Art. 14 of the Trust Deed and Art. 920 PCA applies to past and contingent liabilities of the Trustee to the extent that these liabilities have [been] incurred due to the engagement and acting as Trustees of the Trust. It also applies to liabilities that have been incurred by the Trustees but are to be performed in the future.*
>
> *Future liabilities that are not either liabilities incurred but to be performed in the future or contingent liabilities are not covered by the indemnity."*

34. Dr Niedermüller's answer to question 3 was as follows (underlining added):

> *"…the Trustee by definition has a proprietary right on the entire trust assets in relation to third parties.*
>
> *As stated above, the Trustees have a right of recourse to the assets of the Trust as soon as a contingent liability to the Funder was incurred under the LFA and/or DOV. The Trustees incurred a contingent liability when funds were provided to the Trustees by the Funder under the LFA and/or DOV…. the Trustees have a lien on the trust assets securing their right of recourse to the Trust assets.*
>
> *If a beneficiary or a creditor of the Trust would try to assert claims against the trust assets the Trustees could oppose that they have a lien on the trust assets that serves to secure the existing and contingent liabilities of the Trustees to the Funder and has priority against the claims of a beneficiary or creditor of the Trust. This lien would give the Trustees priority against claims of a beneficiary to the Trust assets. It is not yet clarified by jurisprudence the extent to which such lien could validly have priority against claims of other creditors of the Trust and this would have to be decided on a case-by-case basis. However generally all claims that already represent an economic value can be secured by a lien including conditional or aged claims and thus in my view the lien would give the Trustees priority against such claims of creditors of the Trust. A different situation would only appear if the Trustees have given a creditor security that has express priority over their lien."*

35. Dr Niedermüller's answer to question 6 was as follows (underlining added):

> *"Generally, the Injunction is not enforceable against the Trustees in Liechtenstein. A violation of the Injunction could only be enforced in the Cayman Islands and possibly other jurisdictions recognizing the Injunction. The Funder to our understanding is not bound by the Injunction. In the case of "success" whilst the Inunction is still in place the Trustees*

would face conflicting duties towards the Cayman court based on the Injunction and towards the Funder. Despite the Injunction being in place the Funder would be able to obtain a lien and enforce his claims directly into the entire trust assets of the Trust, also including the assets which are covered by the Injunction."

36. Dr Walch said (at [6] of his report) that, by way of a brief summary of his conclusions that in his opinion "*a. The Trustees did not encumber the assets of the Ypresto Trust (the 'Trust Assets') with a right of indemnity or a lien when they entered into the financing agreement dated 22 June 2018 (the 'Financing Agreement' or 'LFA') [and] b. Any payments arising from the Financing Agreement would be made directly from the Trust Assets. Therefore, in all likelihood, the Trustees will never even receive a right of reimbursement against the Trust Assets at all."* His answer to question 1 was as follows (underlining added):

> *"7. Under Liechtenstein Law a trust has no separate legal personality. Hence, the contracting party of the LFA is not the Trust but the Trustees expressly in their capacity as trustees of the Ypresto Trust. In circumstances where the Trustees have contracted as trustees of the Trust they can either:*
>
> *a. meet the liabilities under the LFA from the assets of the Trust; or*
> *b. meet the liabilities from their private assets and then claim reimbursement of their expenses from the Trust Assets.*
>
> *8. In most cases the trustee will simply meet the liabilities of the trust directly from the trust assets.*
>
> *9. If the trustee does not perform its obligations, the counterparty may sue. If the trustee fails to pay after a judgment, the creditor may seize trust assets by way of execution. However, ordinarily, the creditor has no recourse against the personal assets of the trustee…*
>
> *10. This was confirmed by the Supreme Court in case 4.11.2011, 01 CG.2010.181, LES 2012, 22:*
> *"According to Art 916 (I) PGR, the Trustee is primarily liable with the Trust Assets for the debts of the Trust incurred by him "at the expense of the Trust".*
>
> *11. The mere fact of entering into the Financing Agreement itself does not have any immediate effect on the Trust Assets. The Trust Assets would only be affected in the event that a liability becomes payable under the Financing Agreement and the Trustees either pay that liability from the Trust Assets voluntarily or the Trust Assets are seized by way of execution by order of the Liechtenstein courts.*

> 12. *Taking into account the Notice of Motion, dated March 23, 2022, which expressly refers to the right of indemnity, I would like to clarify that the question of whether trustees can access Trust Assets to satisfy their reimbursement or indemnity claim arises a priori only if they have previously "sacrificed" private assets. From the perspective of Liechtenstein law the question of whether the Trustee has a right of reimbursement or indemnity is hypothetical and not crucial. If the Trust Assets are sufficient to meet the claims under the financing agreement, they will be met from the Trust Assets."*

37. Dr Walch's answer to question 2 was as follows (underlining added):

> *"14. The Trustees' right of indemnity whether under clause 14 of the Ypresto trust deed or Article 920(1) of the Persons and Companies Act only applies in respect of costs and expenses which have actually been paid by the Trustees on behalf of the Trust. Since entering into a financing agreement does not affect the private assets of the Trustees in any way it does not give rise to any right of reimbursement or indemnity of the Trustees.*
>
> *15. [Article 920 of the LPA].*
>
> *16. The trustee's right of reimbursement arises only in respect of expenses which the trustee has actually already paid out of their own funds on behalf of the trust. This was explained by the Court of Appeal in case 10.11.1977, 03 C 150/75, ELG 1973, 188: "Art 920 PGR does not offer any room for it, since it unambiguously speaks only of the right of the Trustee to reimbursement of all expenses etc. that have become necessary. With "compensation" - the literal meaning leaves no doubt about this - only an expense can be meant which the entitled person [= Trustee] has already incurred."*

38. Dr Walch's answer to question 3 was as follows (underlining added):

> *"20 ….the Trustees' right of indemnity with respect to the Trust Assets only arises once they have incurred and actually paid expenses out of their personal assets on behalf of the trust.*
>
> *21. The Trustee has no property in the Trust Assets. Instead, he has a right to manage the Trust Assets like an owner (in German: dingliches Verwaltungsrecht).*

22. *With respect to right of remuneration, reimbursement and indemnity, Art 921 (2) of the Persons and Companies Law grants the Trustees priority over the beneficiaries with respect to the trust property and a kind of lien on the Trust Assets as follows:*

> *"He may be reimbursed from the trust property in preference to the beneficiaries and for this he may set off the claims he may have against the settlor or beneficiary and may assert a lien on the assets of the trust property"*

23. *I would describe this "lien" more accurately as a limited right of retention. The Trustees are not required to hand over Trust Assets to the beneficiaries until its rights to reimbursement (if any) have been satisfied. However, this provision applies only to beneficiaries and is not a "true" lien.*

24. *Under Liechtenstein law the right of remuneration, reimbursement and indemnity according to clause 14 of the Ypresto trust deed and Art 920 (1) of the Persons and Companies Act would be qualified not as a proprietary right but as a personal right, this because:*

    a. *The trustee ranks ahead of the beneficiaries only and has the same legal position as other creditors. Especially in the event of bankruptcy of the trust (Art 916 [4] of the Persons and Companies Act), he receives only the same quota as other creditors.*

    b. *Like other creditors, the trustee may sue the trust for its claims for reimbursement or indemnity. This is one of the few exceptions in which a trust has legal capacity. This also shows that the trustee of a Liechtenstein Trust is an ordinary creditor without any property rights when it comes to the right of indemnity.*

25. *… a Liechtenstein court would interpret the indemnity provisions of clause 14 consistently with the provisions of Art 920 of the Persons and Companies Act. There is no indication that the clause is to be understood more broadly or goes further than the indemnity under Art 920 of the Persons and Companies Act. For that reason, clause 14 does not grant any wider security than Art 920 of the Persons and Companies Act."*

39. Dr Walch's answer to question 6 was as follows (underlining added):

> *"30. The Proprietary Injunction would not be recognized or enforced by the Liechtenstein courts. In Liechtenstein, foreign court rulings are generally not recognized. There are only a few exceptions, for example judgements from Austria*

or Switzerland, which are not applicable in the case at hand. Measures of interim relief are not recognized at all. Supreme Court in case 4.5.2018, 06 CG.2017.406, LES 2018, 138: "For the sake of completeness, it should be mentioned that mutual recognition of interim measures injunctions is not even provided for with states with which enforcement conventions have been concluded".

31. Accordingly, from the perspective of Liechtenstein law it does not have any effect on the rights of the Trustees or the Funder with respect to the assets of the Trust. If a liability of the Funder to the Trustee was to arise under the Financing Agreement then the Liechtenstein courts would likely order that that liability be met from the Trust Assets in line with the principles which I have outlined above."

The Fifth Defendant's submissions

40. The Fifth Defendant submitted that under Liechtenstein law all trustees have a statutory right (under the PCA) of indemnity and a statutory lien securing that indemnity. In addition, in this case, the Ypresto Trustees have rights by agreement under clause 14 of the Trust Deed which rights are wider than those given to trustees by the PCA and also include a lien.

41. Under English and Cayman law, a trustee's rights under his/her indemnity and lien in respect of liabilities, costs and expenses incurred by him/her as trustee include:

(a) a right to discharge the relevant liabilities from his own resources and then reimburse himself (the ***right to discharge and reimburse***).

(b) a right to discharge the relevant liabilities from the trust property so as to exonerate himself (the ***right to exonerate***).

(c) a right to retain trust assets or income as against beneficiaries until he has been indemnified as regards present, contingent, and future relevant liabilities for which he may become accountable (the ***right to retain***).

42. Dr Niedermüller and Dr Walch agreed that a trustee under Liechtenstein law also had each of these rights.

43. In addition, as was made clear by article 915 of the PCA, a creditor of a trustee if not paid could obtain a judgment against the trustee and then enforce the judgment by execution against the trust assets.

44. In this case, the Trustees were liable under the LFA to pay the Resolution Amount (from the date on which the LFA was entered into). It did not matter that their liability was expressed to be non-recourse. This simply meant that a creditor could only execute a judgment against trust assets and not against the Trustees' personal assets. The liability was to be characterised as contingent until the conditions which had to be satisfied before the Resolution Amount became due and payable occurred. The Fifth Defendant noted that the accounts for the Ypresto Trust for the period from 1 January 2020 to 31 December 2020 recorded the Ypresto Trustees' liability under the LFA as a contingent liability. The Trustees were liable jointly and severally with BGO (as Claimants) so that if BGO recovered Target Assets and the other conditions to the obligation to pay the Resolution Amount were satisfied, the Trustees were also and concurrently liable.

45. Accordingly, the Fifth Defendant submitted, from the time when the Trustees entered into the LFA, (a) they became entitled to apply the Ypresto Trust assets to discharge the liability incurred under the LFA, including a liability to pay the Resolution Amount if and when the liability to pay the Resolution Amount ceased to be conditional and fell due for payment, and (b) the Funder became entitled, should the Trustees fail to pay that sum when due, to obtain a judgment in Liechtenstein against the Trustees and to execute the judgment against the Ypresto Trust assets in Liechtenstein. Furthermore, the Injunction would not prevent (and could not be relied on by the Plaintiffs or the Fifth Defendant to prevent) the Trustees from exercising their right of indemnity (and lien) or prevent the Funder from executing a judgment against the Ypresto Trust assets in proceedings in Liechtenstein.

46. The Trustees therefore became entitled to a secured right of indemnity which was exercisable and enforceable against the Ypresto Trust assets which were subject to the Injunction and the Funder, in the event of non-payment, was given a right to be paid out of the same assets.

47. It followed, the Fifth Defendant argued, that by entering into the LFA, the Trustees exposed the assets of the Ypresto Trust to their own right to an indemnity and to direct enforcement by the Funder and this amounted to a dealing with, or the creation of an encumbrance over, those assets in breach of the Injunction. The Ypresto Trust assets had been dealt with or encumbered regardless of whether the Ypresto Trustees' lien was correctly characterised as an equitable charge or merely a possessory security (and Dr Niedermüller's view on this point that the Trustees had a proprietary right was to be preferred to that of Dr Walch).

48. Such a conclusion was justified having regard to the purpose of the Injunction in this case. The Fifth Defendant submitted that the Court should adopt a purposive approach to the construction of the relevant paragraphs in the Injunction, looking at the natural meaning of the words used. The prohibition in the Injunction on any dealing with, or encumbering of, the relevant assets was widely drafted without any carve out or qualification and the Court should adopt a common-sense approach having regard to the wide and non-technical language used. Ms Angus KC referred me to the judgment of Henderson J in *Hewlett Packard Limited and another v Bhandari and others* [2013] EWHC 4647 (Ch) as an example of such an approach in the context of a dispute over whether the withdrawal of funds by one defendant from a bank account in the name of another defendant (the fourth defendant) amounted to a breach of a freezing order (which stated that the defendants should not dispose of, deal with, or diminish the value of any of their assets). The defendant's counsel had noted that there was some authority and textbook commentary to the effect that a withdrawal from a bank account could not constitute a "*dealing*" with the funds in the account. The defendant eventually did not rely on the point but Henderson J remarked (at [24]) that the defendant should be given credit for doing so since the argument "*whatever its possible technical appeal is certainly conspicuously lacking in merit in a case of the present type where, on any view, what he did (in common sense terms, or as a matter of normal language) did*

amount to a dealing with the amount standing to the credit of the fourth defendant in such a way that is was thenceforth and immediately transferred into his hands in the form of cash.".

49. Ms Angus KC submitted that the Court's approach to the construction of a proprietary injunction was different from the approach to interpreting a freezing order. As I discuss below when summarising the Trustees' submissions, the approach to the construction of freezing injunctions was discussed by the Supreme Court in *JSC BTA Bank v Ablyazov* [2015] UKSC 64 (***Ablyazov***), where Lord Clarke agreed that such injunctions must be construed restrictively. Ms Angus KC argued that the reason for construing freezing injunctions restrictively was to protect the position of the injuncted party with respect to dealings with his/her own property: the freezing order potentially had a draconian effect on the commercial and economic freedom of that person in a case where there was no claim that the assets in dispute belonged to the plaintiff. However, in the case of an injunction based on proprietary claims, the primary purpose of the injunction was to protect the person who was found to own the assets in dispute and less weight should be given to the need to limit the scope of the restrictions imposed by the injunction (and to protect the interests of the injuncted party). In a case such as the present one, the Court's approach to the construction of the injunction ought to be the ordinary approach to construction, namely, to adopt a purposive construction looking at the natural meaning of the words used.

50. The Fifth Defendant submitted that the purpose of the Injunction was to protect the assets in which the Plaintiffs claimed a proprietary interest by prohibiting any action which resulted, or could result, in those assets being paid away or transferred to, or becoming subject to rights in favour of, a third party or from being diminished in value, if such payments, rights or value diminishment could affect and be binding on (or rank in priority to the rights of) the Plaintiffs. Those assets could be not treated as having been so protected where the Trustees had incurred a liability which was capable of being discharged out of the assets subject to the Injunction at the instigation of and upon action being taken by the Trustees or the Funder. As the Fifth Defendant said in her written submissions (at [26] and [27]), by incurring liabilities under the LFA the Trustees had encumbered the Ypresto Trust assets and by entering into the LFA and exposing the

Ypresto Trust assets to direct enforcement by the Funder, the Trustees had dealt with the Ypresto Trust Assets in breach of the Injunction. Ms Angus KC noted that the Injunction could have stated, or the Trustees could have applied to vary the Injunction to state clearly and explicitly, that incurring liabilities (for the purpose of litigation funding) which were subject to the Trustees' right of indemnity was not prohibited but it did not, and they had not done so. The Trustees should have ensured, before entering into the LFA, that the Injunction clearly permitted the incurring of the liabilities assumed when they entered into the LFA, and they only had themselves to blame for failing to ensure that they did not breach the Injunction.

51. The Fifth Defendant accepted that the mere incurring of a liability (for example by borrowing money) by a party subject to a freezing injunction and by a non-trustee subject to a proprietary injunction did not constitute a disposal of, dealing with or the granting of an encumbrance over assets subject to the injunction. The incurring of a liability reduced the party's net asset position but that was not what was restrained (depending on the wording of the injunction). This had been held to be the position in relation to freezing injunctions in *Cantor Index Ltd v Lister* [2022] CP Rep 25 (referred to and discussed in the judgment of Lord Clarke in *Ablyazov* at [29-30]). However, the position was different in the case of a proprietary injunction granted against trustees. In such a case, and the present proceedings involved such a case, when the trustees incurred a liability, they acquired a secured right of indemnity out of the trust assets so that where those assets were subject to the injunction, incurring the liability resulted in the creation or coming into existence of rights over and against the injuncted assets. Ms Angus KC accepted that this meant that in any case where a trustee was subject to a proprietary injunction, the trustee would be prohibited from incurring any liability on the injuncted assets and would need to ensure that the injunction stated that the trustee was permitted to incur liabilities of a certain type (although I note that Ms Angus KC did not cite any authority in support of this proposition).

52. The Fifth Defendant noted that Dr Walch considered that "*the trustee's right of reimbursement [under Article 920 of the PCA] arises only in respect of expenses which the trustee has actually paid*" and that the Ypresto trustees had no right of indemnity under clause 14 of the Trust Deed

and Article 920 of the PCA until they had discharged a liability of the Ypresto Trust and that, accordingly, they had no right to be indemnified for contingent liabilities. The Fifth Defendant submitted that Dr Niedermüller's opinion was however to be preferred on this issue. In his opinion, the Ypresto trustees' right of indemnity under clause 14 of the Trust Deed and Article 920(1) of the PCA protected the Ypresto trustees against present, future and contingent liabilities incurred by them and, that, as soon as the Ypresto trustees incurred a contingent liability to the Funder under the LFA (or DOV), the Ypresto Trust assets became affected by their right of indemnity and by the lien securing that right conferred by clause 14.4 of the Trust Deed and Article 921(2) of the PCA. Dr Niedermüller's view was more persuasive because it was based on a natural reading of clause 14 and Article 920; it took into account the distinction between the point at which rights are conferred upon the Ypresto trustees under clause 14 and Article 920 and the point at which the rights were exercised; it reflected the position in common law jurisdictions from which Liechtenstein trust law was derived (and which forms the background against which Article 920 and clause 14 should be construed) and it was consistent with the Ypresto trustees' having a right to retain Ypresto Trust assets against contingent and future liabilities. The Fifth Defendant submitted that insofar as the expert evidence of Liechtenstein law did not resolve an issue of foreign law (so that there were gaps in the foreign law evidence), there was a presumption (the presumption of similarity) that Liechtenstein law was materially similar to Cayman law on the issue in question (in reliance on *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45 at [6], [88], [119-126] and [144] and *Ingersoil Rand v Banco Portugues do Atlantico* 1988-9 CILR N-6).

53. The Fifth Defendant also noted that Dr Niedermüller and Dr Walch differed as to whether the lien conferred upon the Ypresto Trustees by clause 14.4 of the Trust Deed provided them with a security or proprietary interest in the Ypresto Trust assets. Dr Niedermüller's view was that the lien conferred by clause 14.4 is a security and a proprietary interest which can be asserted against beneficiaries and unsecured creditors of the Ypresto Trust. Dr Niedermüller's view was to be preferred. It was consistent with the position under English, Australian and Cayman law, where a trustee's lien was not only a security but also an equitable charge which did not depend on

possession. It was also consistent with the fact that (as Dr Walch accepted) under Liechtenstein law (as under English and Cayman law) the Ypresto trustees have the right to exonerate which implied an ancillary right to realise trust assets. Dr Walch had answered "*no*" to question 5 and was unwilling to accept that the Ypresto trustees' lien is a form of security. His view was in part based on his erroneous conclusion as to the nature of the right of indemnity conferred on the Ypresto Trustees by clause 14 and Article 920 but was also based on the argument that it was to be assumed that clause 14 granted no wider security than the rights conferred by Article 920. However, Article 920 did not purport to confer any form of security on trustees and the argument that clause 14.4 could not confer greater rights upon the Ypresto trustees than were granted by Article 920(1) was inconsistent with Article 910 of the PCA which provided that the terms of the trust instrument were to be regarded as authoritative subject to any mandatory provisions in the PCA. Article 920(1) was not a mandatory provision, and accordingly the Ypresto trustees' rights under Article 920(1) (Article 921(2)) and clause 14 should be treated as cumulative and, insofar as they conflict, clause 14 should prevail.

54. The Fifth Defendant accepted that there would be no breach of the Injunction if the liability to pay the Resolution Amount could not accrue and become due and payable while the Injunction remained in force. However, this was not the case here.

55. Ms Angus KC submitted that on the proper construction of the un-redacted parts of the LFA before the Court (applying English law as the law governing the LFA), it was clear that:

(a). the Resolution Amount could become due and payable before the Injunction was discharged.

(b). this would happen where Success occurred because Target Assets not subject to the Injunction were recovered (by the Trustees or BGO) in Proceedings in other jurisdictions (so that the relevant Claimant achieved Control over them) and (i) the market value of

those Target Assets (combined with the value of other Target Assets already under the Control of the Claimants) met the Target Asset Threshold and (ii) payment of the Resolution Amount then otherwise due would result in the Claimants having Control of Assets with an aggregate market value of US$10 million or more.

(c). the Target Assets subject to the Injunction were to be treated as being under the Control of the Trustees since the Trustees had "*actual*" control over all the assets in Liechtenstein. Actual or *de facto* control was included in and satisfied the definition of Control. The Injunction was not recognised or enforceable in Liechtenstein and therefore did not interfere with or restrict the Trustees' practical ability to exercise *de facto* control over them. The Fifth Defendant submitted that the evidence of the Liechtenstein experts indicated that the Trustees had Control of the Ypresto Trust assets notwithstanding the Injunction. The Fifth Defendant did not accept that when construing the meaning of "*Control*" in the LFA, the Court was entitled to ignore whether the Injunction *in fact* prevented the Trustees from dealing with assets in other jurisdictions.

(d). the Resolution Amount was always the full amount of the Transaction Costs (being the Funder's costs of entering into the LFA and the DOV), the Funded Amount (being the total sums advanced by the Funder to pay legal expenses) plus the Funder's profit element (the precise amount or formula for calculating this element was not disclosed by the Trustees) paid, advanced, and as calculated from time to time.

(e). the Resolution Amount would become immediately payable if a Termination Notice was served by the Funder under sub-clauses 17.1.3 or 17.1.4 merely by virtue of the Ypresto Trusts assets having been retained by the Trustees (as Special Assets). Given the redactions made by the Trustees, the Court was unable to find that it was impossible for the Resolution Amount to become payable to the Funder upon service of a Termination Notice under clause 17.1.1 or 17.1.2 simply by virtue of the Trustees having Control of the Ypresto Assets.

(f). clauses 6 and 7 of the DOV did not change the analysis. Furthermore, the corrections which the Trustees relied on and which were set out in Boulton 10, were unsupported by evidence that reflected the Trustees' understanding at the time that the DOV was executed (the 20 October Letter itself was insufficient evidence of this) and were inconsistent with the evidence (as has been made available) of the Trustees' understanding at that time (namely their submission filed in proceedings in Liechtenstein in July 2018 – as to which see [67] of the May Judgment and Rebholz 1 – the Byrne Memorandum, Boehler 6 at [22] and Boehler 7 at [8]).

56. As the Trustees now (belatedly) accepted, circumstances could arise where the Resolution Amount became due and payable before the Injunction was discharged and as a result the Funder would, if the Trustees were unable or refused to pay the sums due, be able to obtain a judgment against the Trustees and execute it against the assets subject to the Injunction. Because the details of the assets included within the definition of Target Assets, Excluded Assets and Special Assets, the details of the Resolution Amount and the details of the litigation included within the definition of Proceedings had not been disclosed, the Court could not conclude, on the evidence, that the Resolution Amount when it fell due could be met in full out of free (non-injuncted) Assets. The NOM must be decided on the basis that the Resolution Amount could be larger than the value of the net Assets recovered in Proceedings outside this jurisdiction. Although the Trustee's attorneys had asserted in correspondence that there were more than sufficient funds available in the structure to discharge any liability under the LFA without recourse to the Ypresto Trust assets, there was no evidence to support that assertion. Nor was there a term in the LFA which required the Trustees (and BGO) only to use the free Assets to pay the Resolution Amount.

57. The Fifth Defendant also accepted that ordinarily where a freezing injunction has been obtained against a party to litigation, that party did not, merely by entering into a financial obligation, deal with his assets contrary to the freezing injunction (see *Ablyazov*). However, the Fifth Defendant argued, the rationale for a reduction in that party's net assets not being treated as a breach of the freezing injunction was that the purpose of a freezing injunction was to safeguard the injuncted

party's assets for all of his unsecured creditors, not to give the party obtaining the injunction the status of a secured creditor. However, in the present case, the purpose of the Injunction was to preserve assets in respect of which a proprietary claim was being made and the Ypresto Trust assets are trust assets. As soon as the Ypresto Trustees incurred a contingent liability to the Fund, those assets became subjected to the Ypresto trustees' right of indemnity and lien.

58. The Fifth Defendant also noted that the assets of the Ypresto Trust included pledges over certain assets held by the Citizen Trust including its shares (the ***EHI Shares***) in European Holdings Investment Ltd (***EHI***) and certain receivables. These pledges (the ***Citizen Pledges***) were provided as security for loans (the ***Loans***) totalling $8,000,000 made by the Ypresto trustees out of the Ypresto Trust assets to the Citizen Trustees and, accordingly, the Loans and the Citizen Pledges were property derived from and representing the BH06 dividends and caught by the Injunction. The Fifth Defendant, as I have noted, said in her evidence (D5 14 at [21]) that Global (who has seen the unredacted LFA and DOV) had informed her that under clause 27.3 of the LFA (which neither the Fifth Defendant nor the Court had seen as it had been redacted) the Trustees had agreed that payment of the Resolution Amount to the Funder under the LFA would take priority over all existing loan agreements or debt instruments in the trust so that "*by entering into the LFA, the Ypresto Trustees immediately diminished the value of the Loans and the Citizen Pledges, and this in itself amounted to a dealing with Ypresto Assets prohibited by the Injunction*." The Fifth Defendant's evidence (in D5-14) was as follows (underlining added):

> *"21. In paragraph 9 of Boehler 7, Mr Boehler states "I confirm that no security or proprietary interest has been granted to the Funder over the Citizen Assets". However, I have been informed by Global PTC ("Global"), the third trustee of Ypresto, who has seen the [August] Judgment, that a redacted clause of the LFA (27.3) provides that payment to the [Funder] under the LFA will take priority over all existing loan agreements or debt instruments between the trusts in the trust structure.*
>
> *22. Also, EHI is itself the subject matter of proceedings involving the Plaintiffs and the Trustees in Panama. These proceedings are referred to by Nicola Boulton of Byrne and Partners in her Sixth Affidavit dated 30 September 2019…. It is clear from*

evidence already filed in respect of my Notice of Motion that "the Proceedings" listed in the LFA include the proceedings between the Trustees and the Plaintiffs worldwide. Global have confirmed that this includes the proceedings in respect of EHI. Global have also told me that Schedule 3 of the LFA gives the Fund priority over "Proceeds" recovered in "the Proceedings" which include EHI. Without the benefit of advice from lawyers who have been permitted to see the relevant provisions, I cannot say whether the redacted parts of the LFA that Global refer to give the Fund a proprietary interest in the pledged assets but, whether or not they do, if the provisions are as Global have described, by entering into the LFA the Trustees have dealt with the EHI pledge in a way that reduces their value.

23. The B&P Memorandum referred to above did not address the Trustees' own right of indemnity and their lien under clause 14 of the Ypresto Trust deed or whether the Fund could step into the shoes of the Trustees to enforce those rights. However, in a submission made to the Liechtenstein court on 15 September 2022 by the Protector, Dr Peter Schierscher, who has seen the unredacted LFA and DOV, it was submitted that if the Trustee failed to meet its obligation to pay the Resolution Amount to the Fund, the Fund will have direct rights against the assets of Ypresto. Given that Mr Schierscher is a partner at Ritter Schierscher Rechtsanwalte and, from 2011 to 2016 was a substitute judge at the State Court of the Principality of Liechtenstein, he is unlikely to have misunderstood the LFA…"

59. The Fifth Defendant therefore argued that on the basis of the information provided by Global (as to the effect of clause 27.3 and schedule 3 of the LFA) by entering into the LFA, the Trustees, as trustees of the Ypresto Trust, had immediately diminished the value of the Loans and the Citizen Pledges, and that this amounted to a dealing with Ypresto Trust assets prohibited by the Injunction.

The Trustees' submissions

60. Mr McPherson KC developed his arguments orally and explained the Trustees' case in more detail and more clearly than had been set out in the written submissions. Furthermore, the Trustees' position had changed in the course of the various applications made in the NOM proceedings. Initially, as I noted at [46] of the May Judgment, for the purpose of resisting the Fifth Defendant's application for disclosure of the terms of the LFA the Trustees had said that the LFA was "*a non-recourse agreement which gave rise to no liability in respect of any assets*

subject to the Injunction unless and until the Injunction had been discharged. There was no arguable case that entering into the [LFA] resulted in a breach of the Injunction and no need for the Court or the Fifth Defendant to see the agreement in order to be able to conclude that no breach had occurred or could occur."

61. The Trustees' position can be summarised as follows:

(a). the Injunction should be construed restrictively.

(b). it was insufficient for the Trustees to act so as to create a risk that the assets subject to the Injunction might not be preserved. The purpose of the Injunction was to ensure that those assets were preserved for the benefit of the Plaintiffs in the sense that the assets would be held for, and available to be transferred to, the Plaintiffs following final judgment being given in their favour. The Trustees could and would only be in breach of the Injunction if they had acted in a way that resulted or would in the future result in the assets not being so available.

(c). since, on the date on which the LFA was signed and became effective it was possible that no liability to pay the Resolution Amount would ever arise entering into the LFA did not result, nor would it necessarily result in the future, in the assets subject to the Injunction being taken away from and being unavailable to the Plaintiffs.

(d). furthermore, even if a liability to pay the Resolution Amount did arise (on satisfaction of the conditions in clause 13.1 of the LFA were satisfied), the Trustees (and BGO) would be entitled under the LFA and able to pay the sum owing without touching or using the assets subject to the Injunction.

(e). this was because the liability to pay the Resolution Amount only arose and would be payable if following an instance of Success, the Trustees (and BGO) would, after paying the Resolution Amount, retain Control of Assets worth more than $10 million. Since

Assets subject to the Injunction could never be in the Control of the Trustees, Success would not occur in relation to such Assets, and those Assets would not count for the purpose of calculating the $10 million threshold, until the Injunction was discharged.

(f). therefore, the Trustees (and BGO) would never be liable to pay the Resolution Amount when, putting the matter colloquially, they could not afford to do so out of free Assets (that is Assets not subject to the Injunction). They must have Control of free Assets which were of a sufficient value to pay the Resolution Amount in full and leave a substantial surplus of free Assets of at least $10 million.

(g). the Assets subject to the Injunction could not be treated as being in the Control of the Trustees since Control could not occur with respect to any Asset which the Trustees were prohibited from dealing with. Control was inconsistent with the prohibitions imposed by the Injunction.

(h). consequently, while Success could occur when the Resolution Amount exceeded the monetary value of Target Assets over which the Trustees (or BGO) had obtained (or maintained) Control, and Success could occur when the Resolution Amount was greater than the value of the free Assets, the liability to pay the Resolution Amount could not arise or become payable unless the Resolution Amount was less than a sum equal to the value of the free Assets (in the Control of the Trustees and BGO) minus $10 million. Or, as Mr McPherson put it during his oral submissions "*A Resolution Amount will never be payable unless the pool of non-injuncted Assets is at least $10 million more than the [Resolution Amount]*."

(i). accordingly, for example, if the Assets held by the Claimants were $5 million; Target Assets with a value of US$10 million were subsequently recovered in Switzerland (and the Target Asset Threshold was US$5 million); the Assets subject to the Injunction were valued at $20 million and the Resolution Amount at the relevant time was $10 million, the

Resolution Amount *would not* be payable because payment of the Resolution Amount ($10 million) would leave the Claimants with only $5 million of free Assets. However, if the Assets held by the Claimants were $5 million, Target Assets with a value of US$20 million were subsequently recovered in Switzerland (the Target Asset Threshold was US$5 million), the Assets subject to the Injunction were valued at $20 million and the Resolution Amount at the relevant time was $10 million, then the Resolution Amount *would be* payable, because a payment of the Resolution Amount ($10 million) would leave the Claimants with $15 million of free Assets.

(j). it followed that if the liability to pay the Resolution Amount did arise and become payable before the Injunction was discharged, which the Trustees now accepted was possible, the Trustees (and BGO) would have sufficient resources (and were permitted under the LFA to use the free Assets) to discharge Resolution Amount without having recourse to, and without needing to touch, the Assets subject to the Injunction.

(k). in considering whether there had been a breach of the Injunction as a result of the Trustees entering into the LFA, the Court was not entitled to and should not assume that the Trustees would breach their obligations under the LFA and fail to pay what was owed to the Funder (where the Trustees had not agreed and were not contractually required to use injuncted assets to pay sums due to the Funder). In any event, there could be no breach of the Injunction before at the earliest the point at which the Trustees had failed to discharge the Resolution Amount out of other free Assets and had put the Funder in a position where it could and needed to bring proceedings to enforce the obligation to pay the Resolution Amount and could seek to execute a judgment against Assets subject to the Injunction.

(l). there was no risk of Ypresto Trust assets in fact being dissipated or diminished as a result of the terms of the LFA since the Plaintiffs' final appeal in the main action was due to be heard by the Privy Council on 18/19 January 2023 and no other Proceedings were anywhere near a conclusion. Accordingly, there was no prospect of Success occurring

before the Privy Council had determined the substantive issue. There was in practice therefore no risk of any obligation to pay the Resolution Amount under the LFA arising while the Injunction remained in place.

62. The Trustees relied on the approach to the construction of injunctions set out in the judgment of Lord Clarke in the Supreme Court in *Ablyazov* (at [16]-[21]) (in that case a freezing injunction). Lord Clarke said this (referring to the judgment of Beatson LJ in the Court of Appeal) (underlining added):

> "*19 I further agree that orders of this kind are to be restrictively construed in accordance with Beatson LJ's strict construction principle, which he described in this way in para 37:*
>
> *"The third principle follows from the 'fundamental requirement of an injunction directed to an individual that it shall be certain': Z Ltd v A-Z and AA-LL [1982] QB 558, 582, per Eveleigh LJ. It is that, because of the penal consequences of breaching a freezing order and the need of the defendant to know where he, she or it stands, such orders should be clear and unequivocal, and should be strictly construed: Haddonstone Ltd v Sharp [1996] FSR 767, 773 and 775 (per Rose and Stuart-Smith LJJ); Federal Bank of the Middle East Ltd v Hadkinson [2000] 1 WLR 1695, 1705 C and 1713 C– D (per Mummery and Nourse LJJ). In Anglo Eastern Trust Ltd v Kermanshahgi [2002] EWHC 1702 (Ch) Neuberger J stated: 'A freezing order, which has been referred to as a nuclear weapon, should … be construed strictly' because the court is 'concerned with an order which has a potentially draconian effect on the commercial and economic freedom of an individual against whom no substantive judgment has yet been granted'."*
>
> *He added, at para 66, that strict construction is also an aspect of the "great circumspection" with which Lord Mustill, in Mercedes Benz AG v Leiduck [1996] AC 284, 297, stated that the jurisdiction should be exercised. I agree. One of the reasons for this principle, as I see it, is the risk of oppression.*
>
> *20 What then of Beatson LJ's enforcement principle? As quoted in para 13 above, it is that the purpose of a freezing order is to stop the injuncted defendant from dissipating or disposing of property which could be the subject of enforcement if the claimant goes on to win the case it has brought, and not to give the claimant security for his claim. The principle has been put in much that way, not only by the courts*

> *below in this case but in many of the decided cases: see e g JSC BTA Bank v Solodchenko [2011] 1 WLR 888, per Patten LJ, para 49(1) and Longmore LJ, para 52. Aikens LJ agreed with both. Thus Longmore LJ said that the purpose of a freezing injunction is to preserve a defendant's assets, subject to dealings in the ordinary course of business so that, if and when a judgment is pronounced, the defendant still has assets to meet that judgment. See also the cases referred to in para 23 below.*
>
> 21 *The expression "assets" is capable of having a wide meaning. For example it can include a chose in action. However, like any document, a freezing order must be construed in its context. That includes its historical context. ....."*

63. The Trustees submitted that the mere existence (or creation) of a prospective (or, as Mr McPherson KC put it, "*abstract*") right of indemnity out of trust assets subject to the Injunction could not result in a breach of the Injunction. The liability to pay the Resolution Amount did not come into existence or at least accrue until the relevant conditions set out in the LFA occurred. At the date on which the LFA entered into force, there was no liability which could be recovered pursuant to the Trustees' right of indemnity. There was nothing to which the Trustees' lien could attach or which could be enforced against the trust assets pursuant thereto. Furthermore, at that date, it remained possible that nothing would ever become due and payable to the Funder (if Success was never achieved). The Injunction should not be interpreted so that a breach could occur merely by the Trustees entering into the LFA, when it remained possible that no liability to the Funder would ever arise or become payable.

64. Mr McPherson KC, during his oral submissions, drew a distinction between the Trustees having (a) granted a charge over the Ypresto Trust assets to secure a present liability, even a contingent liability, and as occurred in this case, (b) having entered an agreement which might result in (i) their becoming liable in the future to pay a monetary sum (the Resolution Amount) and (ii) upon that liability coming into existence at some future date, the Trustees having a right of indemnity against and a lien over trust assets. He said this:

> *"... my position is, unless you find that actually we are hugely over complicating things, and in really this LFA is no different to the Trustees having granted a formal charge over*

the Ypresto assets to a third party bank … [so that the] third party bank has proprietary interests in the Ypresto assets as a result, if you conclude that that's what the LFA is equivalent to, then I lose. Simple as that.

…. If I grant a charge over something, the chargee gets proprietary rights straight away. If I create a state of affairs that at some stage in the future, the chargee may get proprietary rights, then that's a very different scenario…. the first [example] would be a breach of the injunction. The second would not. A breach of the injunction could occur in the future, but it's not [immediately] a breach of the injunction……

[Where a party gives a guarantee and has a right of indemnity, he has] a liability unless someone does something. Here [in the present case] it's quite the reverse. [The Trustees have no liability unless the Funder subsequently advances funds and the conditions in clause 13 of the LFA are satisfied], because the default position is [that they] have no liability to pay the resolution amount. Full stop. Unless Success occurs, and the 13.2 condition is also achieved. And that's an important distinction. Because I - whereas in a guarantee situation or a security situation, I am liable unless something happens.

Here, [the Trustees are] not liable unless something happens. And that's why entry into [the LFA] may make it more likely, [the Fifth Defendant claims that] it does make it more likely, that I will have to do something in the future, that I will have to pay the Resolution Amount on the future. Because if I hadn't entered the agreement, of course I wouldn't have that liability. But what it does not do is mean that I do have a liability, or even if I will have a liability in the future, it simply creates the state of affairs."

65. To illustrate his argument, Mr McPherson KC gave the following example:

"Let's suppose that what's been injuncted is a gold bars in a safe. If I hand over those gold bars to someone else, I give them away that I'm disposing of them. If I create security over them, then I'm encumbering them. If I swap them for magic beans, then I'm dealing with them. If I leave the safe door open or I take preparatory steps to give them away or swap them for magic beans or create a charge over them, I'm creating a risk that in the future, in due course, something will happen that amounts to a breach of the injunction. But the mere creation of that state of affairs is not of itself a breach of the injunction. And that's what we've got here."

66. The service of a Termination Notice, even where that was done pursuant to sub-clauses 17.1.3 or 17.1.4 of the LFA, did not change this analysis. Even if there was Success after such a termination, the Resolution Amount only became payable if, after payment of that sum (the quantum of the Resolution Amount at the time), the Trustees (and BGO) would have Control of

free Assets valued at $10 million or more. The effect of clause 17.3 of the LFA was that, for the purpose of clause 13.2, Success is treated as having occurred where the Trustees (and BGO) acquired or had Control over any Target Assets or Special Assets without any threshold being applicable. Nonetheless, clause 13.1.2 was unmodified and still stipulated that nothing was payable if after payment of the Resolution Amount, the Trustees (and BGO) would not Control free Assets of $10 million or more. If a Termination Notice is served under sub-clauses 17.1.3 or 17.1.4 the Trustees would not have Control over the Ypresto Trust assets since they were subject to the Injunction.

67. The Trustees submitted (and their position assumed) that it did not matter that they could become liable to pay the Resolution Amount jointly and severally with BGO when BGO rather than the Trustees made the relevant recovery of Target Assets or in circumstances where BGO rather than the Trustees were in Control of the Assets needed to pay the Resolution Amount. BGO was a related entity and the Fifth Defendant's application should be dealt with on the basis that they would act together and that BGO would cooperate with the Trustees.

68. Mr McPherson KC reviewed the terms and operation of the LFA in detail. He noted that it was necessary to review continually (on a daily basis) the monetary value of the Target Assets over which the Claimants had Control. This was because the value of some of the Target Assets and other Assets (such as investments) was capable of material fluctuations. Since the definition of Success included a Claimant maintaining Control of Target Assets meeting the Target Asset Threshold, when the value of an investment which was a Target Asset increased, it was necessary to assess whether the increase in value meant that the Claimants then maintained Control of Target Assets of a sufficient value to satisfy that threshold and therefore give rise to Success. Success could therefore occur on multiple occasions when the value of the Target Assets changed (increased) and even before the Trustees had been successful in any Proceedings. Mr McPherson KC, during his oral submissions, summarised the Trustees' position as to the manner in which the LFA operated as follows:

> *"At any point in time, from 22 June 2018 onwards, the funder and the claimants have been able to ask themselves, "Has success been achieved?" It sounds silly to put it in those terms, because one ordinarily thinks about success as winning new proceedings, or settling proceedings, but because there is a base level of assets there, under the definition of "target assets" -- let us say for the sake of argument one is an investment that has done extremely well -- it is not impossible that target assets could rise to a value that exceeds the target asset threshold, even if none of the proceedings become concluded. What it does mean therefore, for practical purposes is day in, day out, one can ask, "Has success been achieved?" because success is not a measure of "Have I won litigation or lost litigation?" It is a measure of "Is the pool of assets over which I have control greater than or lower than [a figure]?"*
>
> *If, when I ask myself that question, I reach the answer "No. The pool of target assets over which I have control is less than the target asset threshold", then, okay, success has not been achieved, the first [condition] in 13.1 has not been satisfied, and so there is no question of any obligation to pay a resolution amount, or, looking at from the funders' point of view and using the precise wording in 13.1, there is "no entitlement on the part of the funder to be paid the resolution amount".*
>
> *If of course a piece of litigation comes to an end, and that causes a recovery to be made, the recovery then becomes, assuming that the claimants have control over it, part of the pool of target assets and one asks the question again, "Okay, well, do we now have control over a pool of assets which meet the target asset threshold? Yes or no." If no, well that is an end to the matter. If yes, then we will go on to look at [clause 13.1.2].*
>
> *But all the time that the injunction is in place, the pool of assets to which I am having regard when I am asking myself these questions -- "Does the pool of assets exceed the target asset threshold?" -- excludes the Ypresto [Trust] assets because I do not have control over those."*

69. Clause 14.1 of the LFA referred to "*successive instances of Success*." Success could occur on multiple occasions and each time it did occur there was what clause 14.1 described as an instance of Success. So, for example, (i) Success may occur (say on 1 January) by reason of the recovery of Target Assets (say of $10 million) above the Target Asset Threshold (say of $7 million) without causing the obligation to pay the Resolution Amount to arise (because, since the Resolution Amount is at that time $5 million and the Claimants do not have Control over any other Assets, the condition in clause 13.1.2 of the LFA requiring that after payment of the Resolution Amount the Claimants would have Control of Assets with a value of at least $10

million would not be satisfied) but (ii) subsequently Success occurs again (say on 3 January) by reason of the recovery of Target Assets (say of $5 million) above the Target Asset Threshold. When deciding whether the Target Asset Threshold has been met on 3 January, clause 14.1 requires that the previous occurrence of Success (on 1 January) be taken into account (so that Target Assets of $15 million are treated as recovered) since the "*duty under clause 13 to pay a Resolution Amount … shall apply cumulatively to each … instance*" of Success.

70. Mr McPherson KC also explained that the LFA (including clause 14.1) sought to deal with the effect on the definition of Success of there having been a payment of the Resolution Amount. When the Resolution Amount is paid the Assets over which the Claimants had Control would be reduced in value because funds had been paid out. Mr McPherson KC agreed that the following example, which I put to him during his submissions, accurately reflected the way that the LFA dealt with this issue:

> *"But if on 1 January there is [a] recovery in Panama … and there is Success because [the recovery] results in the [recovery of] Target Assets exceeding the Target Asset Threshold and [clause] 13.1.2 is satisfied, the full amount that has been advanced by the Funder with the transaction costs, with profit added, then becomes payable and is paid.*
> *[On] the following day the value of investments [held by the Claimants [being their] base assets goes up and achieves further Success, at that point [since the full amount of] the Resolution Amount was paid on 1 January, … there is no further Resolution Amount which is payable even on the subsequent instance of Success."*

71. The Trustees submitted that their right of indemnity in respect of the Resolution Amount had not, and was not to be treated as having, arisen at the time they entered into the LFA. The right of indemnity only arose when the obligation to pay the Resolution Amount subsequently arose and (on satisfaction of the conditions set out in clause 13.1 of the LFA). Before then, the Trustees had no right to charge the trust fund and the right of indemnity was purely abstract and without substance. This was the position under Liechtenstein and Cayman law. The Trustees relied on Dr Walch's opinion, in particular [11], [12], [14] and [16] of his report.

72. In addition, the Trustees argued that there could, under Liechtenstein law, be no lien until (and that the lien only came into existence when) the Trustees were entitled to an indemnity in respect of a sum paid or payable by them (under clauses 14.2-14.3 of the Trusts Deed). Dr Walch's view was to be preferred to that of Dr Niedermüller on this point. Dr Niedermüller's position on this issue was too qualified to be relied on. He had acknowledged that his own position was unsupported by clear law when he had said (at [4.5] of his opinion) that it was to be "*noted that no jurisprudence or doctrine exists on the question whether and how the trustee can obtain a valid lien on the trust assets by a clause in the trust deed such as Art. 14.4 provides. Thus, it is well possible that courts or doctrine could come to a different conclusion that the one [he had] outlined above.*" The Trustees submitted that the presumption of similarity was not applicable in this case because the Fifth Defendant had accepted in the agreed statement of the issues governed by that Liechtenstein law and on which expert evidence of Liechtenstein law was required.

73. Mr McPherson KC argued that this analysis was supported by the characterisation of rights of indemnity in Cayman (and English) law. A right of indemnity involved, he submitted, protection against damage which had occurred and the entitlement to an indemnity was triggered by the coming to existence of the liability. He relied on the decision of the English Court of Appeal in *Post Office v Norwich Union Fire Insurance* [1967] 1 Lloyd's Rep 216. In that case the Post Office claimed against a contractor for damage to a cable. The contractor went into liquidation. The contractor was insured and the Post Office issued proceedings against the insurers claiming that under the Third Parties (Rights against Insurers) Act 1930 the contractor's rights against the insurer had been transferred to it. Under the 1930 Act (which has subsequently been amended) the injured person steps into the shoes of the wrongdoer so that there is transferred to him the wrongdoer's "rights against the insurers under the contract [of insurance]." The Court of Appeal held that the Post Office's claim failed. The rights of the insured against his insurer which vested in the injured party by virtue of the 1930 Act were transferred subject to the conditions of the insurance contract and since the insured contractors could not have claimed to be indemnified by their insurer until their liability had been established, the Post Office could be in no better position. Lord Denning MR said as follows (at 373E – 374B):

> *"Under that section, the injured person steps into the shoes of the wrongdoer. There is transferred to him the wrongdoer's "rights against the insurers under the contract". What are those rights? When do they arise? So far as the "liability" of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident when negligence and damage coincide. But the "rights" of the insured person against the insurers do not arise at that time".*
>
> *The policy says that "The Company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of or damage to property. It seems to me the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. His liability to the injured person must be ascertained and determined to exist, either by judgment of the Court or by an award in an arbitration or by agreement. Until that is done, the right to an indemnity does not arise.."*

74. The right question to be asked when considering whether there had been a breach of the Injunction on the date on which the LFA was entered into (by reason of the existence of the Trustees' right of indemnity and lien) was not "is there an entitlement to indemnity?" but rather "is there a sum in respect of which the Trustee is entitled to an indemnity?" As Mr McPherson KC said during his oral submissions: "*A right to be indemnified against no liability is no right to be indemnified. The lien to secure nothing is no lien."* The principle that there needed to be a liability to which the right of indemnity applied before an indemnity could be said to be available was recognised in dicta in the judgment of Lord David Richards and Sir Nicholas Patten (who were in the minority on a different point) in *Equity Trust (Jersey) Ltd v Halabi* [2022] UKPC 36 at [65]:

> *"A trustee's right of indemnity is the not the gross amount of trust liability incurred by it but for a net sum determined by reference to those liabilities after deduction of any amounts which the trustee is accountable for the trust. If any such amounts exceed those liabilities, no indemnity is available to the trustee".*

75. The Trustees noted that the impact of the Injunction had been explicitly acknowledged and dealt with in the DOV. The relevant terms of the DOV at least implicitly accepted that prior to the discharge of the Injunction, the Assets subject to the Injunction were not under the Control of the

Trustees or available to the Funder. Sub-clause 6(a)(iii) and (iv) assumed that the discharge of the Injunction would, subject to the amendments made by the DOV, have resulted in Control being achieved in respect of those Assets (and that the Trustees did not have Control of Assets subject to the Injunction prior to its discharge) because they removed the obligation to pay the Resolution Amount upon a discharge and substituted an obligation to grant a charge over the Assets that had previously been subject to the Injunction. Clause 7(i) also acknowledged, and confirmed, that if the Funder had been granted a charge after the discharge of the Injunction, that the Funder would never be entitled to have recourse to the assets subject to the Plaintiffs' proprietary claims if the Plaintiffs were ultimately successful.

76. The Trustees also relied on the 20 October Letter and the corrections to the DOV referred to therein. They relied in particular on the confirmation (from the Trustees and confirmed by the Funder) contained in the final paragraph that it had "*always been the understanding of the Trustees that unless and until [Injunction had been] discharged, [the Funder, inter alia, would not] have any right to any asset that is subject to the … Injunction (including the assets of the Ypresto Trust)*." Mr McPherson during his submissions accepted that this could be seen as self-serving and could not be taken into account for the purpose of interpreting the LFA, but submitted that it was evidence relevant to the likelihood that the Funder would ever "*find itself in Liechtenstein, saying to Liechtenstein Court, "Yes, yes, we know it's all injuncted but actually, what we'd quite like to do please is enforce this arbitration award [against] the Ypresto assets*." He submitted that the Court could conclude that in reality this was only a theoretical risk and that the likelihood of it occurring was vanishingly small.

77. The Trustees accepted that the Loans and the Citizen Pledges are property derived from and representing the BH06 dividends and are therefore subject to the Injunction. However, they rejected the Fifth Defendant's claim that the terms of the LFA as they related to or affected the Loans and the Citizen Pledges gave rise to a breach of the Injunction. The Trustees in their written submissions simply said that they did not understand the Fifth Defendant's case on this issue. In his oral submissions Mr McPherson KC provided a further explanation of the Trustees' position

but even this was only brief and cryptic. He summarised the Trustees' position as follows: *"whatever the outcome in Cayman or elsewhere in the world the value of the Ypresto [Trust] assets which includes a right to be repaid the loan by Citizen Trust cannot be adversely impacted because that is expressly carved out."*

78. As I understand it the Trustees say that it is wholly unclear how their agreement to pay the Resolution Amount to the Funder in priority to all sums owing by them *qua* trustees of one trust to themselves *qua* trustees of another trust (under existing intra-trust loan agreements or debt instruments) could constitute a dealing with the Loans and the Citizen Pledges.

79. Mr McPherson KC noted (as had been discussed by the Fifth Defendant in D5 14 at [22]) that there was a dispute between the Plaintiffs and the Trustees regarding ownership of the EHI Shares and proceedings had been commenced in Panama dealing with that issue (this dispute had been raised in the main proceedings and was discussed in my judgment after the trial handed down on 27 May 2020). Commenting on the impact of these proceedings on the Fifth Defendant's claim with respect to the Loans and the Citizen Pledges, Mr McPherson KC then said this:

> *"Because of the LFA, it is said, as I understand it, the EHI Shares are vulnerable to or exposed to the Funder if the Funder succeeds. But the EHI Shares are only vulnerable to the Funder if [the Plaintiffs] fail to demonstrate that they own the EHI Shares. If [the Plaintiffs] fail to demonstrate that they own the EHI Shares, then the fact that the EHI Shares are potentially vulnerable to the Funder, cannot in any way impact on their rights because their rights have already been established as non-existent.*
>
> *Conversely, if [the Plaintiffs] fail in Panama and it is established that the EHI Shares are not owned by [them], then it does not matter that the EHI Shares might be adversely affected in value by a liability to the Funder because the Injunction is there to preserve their assets and the value in their assets and those are not their assets."*

Discussion and decision

The key issues arising on the application

80. The Fifth Defendant's application for a declaration in the terms of [6] of the NOM raises four key issues:

(a). first, what is the proper interpretation of the LFA (as amended by the DOV and as redacted)? In particular, what liabilities did the Trustees assume by reason of entering into the LFA and when do such liabilities accrue and become payable? The interpretation of the LFA (and the DOV) is governed by English law.

(b). second, what rights do the Trustees have, under the Trust Deed and Liechtenstein law, to use assets subject to the Injunction to discharge liabilities arising and payable under the LFA? These are questions of Liechtenstein law (the various trusts are Liechtenstein law trusts, the Ypresto Trust assets are in Liechtenstein and the Trust Deed is governed by Liechtenstein law).

(c). third, what is the proper interpretation of the Injunction? In particular, does the requirement that the Trustees "*must not in any way … dispose of, encumber, or deal with*" the assets which the Plaintiffs claim (including the Ypresto Trust assets) prohibit the Trustees from entering into an agreement pursuant to which they could become liable to pay a monetary sum to the Funder, where the assets subject to the Injunction might be used to pay that sum if the Trustees failed to pay the Funder from other assets and the Funder chose (exercised its right) to obtain an arbitration award against the Trustees and enforce the award against those assets pursuant to a Liechtenstein court judgment? The interpretation of the Injunctions is a matter of Cayman law.

(d). in light of the answers to these questions, was entry into the LFA clearly an act of the type prohibited by the Injunction?

81. Leaving aside the technicalities, the NOM requires the Court to consider whether the Trustees were in breach of the Injunction by entering into a litigation funding agreement. The Fifth

Defendant argues (summarising the core of her argument) that they were in breach because as a result of the Trustees' right of indemnity against and lien over the trust assets caught by the Injunction the Trustees had an immediate or at least a subsisting right of recourse against the assets subject to the Injunction (exercisable when the contingent liability to the Funder became an actual liability) and because the Funder was given and acquired a right to have recourse to those assets when the liability accrued and became payable if the Trustees failed to pay what was due. The Fifth Defendant said that this result was inconsistent with the protection which the Injunction was intended to provide because it exposed the assets subject to the Injunction to the risk that they would be used to pay sums due to the Funder despite and irrespective of the proprietary rights of the Plaintiffs (if they succeeded in their appeal to the Privy Council).

An outline of my conclusions

82. I have concluded, after carefully considering the evidence adduced and the parties' submissions, and both by reference to the criminal and civil standard of proof, and based on the original NOM, that the Trustees did not breach the Injunction by entering into the LFA (and assuming the obligations to which they became subject thereunder). I explain my reasons for this conclusion below. The central point is that, having regard to the terms of the LFA (as amended by the DOV), after entering into the LFA it remains in the Trustees' power to avoid any dissipation of the assets subject to the Injunction (including the Ypresto Trust assets). They have not yet taken action which has resulted or will result in the assets subject to the Injunction ceasing to be available to the Plaintiffs (in the event of a successful appeal) and they remain able (and subject to an obligation by reason of the Injunction, to the extent that action can properly be taken by them) to prevent that result. The Trustees remain subject to the Injunction which clearly prohibits their using, or granting (or permitting to subsist) rights ranking in priority to the Plaintiffs' rights in respect of those assets in a manner that would prevent the assets being available to the Plaintiffs. If and when the liability to pay the Resolution Amount arises and becomes payable, the Trustees are permitted under the LFA to discharge it out of free Assets which are not subject to the Injunction. The LFA also envisages and is drafted so that there will be free Assets which can be

used to pay the Resolution Amount. The LFA provides that the Trustees (and BGO) only become liable to pay the Resolution Amount when, if the amount of the Resolution Amount were to be paid, they and BGO would retain and have Control of free Assets with a value of at least $10 million. Furthermore, there is no evidence to indicate that such free Assets could not be realised or used for the purpose of paying the Resolution Amount (thereby creating the risk that the Funder would have an incentive to obtain an arbitration award and judgment before those free Assets were realised and enforce the judgment against the assets subject to the Injunction). The risk that this might occur (a purely theoretical risk) is not sufficient to support the conclusion that the Trustees have in fact taken action which has resulted or will result in the assets subject to the Injunction ceasing to be available to the Plaintiffs.

83. In my view, the Trustees have not, by entering into the LFA (and assuming the obligations arising thereunder) disposed of, encumbered or dealt with the assets subject to the Injunction as those terms are to be interpreted and understood having regard to the nature and purpose of the Injunction. The Trustees cannot enforce their right of indemnity or lien since that would clearly be prohibited by the Injunction (as doing so would involve disposing of and dealing with the injuncted assets) and in my view additional wording would need to be included in the Injunction in order to capture action taken by the Trustees which *might* permit a third party to obtain and enforce a judgment against the Trustees and thereby as a judgment creditor of the Trustees have access to the injuncted assets in circumstances where the Trustees are able (having regard to the terms of the LFA) to prevent the third party from acquiring such a right and thereby prevent any dissipation of or the creation of rights against the injuncted assets.

84. It is important to ask whether the protection which the Injunction was intended to provide (having regard to the terms used and the relevant context) required that the Trustees be prevented from entering into a litigation funding agreement (on the terms of the LFA):

(a). the purpose of the Injunction was to preserve the assets subject to the Plaintiffs' proprietary claims so that they would be available to the Plaintiffs in the event that they were successful.

(b). the language used in the Injunction (disposal, encumbrance or dealing) refers (in the case of a disposition or encumbrance) to an act which involves (gives rise to) a transfer of the injuncted assets or a transfer (or the granting or creation including by way of charge) of rights in, over or to those assets (whether absolutely or by way of security) or (in the case of a dealing) some use of or change to the assets (or the rights attaching to them) in a manner that would prejudicially affect the Plaintiffs' rights to them (I would note that I the parties chose to cite only one authority on the meaning of "*dealing*" and save for *Ablyzaov* I was not directed to any case law on the interpretation of freezing injunctions and no cases on the interpretation of proprietary inunctions were relied on).

(c). the transfer of the assets (or of rights in, over or to them), the granting or creation of rights in, over or to the assets, or the prejudicial use of or change to the assets must have occurred and taken effect. It can have taken effect where a third party (not bound by the Injunction) has become entitled to the assets (or rights in, over or to them) in the sense that the third party has taken a transfer of, been granted rights over or been party to a use or change of the assets, or where the third party has been granted an enforceable right (i) to have the assets transferred to it subsequently, or (ii) to rights in, over or to the assets in the future or (iii) to them or to use or change them.

(d). in the present case the Trustees' prospective right to enforce its indemnity and lien in respect of trust assets and the Funder's potential future rights as a judgment creditor of the Trustees are insufficient to give rise to a breach of the Injunction. The enforcement of the right of indemnity and lien would of itself clearly be a breach of the Injunction. The injuncted assets can be and will be preserved without the need to interpret the Injunction as prohibiting and applying to the earlier act of incurring a liability (or entering into an

agreement which may result in a liability being incurred which is) covered by the indemnity and lien. Furthermore, the Funder's rights against the injuncted assets has not arisen and the Funder has not become entitled to rights against the injuncted assets at the time of and by reason of the Trustees' entry into (or even the performance of) the LFA. The Funder does not, on the LFA coming into force or it being performed, have any right to go against injuncted assets (even a contingent right). There is also an issue, not explored by the parties, as to whether the Funder could be liable for aiding and abetting a breach of the Injunction.

(e). in my view, the Injunction did not and was not intended to prevent the Trustees incurring a liability (or entering into a contractual obligation that was capable of and would in the event that certain conditions were satisfied become a liability) which, even though it may arise and become payable before the Injunction was discharged (i) they were not permitted to pay out of the injuncted assets (because the Injunction prohibited that) and (b) which could only be enforced by the Funder against, and would only result in the Funder having rights against, the injuncted assets upon the occurrence of subsequent events which were not required by the terms of the LFA and may never happen, namely if the Trustees subsequently failed to pay the liability (out of assets not subject to the Injunction) and the Funder acquired the rights of a judgment creditor of the Trustee.

(f). the Fifth Defendant goes too far when she asserts that the Injunction prohibited any action by the Trustees which resulted in there being a risk of dissipation of the injuncted assets, in particular a risk that those assets could subsequently be subject to a process of execution of a judgment by a third party. A mere risk of dissipation is different from an act which takes effect so as to result in a disposition of or the granting of rights over or to (or changes to) the assets (even rights exercisable in the future) and, in order to be covered, would need additional wording in the Injunction. I note that the Injunction did not include the words used in the standard freezing injunction (see *Ablyazov*) prohibiting the injuncted party from "*diminishing the value*" of his/her assets but even that language requires an act which can

be said to have effect so as immediately and irrevocably to diminish the value of the assets concerned, rather than to give rise to a risk of diminishment in the future.

The effect of the redactions to the LFA and DOV made by the Trustees

85. The Fifth Defendant referred to [50] of the August Judgment and argued that I had decided that her application was to be determined on the basis that (a) the Trustees will become liable to pay the Resolution Amount when Success is achieved, and this can be before the Injunction is lifted and (b) the Trustees' redaction of the sub-paragraphs after (ii) in paragraph 2 of schedule 2 of the LFA (paragraph 2 deals with how the Resolution Amount is to be calculated and the redacted LFA, as noted above, states that the Resolution Amount is equal to the aggregate of the Transaction Costs and the Funded Amount but redacts the three further sub-paragraphs) the Resolution Amount could be larger than the net Assets recovered in Proceedings outside Cayman. The Fifth Defendant submitted that since the Trustees had chosen not to adduce evidence to support the assertion made in their attorneys' letter dated 18 March 2022 (referred to in [61(c)] of the August Judgment) that there were "*more than sufficient funds available in the structure …to discharge any liability under [the LFA] without recourse to the Ypresto Trust [assets]*" her application should be decided on the footing that the Trustees would need to have recourse to the Ypresto Trust assets to pay the Resolution Amount.

86. [50] of the August Judgment was as follows (underlining and emphasis added):

> *"Accordingly, on the basis of the Redacted LFA and the Redacted Deed, and the Trustees' confirmations, the Notice of Motion falls to be decided on the basis that the Trustees have agreed and will become liable to pay the Resolution Amount when Success is achieved, and that Success can be achieved in proceedings in other jurisdictions which do not relate to the assets subject to the Injunction. The effect of incurring and of the accrual of such a liability on the assets subject to the Injunction (and the construction and effect of the Injunction) will need to be considered at the next hearing of the Notice of Motion. Furthermore, it is not clear that such liability has to or will be discharged only out of the assets recovered. Because the terms governing the quantification of the Resolution Amount have not been disclosed* **it is unclear whether, and the Trustees will be unable to show**

> ***that, the Resolution Amount payable in those circumstances will and must be equal to or less than the net value or the net proceeds of the assets recovered in those other proceedings. It therefore appears to be possible that the Trustees will be subject to a liability in excess of the value of the assets recovered*** *(clause 2.1.1 of the LFA deals with the nature of the Trustees' liability by stipulating that the Trustees' liabilities are incurred solely in their capacity as a trustees of the Trusts). The risk of such a shortfall then raises the question, inter alia, of how the shortfall would be covered and discharged.* ***The Court will need to consider, in these circumstances, the nature of the Trustees' rights of indemnity (under applicable law) against trust assets, how those rights are to be characterised - are they proprietary or merely personal rights (under applicable law) - and how they can be exercised, the extent to which the Fund may be subrogated to the Trustees' rights, the impact of the Injunction on the Trustees' rights of indemnity and any rights of subrogation and the interpretation and effect of the Injunction.*** *Because the Trustees have not granted any pledges or charges over the assets subject to the Injunction no question arises as to the impact of the Fund having rights to enforce a security interest over those assets."*

87. As can be seen from this passage in the August Judgment, I did not form a firm and final view as to whether on the proper construction of the redacted LFA and the DOV it was to be assumed that the Resolution Amount could be larger than the net Assets recovered in Proceedings outside Cayman. My views were tentative and preliminary and subject to revision in light of the further submissions to be made at the further hearing. Having heard and considered those submissions, I accept that clause 13.1 (in particular clause 13.1.2) of the LFA ensures that whatever the quantum of the Resolution Amount (and all the elements of the Resolution Amount are in the public domain - see [23(e)(i)] of the Champerty Ruling and the Withers Letter - even if the precise quantum cannot be calculated) a liability to pay it can only accrue and become due where if it was paid the Claimants would retain free Assets with a market value of at least $10 million. The proper assumption therefore is that while the Resolution Amount could be larger than the net Assets recovered in Proceedings outside Cayman, it can never accrue and become payable unless the Claimants have Control of other Assets which, with the net Assets recovered in Proceedings outside Cayman, have a market value greater than the aggregate of the Resolution Amount and $10 million.

88. I am satisfied that the terms of the LFA (and the DOV) and their legal effect as they relate to the application made in [6] of the NOM based on the grounds set out in the original NOM can fairly be interpreted and understood by reference to the redacted versions of the LFA (and DOV), as supplemented by the further material adduced in evidence as I have set out above.

The proper interpretation of the LFA

89. I generally found the interpretation of the relevant provisions of the LFA (as amended by the DOV) put forward by Mr McPherson KC to be persuasive (although, as I have indicated, it would have assisted the Court to have had a much clearer and comprehensive explanation of the Trustees' position and approach to construction of the LFA and the DOV well in advance of the most recent hearing). I accept that, on the proper construction of the LFA (as amended by the DOV):

(a). there are two independent conditions to the Funder's entitlement to the Resolution Amount (as set out in clause 13.1 of the LFA), namely an occurrence of Success and that, at the relevant time, if payment of the sum constituting the Resolution Amount was to be paid, the Claimants (taken together) would still have Control over Assets with a market value of at least $10 million (as I understood the Trustees' position, they accepted that when clause 13.1.2 of the LFA stated that payment of the Resolution Amount must not result in there being Control over Assets with a market value of less than $10 million, it referred to Control by any and all the Claimants over Assets, even though clause 13.1.2 does not explicitly identify whose Control counted and was to be taken into account).

(b). the Assets subject to the Injunction are not treated as being in the Control of the Trustees.

(c). therefore while the Injunction remains in force, the value of the Assets subject to the Injunction (referred to as the Cayman Assets in the DOV) are to be ignored for the purpose of determining whether the $10 million threshold in clause 13.1.2 has been satisfied. In

order for that threshold to be satisfied, the Trustees and BGO must hold and Control Assets not subject to the Injunction which, after payment of the sum constituting the Resolution Amount, would have a market value of $10 million or more.

(d). therefore there can never be a shortfall in the sense that the monetary quantum of the Resolution Amount which is due and payable is greater than the market value of the free Assets under the Control of the Trustees and BGO.

(e). this is the case even where there is Success after the Funder has given a Termination Notice under sub-clauses 17.1.3 or 17.1.4 of the LFA.

(f). the Resolution Amount can accrue and become payable before the Injunction is discharged but in that event the Trustees (and BGO) must (by definition) have resources with a *market* value (that must mean taking account and based on a real world realisable value) that would be sufficient to discharge the Resolution Amount without having recourse to, and without needing to touch, the Assets subject to the Injunction.

(g). the Trustees are not obliged under the LFA to use Assets subject to the Injunction to pay the Resolution Amount when it falls due.

90. I accept the Trustees' submission that the Assets subject to the Injunction are not in their Control. Control, as noted above, is defined in the LFA to mean "*any actual control, in each case whether direct or indirect, any legal, equitable, beneficial, signatory or other control exercisable by or on behalf of a Claimant (whether alone or together with another Claimant), including any rights of distribution.*" This definition must be understood in my view as referring to actual control *lawfully* exercisable by the Claimants. Actual Control must, in the context of the LFA as a whole, connote the ability and right actively to deal with or direct dealings with the relevant Asset – to the extent at least of being able to realise the value of the Assets concerned. The constraints

imposed by the Injunction are inconsistent with the Trustees having such a power and rights with respect to the assets subject thereto.

91. This construction of Control is consistent with the terms of, and approach adopted in, the DOV. As Mr McPherson KC submitted, sub-clauses 6(a)(iii) and (iv)of the DOV (without the need for the corrections relied on by the Trustees) assume that the discharge of the Injunction would, apart from the amendments made by the DOV, have resulted in Control then being achieved in respect of those assets (and that the Trustees did not have Control of Assets subject to the Injunction prior to its discharge). This is because it was considered necessary to remove the obligation to pay the Resolution Amount upon a discharge of the Injunction.

92. Clause 7(i) of the DOV (once again without the need for the corrections relied on by the Trustees) appears to go further by acknowledging that any proprietary rights granted to the Funder in respect of Assets subject to the Injunction and claimed by the Plaintiffs would be subject to the Plaintiffs' proprietary rights (if established on appeal). This provision acknowledges that even if the Funder is granted and acquires such rights only after the discharge of the Injunction, the Trustees would have granted, and the Funder would have acquired, those rights with and when on notice of the Plaintiffs' proprietary claims and therefore will or at least may be bound by the Plaintiffs' rights and potentially liable to the Plaintiffs under the applicable law.

93. I accept that, as the Fifth Defendant pointed out, the Trustees are jointly and severally liable to pay the Resolution Amount with BGO and that for the purpose of determining whether the $10 million threshold in clause 13.1.2 has been satisfied it is necessary to have regard to Assets under the Control of all or any of them. Accordingly, if BGO is the party that has Control of Assets with a market value that would allow the Resolution Amount to be paid and leave a surplus of free Assets worth at least $10 million, then the Trustees would be liable to pay the Resolution Amount even though they themselves did not have Control of any (or sufficient) Assets from which to discharge it. But it does not follow that the Trustees would be required to have recourse to the Assets subject to the Injunction or that they would be required to submit to a judgment

obtained by the Funder. While this was not a point dealt with in the expert evidence of Liechtenstein law, I think that it is permissible to assume that the Trustees would be entitled (and it has not been established that the Trustees would not be entitled) to require that BGO as joint obligor discharge the liability on the basis that if one Claimant only has Control of Assets when the Resolution Amount becomes payable it was agreed that they would be liable to pay what was then owing. In any event, it seems to me that it is reasonable inference to draw that the Claimants agreed and accepted that for the purpose of discharging their joint and several liability to pay the Resolution Amount they would cooperate and act together so as to ensure that Resolution Amount was paid when due. The evidence confirmed the relationship between the Trustees and BGO - see, for example, the Liechtenstein court judgment dated 15 February 2018 at [16], see pages 250-274 of the hearing bundle, which confirms that BGO was one of trusts and foundations established by Mr Perry; the Fifth Defendant's Third Affidavit at [7(iv)] in which she states that BGO "*is managed by a board largely comprising members provided by the First Defendant*"; the appendix to D5-12 at [2] and [3] in which she acknowledges that the Trustees and BGO are *"on one side and [the Plaintiffs are] on the other side*" of the worldwide litigation and that the Trustees could use and access the funds in BGO; the email, at pages 138-139 of the hearing bundle from BGO's legal adviser, Mr Nic Reithner, to the Fifth Defendant in which he confirmed that the interests and objects of BGO and the Trustees were "*aligned*"; the Ypresto Trust accounts for 2020 which refer to BGO as a related entity and the fact that the First Defendant and BGO have the same registered office.

94. Under the LFA, the Funder assumes an obligation to fund the payment of certain litigation costs and the Trustees (together with BGO) assume various obligations including, in the event that the Funder does advance such sums, to pay the Resolution Amount, if certain conditions are satisfied. The Trustees are parties to the LFA as trustees (clause 2) and their liability is expressed to be non-recourse (the Fund Amount is provided to and paid on account of the Claimants on a non-recourse basis – see [1] of Schedule 2). This means that the liability of the Trustees is qualified and limited. They are only liable to the extent of the trust assets out of which the sums due and payable under the LFA can be discharged. If there is a shortfall between the sums due under the

LFA and the value of trust assets available to meet those sums, the Trustees' liability is equal to the value of those trust assets. The reference to "*non-recourse*" therefore reflects and reinforces the term that states that the Trustees enter into the LFA in their capacity as trustees. When the Resolution Amount becomes payable, the Trustees can use trust assets to pay it (by reason of the Trust Deed and applicable Liechtenstein law - see article 916 of the PCA).

95. The Trustees clearly became immediately subject to contractual obligations and liabilities when they entered into the LFA. These obligations included an obligation to pay the Resolution Amount in the event that the Funder invested in the Proceedings and advanced funds, and if certain conditions were subsequently satisfied. It seems to me that the Trustees' contractual obligations can be characterised as giving rise to a contingent liability to pay a future debt (even if the Funder's *cause of action* only accrued upon satisfaction of the conditions applicable to the obligation to pay the Resolution Amount). The liability to pay the Resolution Amount when it arose would clearly be a liability in debt (to use the words of Millett LJ (as he then was) in the English Court of Appeal in *Jervis v Harris* [1996] Ch. 195 at 202: "*a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition*)". The Trustees' liability to pay the debt was contingent upon the occurrence of various matters (but since the Funder had not yet made any investment or advanced any funds, the Trustees' liability probably cannot properly be characterised as a contingent *debt*). The Funder would be considered in this jurisdiction for the purpose of a winding up a contingent creditor of the Trustees (see the judgment of Pennycuick J in *Re William Hockley Ltd* [1962] 1 WLR 555 at 558 where he held, in deciding whether a petitioning creditor had standing to present a winding up petition as a contingent creditor, that *"The expression "contingent creditor" ... must ... denote a person towards whom under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date."*)

96. But I accept that at the date when the LFA became binding and effective, there was no debt owed and the Trustees were not subject to a present unconditional liability to pay the Resolution Amount.

What rights do the Trustees have under the Trust Deed and Liechtenstein law and what rights does the Funder have to use assets subject to the Injunction to discharge liabilities arising and payable under the LFA?

97. At the date when the LFA became binding and effective the Trustees did not have an immediately enforceable claim to an indemnity against the Ypresto Trust assets. This conclusion appears to me to be in accordance with the expert evidence of both Dr Walch and Dr Niedermüller.

98. Both parties accepted that the Trustees had (a) a right of indemnity in respect of liabilities incurred as trustees (under sub-clauses 14.2 and 14.3 of the Trust Deed and article 920(1) of the PCA), and a lien in respect thereof (both by way of agreement or grant in clause 14.4 of the Trust Deed and by operation of law under article 921(2) of the PCA), which would permit the Trustees to use trust assets to pay the Resolution Amount when it fell due or reimburse themselves out of the trust assets if they had first used their own money to pay the Resolution Amount and (b) a right of retention which would permit the Trustees to hold trust property while they remained subject to an outstanding contingent liability (Dr Niedermüller concluded at page 19 of his report that "*Given that the retention right of the trustee according to Art. 921 para 2 PCA mainly serves the purpose to secure all claims of trustee under Art. 920 PCA, we consider that the retention right of the Trustees most likely expands to all claims of trustees under the provision of Art.920 PCA and thus both due claims as well as contingent claims*"). Dr Niedermüller said that the trust assets were *affected* (a term used in question 1) when the Trustees' incurred a contingent liability under the LFA to pay the Resolution Amount (in the sense that, as he said in his answer to question 1b on page 15 of his report, the contingent liability was covered by the right of indemnity and the lien) but accepted that recourse to the trust assets could only occur once the Resolution Amount became payable (in his answer to question 1c, on page 15 of his report, he said that "*When the contingent liabilities to the Funder for the payment of the Resolution Amount become*

due, this also affects the trust assets in the sense that the Trustees can then use the trust assets of the Trust to effect payment of the Resolution Amount").

99. It is however, clear, as I have noted, that the Trustees' right to retain the trust assets applied to their liability in respect of the Resolution Amount. Upon the LFA becoming binding the Trustees assumed obligations which could result in a debt which they would be entitled to pay out of trust assets. It seems to me that both experts considered that the Trustees would be entitled from the time at which the LFA was signed and became effective to retain trust assets for the purpose of protecting their right of indemnity and lien in respect of the future or contingent liability to pay the Resolution Amount (Dr Walch said (at [27] of his report) that "*To be clear, it would be open to the Trustees to retain Trust Assets within the Trust structure to satisfy future or contingent liabilities of the Trust*").

100. It seems to me that Dr Walch's assertion that the Trustees' right of indemnity only *arises* once they have incurred and actually paid expenses out of their own assets (see [20] of his report) must be understood in context. He was focussing on the right of indemnity but accepted that the position was different with respect to the right to use trust assets to discharge a liability incurred qua trustee (see the summary of his conclusions in [6] of his report). He made it clear (in [7] of his report) that the Trustees had two types of right and options for discharging a liability "*contracted as trustees*," namely to "*meet the liabilities under the LFA from the assets of the Trust or .. meet the liabilities from their private assets and then claim reimbursement of their expenses from the Trust Assets.*" In order to have (and to be able to exercise) their right of indemnity, the Trustees must already have discharged the relevant liability (out of non-trust assets). But clearly they need not have done so before exercising their alternative right to use the trust assets to discharge the liability.

101. There is a dispute between the experts as to whether the Trustees' right of indemnity and lien is to be characterised as proprietary under Liechtenstein law. Dr Walch said that in his opinion (see [23]-[25] quoted above) the "*lien*" referred to in article 921(2) of the PCA was best described

and understood more accurately as a limited right of retention (the Trustees were not required to hand over trust assets to the beneficiaries until their right to reimbursement had been satisfied) but it was not a true lien (or proprietary right) since article 921(2) and therefore the lien referred to therein only gave priority over the claims of the trust beneficiaries. Further, the lien granted by clause 14 of the Trust Deed was to be treated as having the same limited effect. Furthermore, the right of indemnity given by article 920(1) and clause 14 of the Trust Deed only gave the Trustees the same rights as other creditors (presumably being those to whom liabilities had been incurred in managing the trust). Dr Niedermüller however considered that the Trustees' lien (both under article 921(2) and clause 14.4 of the Trust Deed) would give the Trustees priority over the claims of other creditors but he accepted that it the position was not settled. He noted that it had not yet been decided whether the lien would give priority over the claims of other creditors and that "*no jurisprudence or doctrine exists on the question whether and how the trustee can obtain a valid lien on the trust assets by a clause in the trust deed such as Art. 14.4 provides. Thus, it is well possible that courts or doctrine could come to a different conclusion*."

102. For the purpose of the Fifth Defendant's application, I must assume that under Liechtenstein law following the LFA becoming binding, the Trustees had a right to retain at least as against the beneficiaries of the Ypresto Trust, the Ypresto Trust assets for the purpose of protecting their right of indemnity and lien in respect of the future or contingent liability to pay the Resolution Amount and, when that liability arose and became payable, to use the Ypresto Trust assets to pay the Resolution Amount. I must also assume that it is arguable that the Trustees had a secured right of indemnity out of the Ypresto Trust assets in priority to, and to use the Ypresto Trust assets to pay the Resolution Amount which ranked ahead of, other trust creditors. The other creditors to whom Dr Niedermüller and Dr Walch refer must be creditors of the Trustees who are owed sums arising out of the Trustees' activities as trustees. Article 915 of the PCA makes it clear that only claims involving the Trustees' remuneration and compensation can be enforced against trust property. Therefore, they are envisaging competition between the Trustees (who are claiming an indemnity out of trust assets where they have previously paid trust liabilities out of

their own assets) and trust creditors (who are owed trust liabilities by the Trustees which have not been paid).

103. But since there is no evidence to suggest that Ypresto Trust is insolvent, so that the claims of the Trustees and other trust creditors could not be paid in full, the relative ranking of the Trustees' and these other trust creditors' claims is not an issue. What is in issue is whether the Trustees' rights, and the rights of the Funder, could or would have priority (under the applicable law) over the proprietary rights of the Plaintiffs to or in the Ypresto Trust Assets in the event that the Plaintiffs succeed in their appeal. This issue was not considered in the expert evidence. It was, as I understood it, assumed by both parties that the Trustees' rights could and would have priority. Certainly, the Trustees did not argue that their rights of indemnity, lien and retention could be ignored for the purpose of the application because the Plaintiffs' proprietary rights would always have priority. It must at least be arguable that the Trustees would not be entitled to set up their rights in priority to the proprietary rights of the Plaintiffs and that the Funder as a judgment creditor of the Trustees would also take subject to the Plaintiffs' rights. But the parties' submissions and the expert evidence did not address the question of what law would govern this priority dispute or what Liechtenstein law had to say on the issue.

104. I can see that it could be argued that unless the Trustees have proprietary rights under the applicable law (the law of the situs of the assets) then there can be no disposition of, encumbrance over or dealing with the assets subject to the Injunction (since as matter of construction such terms involve and require the transfer or granting of proprietary rights). But as I understand their argument, the Trustees did not say that their rights ultimately and in the future, after the liability to pay the Resolution Amount had accrued and become payable, were not to be treated as sufficient to constitute a disposition, encumbrance or dealing with the injuncted assets. Their position was based on the time at which the Trustees' rights against those assets arose and became enforceable. As Mr McPherson KC acknowledged during his oral submissions (as I have explained above) "*If I grant a charge over something, the chargee gets proprietary rights straight away. If I create a state of affairs that at some stage in the future, the chargee may get proprietary*

rights, then that's a very different scenario…. the first [example] would be a breach of the injunction. The second would not. A breach of the injunction could occur in the future, but it's not [immediately] a breach of the injunction."

105. I must also assume, for the purpose of the Fifth Defendant's application, that under Liechtenstein law if the Trustees fail to pay the Resolution Amount when due the Funder can enforce its rights under the LFA against the Trustees (which may require a reference to arbitration), obtain a judgment against the Trustees for payment of the Resolution Amount and then enforce the judgment by way of execution over the trust assets. As Dr Walch said "*If the trustee does not perform its obligations, the counterparty may sue. If the trustee fails to pay after a judgment, the creditor may seize trust assets by way of execution*." Dr Niedermüller said the same: "*Once the Funder has obtained an enforceable arbitration award, he could directly enforce into all trust assets of the Trust, including the assets covered by the Injunction*" (he also considered that the Funder could obtain a freezing injunction in Liechtenstein based on its contingent claim if it could show that payment of this claim was endangered ("*In order to secure the claims to be asserted in the arbitration proceeding, the Funder also could obtain one or more injunctions against the Trustees of the Trust and thereby obtain a lien on the trust assets. For instance for all trust assets of the Trust located in Liechtenstein*").

106. Both Dr Niedermüller and Dr Walch opined that as a matter of Liechtenstein law the Funder would be able to execute its judgment against the Ypresto Trust assets (and other injuncted assets) despite the Injunction remaining in force. The Liechtenstein court would not recognise or give effect to the Injunction.

107. There was no discussion in the Liechtenstein law evidence as to whether the Funder's right to execute its judgment against trust assets was dependent upon (or derivative of) the Trustees having an enforceable right of indemnity, so that if the Trustees were prevented by the Injunction from at least enforcing their rights of indemnity and using assets subject to the Injunction to pay third party liabilities, the Funder could also not access those assets (which might be the case if

the Funder's rights arose by way of subrogation). Nor did the parties' submissions address the question of whether the Funder could so act and obtain rights over the injuncted assets without itself being (or at least being at risk of being) in contempt by reason of aiding and abetting and intentionally frustrating the purpose of the Injunction. I say, at this stage, no more than that this appears to me to be a serious issue. I note that, and this may be one of the reasons why, the Funder has indicated that it has no intention of seeking to assert or exercise rights against the assets which remain subject to the Injunction.

What is the proper interpretation of the Injunction?

108. Court orders are to be construed objectively and in the context in which they have been made. The proper approach to the construction of a court order including an injunction was recently summarised in the judgment of Phillips LJ in the English Court of Appeal in *SDI Retail Services Ltd v Rangers Football Club Ltd* [2021] EWCA Civ 790 at [44] (underlining added):

> *"……. The relevant legal principles had been common ground before the Judge, as they were on this appeal, and were summarised by him by reference to the following authorities:*
>
> *i) In Sans Souci Ltd v VRL Services Ltd [2012] UKPC 6 at [13] Lord Sumption described the correct approach to the construction of a judicial order as follows:*
>
> > *"…the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."*
>
> *ii) In Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd [2017] EWCA Civ 1525 Flaux LJ, with whom Gross and Lewison LJJ agreed) summarised the relevant principles as follows, drawing in particular on the judgment of Lord Clarke of*

Stone-cum-Ebony JSC in the Supreme Court in JSC BTA Bank v Ablyazov (No. 10) [2015] 1WLR 4754:

> *"(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction;*
>
> *(2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court;*
>
> *(3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order."*

109. In my view the requirement (the strict construction principle) to interpret an injunction restrictively (in favour of the injuncted party) applies both to freezing injunctions and proprietary injunctions. As Flaux LJ explained in *Pan Petroleum* (by reference to the Supreme Court's judgment in *Ablyazov*) the need to adopt a restrictive construction arises from the penal consequences of the breach of the order, which applies to both (indeed all) types of injunction. I note that the injunction in *SDI Retail Services Ltd* was not a freezing injunction.

110. Nonetheless, the fact that the injunction is granted to protect proprietary claims (and rights) is clearly relevant to its purpose and therefore to its construction. The standard form of freezing injunction is drafted so as not to interfere with the injuncted party's conduct of its ordinary business and incurring and paying ordinary business expenses. This is consistent with the purpose of a freezing injunction which is to prevent unjustifiable dissipation by the injuncted party of its own assets. The purpose of a proprietary injunction is different. In the case of a proprietary injunction the Court will exhibit a greater reluctance to allow the injuncted party to make use of an asset or payments out of funds subject to the injunction.

111. As both parties accepted, the Injunction should be interpreted so that it operates to achieve its purpose. Its purpose was to protect the Plaintiffs if they succeeded in establishing their

proprietary rights over the assets subject to the Injunction. The Injunction was granted to ensure that those assets were not paid away or transferred to a third party prior to the Injunction being discharged. It was also granted to ensure that a third party was not given rights over those assets which could be enforced while the Injunction was in force or which would rank ahead of the Plaintiffs' proprietary rights if their claims were successful (before or after the Injunction was discharged). It seems to me that the references to disposition, encumbrance and dealing have to be understood in that context. Putting the matter colloquially, the question to be asked when considering whether action by the Trustees is in breach of the Injunction is whether that action has prevented or will prevent the Plaintiffs getting their assets back intact if they win.

112. The core question is whether the protection which the Injunction was intended to provide required that the Trustees be prevented from assuming obligations which could later crystallise into a debt which might fall due before the Injunction had been discharged (or before the Plaintiffs' claims had been finally adjudicated), which debt could (pursuant to the LFA) be paid out of free assets but which if not so paid would give the Funder the ability to have recourse to assets subject to the Injunction (by obtaining a judgment against the Trustees and by way of execution of that judgment in Liechtenstein).

113. As I have already explained, in my view, the Injunction did not do so and to conclude that it did it would be an unjustifiably wide reading of the language of the relevant paragraph of the Injunction, which would be inconsistent with the need to adopt a restricted, contextual and purposive construction. The natural and ordinary meaning of the words not "*in any way [to] ... (ii) dispose of, encumber, or deal with*" the relevant assets connotes a transfer or granting of rights to a third party not bound by the Injunction or change to the condition or terms of the assets that has taken effect in such a way that the Plaintiffs' rights have been or will be prejudiced.

114. If the Trustees were to pay away or grant a charge over the injuncted assets they would have breached the Injunction. A breach would also occur, in my view, if they granted conditional rights to such a third party or agreed to do so in circumstances where the third party could satisfy the

condition and bring the rights into existence without further reference to or action by the Trustees. They would also do so by transferring funds subject to the Injunction held with one bank to another bank or by amending the terms on which those funds were held (that would constitute a dealing).

115. What about the case, posited by the Fifth Defendant, where the Trustees incurred a liability as trustees in circumstances where the only trust assets from which the liability could be paid were subject to the Injunction? In my view, that would not *of itself* constitute a breach of the Injunction as currently drafted. There would be no risk to the Plaintiffs because the Trustees would still be unable to access the injuncted assets to discharge the liability incurred. That of itself would independently be a breach of the Injunction. They could and may well be required to pay the liability out of their own pockets pending the discharge of the Injunction and the outcome of the Plaintiffs' proceedings (rather than allow the creditor to access the injuncted assets). If they failed to discharge the liability, the creditor would then be able, after obtaining a judgment against the Trustees, to seek to execute the judgment against the injuncted assets (by way of subrogation or an independent right as judgment creditor of the Trustees). But the creditor's right to do so remains contingent and remote. To say that as a result of incurring the liability injuncted assets have been disposed of, encumbered, or dealt with, even before the Trustees have failed to pay it or avoid a judgment being executed against the injuncted assets, would involve an unjustifiably and unusually broad meaning being given to these terms.

116. The position is *a fortiori* in the present case since on the proper construction of the LFA the Trustees will only be liable to pay the Resolution Amount in circumstances where they and BGO are in Control of sufficient free assets from which the Resolution Amount can be paid. It must be right that a party cannot be held in breach of an injunction where it remains in their power to avoid the act which the injunction is granted to prevent.

117. In the present case, while the Trustees have a right of indemnity, a lien and a right of retention which will give them the right to use the injuncted assets to pay the Resolution Amount when the

obligation to do so arises, and to retain them until that time, these rights cannot be enforced by the Trustees for the purpose of dissipating and using the assets to discharge the liability because of the terms of the Injunction (the exercise of the right of retention pending the outcome of the Plaintiffs' claims is not inconsistent with or prejudicial to their claims and rights). Furthermore, the Funder has no right to have recourse to the injuncted assets. It is only, at most, a contingent creditor of the Trustees who will only have rights of recourse if and when the Resolution Amount accrues and becomes payable and if the Trustees in breach of the LFA fail to pay the Resolution Amount before a judgment is obtained against them. I accept that the Court should adopt a realistic (common sense) and not a technical approach to the construction of the Injunction (as Henderson J was inclined to do in *Hewlett Packard*) but in my view doing so does not justify treating the Trustees' entry into the LFA as creating an encumbrance or involving a dealing with the injuncted assets.

118. It is, I think, instructive to consider the approach that has been taken in cases (such as *Ablyazov*) where a party subject to a freezing injunction borrows money. In a case (such as *Cantor Index*) where a party subject to a freezing injunction incurs an unsecured liability, there is no breach of the injunction because the unsecured creditor does not thereby acquire a right against that party's injuncted assets which would prevent those assets being available to the party who obtained the injunction upon that party executing a judgment. That is so even though the unsecured creditor could if not paid subsequently obtain his own judgment and enforce the judgment by execution against the assets subject to the freezing order. That possibility is not considered to be sufficient to result in a breach of the injunction. Furthermore, the injuncted party owns the injuncted assets and has the right (in the absence of the freezing injunction) to use his assets for the purpose of paying his liabilities. But the existence of that right of itself does not mean that incurring a liability results in a breach of the injunction. Enforcement of the right is prohibited by the injunction itself.

119. The Trustees are bound by the Injunction. It follows that the exercise of their powers and rights as trustees are subject to the Injunction. These rights include their right of indemnity, their right

to discharge liabilities incurred by them as trustees out of the trust assets and any lien or charge over the trust assets given as security for these rights. To the extent that the LFA gives the Trustees rights which are inconsistent with the Injunction, those rights cannot be exercised and the Trustees are bound not to exercise them while the Injunction remains in force. Therefore, even if the LFA gave rise to a liability to pay the Resolution Amount before the Injunction had been discharged, and an obligation on the Trustees to use assets subject to the Injunction to effect payment, the Trustees would, as a matter of Cayman law and in the eyes of this Court, be bound by the Injunction not to do so and prohibited from exercising their rights for that purpose. This would include reliance on or enforcement of any lien held by the Trustees. The fact that a Liechtenstein court may decline to give effect to the Injunction does not mean that the Trustees can evade the effect of the Injunction or sanctions for its breach in this jurisdiction.

The impact of the LFA on the loans owing and pledges granted by the Trustees as trustees of the Citizen Trust

120. It is the Fifth Defendant's evidence, contained in D5-14 (at [21]) as noted above, that Global told her that "*a redacted clause of the LFA (27.3) provides that payment to the [Funder] under the LFA will take priority over all existing loan agreements or debt instruments between the trusts in the trust structure*" and that the Trustees in their capacity as the trustees of the Citizen Trust owe money (the ***Loans***) to themselves in their capacity as trustees of the Ypresto Trust (and that the debt is secured by the ***Citizen Pledges***).

121. The Fifth Defendant also referred, again as noted above, to the proceedings in Panama relating to the EHI Shares and said (in D5-14 at [22]) that Global had also told her "*that schedule to the LFA gives the [Funder] priority over "Proceeds" recovered in "the Proceedings" which include EHI*." The Fifth Defendant went on to say that while she was unable to "*say whether the redacted parts of the LFA that Global refer to [gave] the [Funder] a proprietary interest in the pledged assets ... whether or not they [did do so] if the provisions are as Global have described, by entering into the LFA the Trustees have dealt with the EHI pledge in a way that reduces their value*."

122. The Fifth Defendant in her supplemental skeleton argument (at [62]) noted that without sight of these provisions in the LFA in unredacted form she was required to guess how they might impact on the Ypresto Trust assets. It had not been until Global had informed her about clause 27.3 and schedule 3 of the LFA that she was able to draw the issue to the Court's attention. She submitted that the Trustees had not disputed that under the LFA the obligations owed by the Trustees as trustees of the Citizen Trust to the Funder took priority over their obligations to themselves as trustees of the Ypresto Trust in respect of the Loans (and under the Citizen Pledges). She submitted that by entering into the LFA on these terms the Trustees had devalued the rights of the Ypresto Trust in and under the Loans and the Citizen Pledges (which were assets claimed by the Plaintiffs and therefore covered by the Injunction).

123. The Fifth Defendant, as I understand it, claimed that, based on Global's statements, which the Trustees had not sought to rebut or deny, it appeared that the effect of clause 27.3 and schedule 3 of the LFA was to affect and diminish the value to the Ypresto Trust of its rights (technically the rights are those of the Trustees as trustees of the Ypresto Trust) against the Citizen Trust (technically the obligations are those owed by the Trustees as trustees of the Citizen Trust) under and in respect of the Loans and the Citizen Pledges, because the sums owed by the Trustees as trustees of the Citizen Trust to the Funder were to be paid before the sums owed to themselves as trustees of the Ypresto Trust under the Loans (which are secured by the Citizen Pledges). The Fifth Defendant submitted that therefore the Trustees dealt with the Loans and the Citizen Pledges in breach of the Injunction.

124. The claim that the LFA includes a term that could qualify or change the rights of the trustees of the Ypresto Trust against the trustees of the Citizen Trust has only arisen recently. D5-14 was sworn on 7 November 2022 and filed shortly before the hearing. The Fifth Defendant did not say when she had been informed of the contents of clause 27.3 and schedule 3 by Global but I assume that it was only after the August Judgment. This was asserted to be the case in the Fifth Defendant's supplemental skeleton argument.

125. For the purpose of the Fifth Defendant's challenge to the redactions made by the Trustees, and as set out in the August Judgment, the Citizen Trust had only been relevant because the Fifth Defendant had raised the question of whether the Trustees as trustees of the Citizen Trust had granted security to the Funder over the assets of the Citizen Trust, which security might prejudice the security already held by Trustees over those assets as trustees of the Ypresto Trust (see [26] of the August Judgment). I held in the August Judgment (see [54]) that the Fifth Defendant was entitled to a clear confirmation from the Trustees that they had not granted such security interest to the Funder over the assets of the Citizen Trust that would rank in priority to or pari passu with the Citizen Pledges granted to the Trustees as trustees of the Ypresto Trust. In Boehler 7, sworn on 26 August 2022, Mr Boehler had confirmed (at [9]) that "*no security or proprietary interest has been granted to the Funder over the Citizen Assets*."

126. In Annex A to Partos 12 (sworn on 8 July 2022), Ms Partos had stated that only clause 27.1 of the LFA was relevant to the NOM and that "*the remaining [sub] clauses [in clause 27] which deal with the Claimants' liability are not*."

127. In their written submissions for the hearing, the Trustees, after having referred to matters raised for the purpose of the Fifth Defendant's challenge to the Trustees redactions and [26] of the August Judgment, said that they did not understand the Fifth Defendant's concerns and case (they said that the Fifth Defendant had redirected "*her fire at redacted provisions of the LFA. Bluntly, her case in that regard – that by entering into the LFA the Trustees have dealt with the EHI pledge in a way that has actually reduced its value and so adversely impacted the assets of the Ypresto Trust - is not understood. How she hopes to persuade the Court of her case in this regard to the requisite standard is unclea*r").

128. At the hearing, as I have explained, Mr McPherson KC only made brief submissions on the Fifth Defendant's allegation. He dealt only with the EHI Shares. I found these submissions cryptic and hard to follow (as I indicated at the hearing). He appeared to focus exclusively on the impact of the LFA on the Plaintiffs' claims, being litigated in Panama, to ownership of the EHI Shares. He

said, as I understood it, that there could be no breach of the Injunction since the LFA did not affect or prejudice the Plaintiffs' rights with respect to the EHI Shares. If they succeeded in establishing in the Panama proceedings that they owned the EHI Shares, then they would obtain the shares free of any claims by the Funder (the shares not, on the evidence, having been charged to the Funder) and their position would not be affected by the fact that the Loans would only be paid to the Trustees as trustees of the Ypresto Trustees after the Trustees as Trustees of the Citizen Trust had paid sums owed by them to the Funder. If, however, the Plaintiffs failed to establish that they owned the EHI Shares then those shares were not assets which the Injunction was intended to protect and preserve and so it did not matter if their value was adversely affected by a liability to the Funder.

129. At no point did the Trustees deny that Global's account was accurate or that (indeed they accepted that) the Ypresto Trust's rights in respect of the Loans (and the Citizen Pledges) were subject to the Injunction.

130. The Trustees' response appears to miss the point being made by the Fifth Defendant. As I understood her submission, the Fifth Defendant claimed that the effect of the LFA was that the Trustees as trustees of the Citizen Trust had agreed to pay (and that the Trustees as trustees of the Ypresto Trust had agreed that the trustees of the Citizen Trust should pay) the Funder what they owed before paying what they owed to the trustees of the Ypresto Trust in respect of the Loans. The Funder would therefore be paid first by the Citizen Trust trustees (and paid first out of the proceeds of the EHI Shares) before the Ypresto Trust was paid. The Fifth Defendant says that even if the terms of the LFA did not create or give to the Funder any proprietary rights over the assets of the Citizen Trust (including the EHI Shares) or of the Ypresto Trust, they changed the rights of the Ypresto Trust trustees and the terms of the Loans (and the pledge over the EHI Shares). As I understand the argument, the Fifth Defendant says that these changes must be treated as amendments to the Loans (and the pledge of the EHI Shares) which were agreed by the Trustees both *qua* trustees of the Citizen Trust and trustees of the Ypresto Trust, and an amendment to the rights of the Ypresto Trust trustees which were subject to the Injunction. As

such, by entering into the LFA and agreeing to these amendments, the Trustees dealt with assets subject to and in breach of the Injunction.

131. This seems to me to be a reasonably arguable position to take. Furthermore, it is a different point to the one raised by the Fifth Defendant when challenging the Trustees' redactions and dealt with in the August Judgment. However, in order to be able to determine the legal effect of clause 27.3 of the LFA, and whether there has been an amendment to the Loans (and the pledge over the EHI Shares) or otherwise a dealing with the Loans (and that pledge) in breach of the Injunction, the Court needs to see and be sure that it has seen the (full) wording of the clause. It is not clear to me that the Fifth Defendant is saying in D5-14 at [21] that Global has given her the precise wording of and quoted from clause 27.3 of the LFA. The Fifth Defendant referred in that paragraph to having been told that the clause stated that "*payment to the [Funder] under the LFA will take priority over all existing loan agreements or debt instruments between the trusts in the trust structure*" and "trust structure" is not obviously wording that would be used in the LFA (it is not a defined term and I cannot see it used elsewhere in the redacted version of the LFA that is in evidence). It is also unclear as to how schedule 3 of the LFA gives the Funder priority over Proceeds recovered in the Proceedings and what the wording of the schedule is. In these circumstances, I am not in a position to rule on the effect of either clause 27.3 or the relevant part of schedule 3. I certainly cannot conclude that there has been a clear breach to the criminal standard. I also cannot conclude that there has been a breach on the balance of probabilities.

132. The Fifth Defendant could, upon having been given the new information by Global, have applied for disclosure of clause 27.3 and the relevant parts of schedule 3. As I have said, the information given by Global and the argument that this disclosed a breach of the Injunction, raised a new point different from the issue on which I had ruled in the August Judgment. *Prima facie*, the new information and argument would have given at least arguable grounds justifying additional disclosure by the Trustees. But the Fifth Defendant did not make such an application and therefore it would be wrong for me to consider ordering further disclosure at this stage. It is a

matter for the Fifth Defendant as to whether she wishes at this late stage to make such an application and whether such an application would be too late or stand any chance of success.

133. I would note that the Trustees have argued, and I have accepted, that there must *by definition* always be free non-injuncted Assets out of which (and which will be sufficient) to pay the Resolution Amount when the liability arises and payment is due. Accordingly, by assuming (upon the LFA becoming effective) an obligation (and even a contingent liability) to pay the Resolution Amount, the Trustees did not become obligated to pay (and remained prohibited from paying) the Resolution Amount out of injuncted assets; nor did they give the Funder a right to have recourse to the injuncted assets. The injuncted assets were therefore protected at least until the Trustees failed to pay the Resolution Amount to the Funder and allowed the Funder to obtain a judgment against them. Following this line of reasoning, the Trustees could no doubt say that, on the basis that the Loans (and the pledge of the EHI Shares) are subject to the Injunction and therefore not in their Control, in order for the Resolution Amount to be payable there must be other free Assets with a market value sufficient to pay the Resolution Amount so that the Trustees are not bound or required to have recourse to the Loans (and the pledge of the EHI Shares) in order to pay the Resolution Amount, so that they will be preserved for the benefit of the Plaintiffs. But, at least on the basis of the arguments made to date, it seems to me that there is a difference when considering whether there has been a breach of the Injunction between saying that (a) incurring a liability which cannot be paid by the Trustees out of injuncted assets (and which under the terms of the applicable agreements the Trustees are not obligated to pay out of injuncted assets and which the applicable agreements envisage will be paid out of other assets) and which gives a Funder rights against the injuncted assets as a judgment creditor of the Trustees in the event of non-payment by the Trustees and (b) an amendment with immediate effect to a chose in action subject to the Injunction (the rights against the trustees of the Citizen Trust or under a pledge they have granted) which qualifies and subordinates the rights granted thereby. If (b) accurately reflects the effect of clause 27.3 (and/or the relevant parts of schedule 3) of the LFA, it seems to me that there has been a breach of the Injunction (at least in the absence of evidence

demonstrating that the amendment and subordination can never reduce or adversely affect the value of the Loans and the pledge).

The conduct of the Trustees and their legal advisers

134. Following the May Judgment, there were a number of issues that remained to be resolved regarding the conduct of the Trustees and their legal advisers and it is convenient to deal with them now.

135. I must say that I remain concerned at aspects the conduct of the Trustees and their legal advisers in relation to the NOM.

136. I have referred above to the evidence filed by Ms Rebholz and Mr Zechberger regarding the circumstances in which they came to tell the Liechtenstein court that the LFA had been submitted to this Court "*for approval*" because it "*had to be seen as a disposal of the assets of the Ypresto Trust*." Both Ms Rebholz and Mr Zechberger acknowledged their errors and state that they do not recall ever sending their written submissions to the Liechtenstein court to the Trustees' Cayman and UK legal teams for their review and that no communications with those teams on that subject had been identified. In circumstances where Ms Rebholz admits to having had "*limited knowledge of the Cayman proceedings*" I find it surprising, and at least from the perspective of this jurisdiction, not in accordance with proper professional practice that she and her firm would have considered it appropriate to make submissions dealing with and including statements regarding the purpose and effect of the Cayman proceedings without first checking that the submissions and statements were accurate with the Trustees' Cayman attorneys.

137. I would also have expected, in view of the significance I attached in [69] of the May Judgment to the issue of when the Trustees' Cayman attorneys and London counsel had become aware of the erroneous statements made regarding the nature of the Cayman champerty application and that the LFA had involved a disposal of assets to the Funder, and the apparent failure of the

Trustees' Liechtenstein lawyers to brief the Trustees' Cayman attorneys properly, that the Trustees' Cayman attorneys would have separately confirmed to the Court that they had not seen or been aware of the submissions before 23 March 2022, when the Fifth Defendant's Eleventh Affidavit had been served. They have not done so.

138. I also have concerns regarding the adequacy of the disclosure made by the Trustees' Cayman attorneys (on behalf of the Trustees) in relation to clause 27 and schedule 3 of the LFA. As I have noted above, in Annex A to Partos 12 (sworn on 8 July 2022), Ms Partos had stated that only clause 27.1 of the LFA was relevant to the NOM and that "*the remaining [sub] clauses [in clause 27] which deal with the Claimants' liability are not*." In view of the statements made by Global to the Fifth Defendant in particular with respect to clause 27.3 (but also schedule 3), it appears that this statement was incomplete and possibly misleading. It seems to me that Ms Partos needs to provide an explanation to the Court of the basis on which those statements were made and how they are justifiable.

139. As I noted at [60] above, the Trustees' position has changed in the course of the various applications made in the NOM proceedings. It may be that the Trustee's previous explanation of its position as being that the LFA gave rise to no liability in respect of any assets subject to the Injunction unless and until the Injunction had been discharged was intended to represent a cryptic summary of the arguments now fully set out and deployed. But I feel bound to say that the impression given by the Trustees before they were required to disclose the redacted LFA (and DOV) was that those documents were drafted so as to make it clear, and were explicit, that the Trustees' obligations could never be discharged by accessing and that the Funder could never have recourse to the assets subject to the Injunction while the Injunction remained in force. Furthermore, their earlier explanations in writing as to their position and their construction of the LFA and DOV were less than clear and comprehensive. As the length of and detailed analysis required for the purpose of this judgment makes plain, the manner in which the LFA (and DOV) were drafted did not make this clear or explicit (although the terms of the DOV did in a somewhat elliptical manner achieve or acknowledge this result, as I have explained). No explanation has

been given by the Trustees as to why the LFA (and DOV) did not spell out that recourse would never be required or could be made to assets subject to the Injunction while the Injunction was in force. Nor was an explanation given as to why, when that was not done, an application to this Court had not been made for a suitable declaration or variation of the Injunction. In any event, had the Trustees adopted a different approach and immediately disclosed the relevant parts of the LFA and DOV and more clearly set out their position at an early stage, the time and costs spent in dealing with the NOM would have been significantly reduced and the Court would have been greatly assisted.

Postscript

140. On 12 January 2023 my Personal Assistant circulated this judgment in draft and, on the usual basis, invited counsel to identify any typographical or other corrections in advance of the judgment being handed down.

141. On 17 January 2023, Campbells wrote to the Court and said that they had written to Priestleys in relation to steps which the Trustees considered were required to preserve the confidentiality of the judgment when formally handed down to ensure that [4] of the July Order was given effect. Paragraph 4 stated, in summary, that insofar as the Relevant Terms were disclosed to the Fifth Defendant pursuant to [2] of the July Order, she was not permitted without the Court's permission, to rely on them in any other proceedings (in any jurisdiction) nor provide them to any other person save for the proper conduct of the NOM proceedings. Campbells explained that if it was not possible to reach agreement, they would apply for an order to preserve the confidentiality of the judgment and requested that the Court delay handing down the judgment until this issue had been resolved.

142. On 19 January 2023, Campbells and Priestleys sent to the Court a composite mark-up of the draft judgment containing the Trustees' and the Fifth Defendant's typographical corrections. On 20 January, I wrote to the parties and confirmed that the parties' proposed corrections were accepted

so that the draft judgment was in final form. I also directed that the parties notify the Court by 24 January as to the agreed position, or their different positions, in relation to the confidentiality issue raised by the Trustees. The draft judgment would not be handed down before this issue had been resolved.

143. On 24 January 2023, the Fifth Defendant and, with my permission, on 25 January the Trustees, filed written submissions dealing with the confidentiality issue. The Trustees sought, and the Fifth Defendant opposed, an order that the judgment shall not be made public but will be confidential to the parties, and that its use will be restricted in the same terms as provided for in the July Order so as to protect the confidentiality of the information disclosed by the Trustees relating to the LFA and DOV. The Fifth Defendant also applied for permission to disclose the judgment in supervisory proceedings that were taking place before the Princely Court in Liechtenstein.

144. On 27 January 2023 Campbells wrote to the Court and filed Ms Partos' Fourteenth Affidavit (***Partos 14***). Partos 14 addressed the issues raised in [137] and [138] above.

145. On 2 February 2023, my Personal Assistant circulated my draft judgment (the ***Confidentiality Judgment***) dealing with the Trustees' and the Fifth Defendant's applications and with Partos 14. Once again, this was distributed on the usual basis that counsel were invited to identify any typographical or other corrections in advance of the judgment being handed down. In the draft Confidentiality Judgment I explained my reasons for dismissing the Trustees' application for a confidentiality order and for granting in part the Fifth Defendant's application for permission to refer to the judgment in the current Liechtenstein supervisory proceedings. I said that the Trustees had failed to establish a proper basis on which an order precluding publication of the judgment, and the overriding of the principle of publicity and open justice, could be justified and that while the order I made (in [4] of the July Order) preventing the collateral use of the documents ordered to be discovered pursuant to that was to be treated as continuing after the 1-2 December hearing and publication of the Judgment, the Fifth Defendant had established a proper justification for

disclosing to and relying on before the Liechtenstein court those parts of the judgment that dealt with the conduct of the Trustees and their advisers, that is [134] – [139] of the judgment (the ***Trustee Issues***).

146. Also on 2 February, but after that email had been sent and the draft Confidentiality Judgment had been circulated, I received a copy of a letter to the Court dated 1 February from Priestleys which attached the Fifth Defendant's summons of that date (the ***1 February Summons***) and an unsworn copy of her Fifteenth Affidavit (***D5-15***). In the 1 February Summons the Fifth Defendant sought, in light of the comments made at [132] above, an order pursuant to GCR Order 24, Rule 13, that the Trustees produce an unredacted copy of clause 27.3 and schedule 3 of the LFA. D5-15 was expressed to have been made in response to Partos 14 (and therefore in relation to the Trustee Issues) and also in support of the 1 February Summons.

147. On 3 February, I received an unsworn copy of Mr Naeff's Eighth Affidavit (***Naeff 8***) but was told by the FSD Registrar that this had yet to be processed and accepted by the FSD Registry. In Naeff 8 Mr Naeff provided further information regarding the Loans and the Citizen Pledges in light of my discussion of the issues relating to the Citizen Trust above. He set out in full clause 27.3 of the LFA and exhibited an unredacted copy of schedule 3 of the LFA.

148. On 7 February, I received the parties' combined corrections to the draft Confidentiality Judgment (which helpfully corrected various typographical errors).

149. On 8 February, I emailed my Personal Assistant to confirm that I had reviewed and approved the parties' corrections to the draft Confidentiality Judgment and was therefore now ready to hand down both this judgment and the Confidentiality Judgment.

150. On 9 February, I received a copy of letters from Priestleys' dated 6 February and 7 February.

151. In the 6 February letter, Priestleys claimed that the documents exhibited to Naeff 8 revealed that the Trustees had in fact breached the Injunction and that sight of schedule 3 of the LFA revealed that the evidence given by Mr Boehler (in Boehler 7 at [9]) was inaccurate. Priestleys said that the Fifth Defendant intended to make an application in respect of these matters within the following 48 hours and asked the Court to delay handing down the judgment until after that application had been made so that the Court could consider the application before finalising and handing down the judgment. Priestleys also requested that the Court delay handing down the Confidentiality Judgment. They noted that I had not received or been able to consider D5-15 before circulating the draft Confidentiality Judgment and that the Fifth Defendant had recently obtained a translation of the Trustees' submissions filed in the Liechtenstein court in connection with the supervisory proceedings, which she considered to be relevant to her application for permission to refer to the Relevant Terms in those proceedings and which in her view should be taken into account before the Court reached a final decision on that application.

152. The 7 February letter attached the Fifth Defendant's summons (the ***7 February Summons***) of that date and an unsworn copy of her Sixteenth Affidavit (***D5-16***). In the 7 February Summons, the Fifth Defendant sought various orders. She requested the Court to exercise the power to revise the judgment before handing it down so as to deal with and take into account the new evidence filed by the Trustees after the judgment was circulated in draft (that is Naeff 8 and its exhibit); she renewed her application for a declaration that the Trustees had breached the Injunction, now solely based only on the Trustees' actions in their capacity as trustees of the Ypresto Trust and in relation to the Ypresto Trust's rights against the Citizen Trust and sought directions for the determination of that application; and sought an order requiring the Trustees to produce an unredacted copy of schedule 4 of the LFA; and sought an order (in [5] of the 7 February Summons) pursuant to [4] of the July Order permitting her to rely on the Relevant Terms disclosed pursuant to [2] of the July Order both in the supervisory proceedings currently being conducted by the Liechtenstein court and in any other supervisory proceedings to which the Fifth Defendant and the Trustees were parties in which the Trustees referred in submissions or evidence to the Relevant Terms or any finding made by the Court in respect of the Relevant

Terms. The Fifth Defendant said that D5-16 had been prepared in response to Naeff 8 (and therefore in relation to the Citizen Trust issues) and in support of the 7 February Summons.

153. I also received on 9 February a copy of a letter to the Court dated 7 February from Campbells. This had been sent in response to Priestleys' letter of 6 February. Campbells said that the Trustees did not consider that there was a proper basis for delaying the handing down of the judgment or the Confidentiality Judgment and invited me to hand down the judgment forthwith and to hand down the Confidentiality Judgment once the parties' corrections to the draft judgment had been received (which of course they were on that day, 7 February). The Trustees accepted that it would then be open to the Fifth Defendant to make further applications if she wished to do so. Campbells further noted that the Trustees considered that it was inappropriate for the Fifth Defendant to reference the draft judgment in the Liechtenstein proceedings although they did not object to her referring to the judgment once handed down, and therefore to the Relevant Terms to the extent referred to in the judgment (despite my decision in the draft Confidentiality Judgment that the Fifth Defendant remained subject to the restrictions in [4] of the July Order even after the judgment had been handed down).

154. On 10 February I wrote (via my PA) to Campbells and Priestleys to respond to these multiple communications and to confirm the status of the two draft judgments, I explained that the previous day (9 February) at 4.32pm the Court's seal had been affixed to both judgments and the sealed copies were uploaded to the Court's file (portal). This had been done before I had read Priestleys' letters of 6 and 7 February and Campbell's letter of 7 February. The sealed judgments had however not been uploaded to the public Judgments Register (and therefore had not been made public). Having read those letters, I had directed that the sealed copies of the judgments not be placed on the Judgments Register for the time being pending a proper review of the position in light of the Fifth Defendant's two summonses and the recent correspondence. I also directed that a case management conference be urgently listed to allow the parties to apply for appropriate directions in the circumstances (and such a hearing was subsequently listed for 16 February 2023). I said as follows

"It seems to me that, in view of the volume of material filed with the Court and the urgent need to establish the status of the judgments and the procedural route and timetable for dealing with the Summonses, the most appropriate course is to list a short case management hearing in the Summonses and the NOM to give the parties an opportunity to make submissions as to the status of the judgments and how they wish the Court to proceed. I suggest that the hearing be listed for next week and be conducted remotely. I am available on Thursday 16 February (for a hearing starting at 8am Cayman time and finishing not later than noon Cayman time) or Friday 17 February (for a hearing starting at 10am Cayman time). Campbells and Priestleys should liaise and seek to agree a time for the listing. Short written submissions should be filed no later than 4pm Cayman time on the day before the hearing.

While I am not prejudging any of the issues that arise, I would say this. First, even if the judgments are to be regarded as handed down, orders giving effect to them have not been drawn up and sealed and so the Court has jurisdiction to reconsider issues dealt with in the judgments in limited circumstances. Second, it now appears to be agreed that the Fifth Defendant may refer to the NOM Judgment (when handed down) in the current supervisory proceedings before the Liechtenstein court (see Campbells letter dated 7 February). This can be documented by way of a suitable form of consent order and doing so will resolve the immediate and urgent issue regarding the Fifth Defendant's wish to refer to the NOM Judgment in the current Liechtenstein supervisory proceeding. This seems to me, I must say, the right result as I would have a serious concern if the Trustees were to be at liberty to and did refer to the NOM Judgment while the Fifth Defendant was unable to do so. This would in my view give rise to a serious injustice and not be what was intended by my decision in the Confidentiality Judgment (it would be different if the Trustees did not refer to or rely on the NOM Judgment in those Liechtenstein proceedings). Thirdly, the issue regarding the Citizen Trust assets and whether the Trustees were in breach of the injunction by reason of clause 27.3 and the relevant parts of schedule 3 to the LFA can be dealt with after the NOM Judgment has been handed down on the basis that the NOM Judgment does not finally dispose of all aspects of the Fifth Defendant's application under [6] of the NOM and the order to be made to give effect to the NOM Judgment. Fourthly, therefore, the judgments could be handed down now and published without prejudicing the Fifth Defendant's position and leaving the Summonses to be heard and dealt with subsequently. If the Trustees are held to have breached the injunction by reason of the effect of the LFA on the Citizen Trust assets an order under [6] of the NOM could be made and further consequential applications made and relief sought."

155. The Trustees and the Fifth Defendant filed written submissions ahead of the further CMC held on 16 February.

156. At the hearing it became clear that (a) it was common ground that the two judgments were to be treated as not yet having been handed down; (b) the Trustees were prepared to produce an unredacted copy of schedule 4 of the LFA and (c) that the Trustees, as had been indicated in Campbells' letter dated 7 February, consented and did not object to the Fifth Defendant referring to and quoting from the judgment (once handed down and supplemented to refer to the further evidence and extracts from the LFA adduced in evidence in Naeff 8 and schedule 4 of the LFA) in the current Liechtenstein supervisory proceedings (and, since the judgment once handed down would become public, in any other proceedings in Liechtenstein or elsewhere). Therefore the relief sought by the Fifth Defendant in [5] of the 7 February Summons was no longer required. To be clear, it has now been accepted by the Trustees and agreed that the Fifth Defendant may refer to and quote the Relevant Terms set out in this judgment and clause 27.3 and schedules 3 and 4 (once produced by the Trustees) of the LFA and freely quote from and refer to any other parts of the judgment (and the August Judgment and previous judgments) in the current or any other proceedings in Liechtenstein or elsewhere once this judgment has been handed down. At the hearing, I indicated that in the circumstances it seemed to me to be appropriate to amend the draft Confidentiality Judgment by stating that the Trustees had accepted that if I dismissed their application for a confidentiality order and decided that the judgment should be handed down without any restrictions, then it followed that the Fifth Defendant would be able to refer to and rely on the judgment and the references therein to the Relevant Terms. This will involve deleting [49]-[54] and substituting a paragraph to this effect.

157. At the hearing I gave directions that the Fifth Defendant have permission to amend the NOM to add and plead her case for a declaration that the Trustees acted in breach of the Injunction based on the terms of the LFA (and DOV if relevant) as they relate to the rights of the Ypresto Trust trustees in respect of the Loans and the Citizen Pledge (and the assets of the Citizen Trust), for the filing of further evidence and for the listing of a further in person hearing to deal with such application for a declaration. I requested that the parties consult as to the appropriate directions to be given and as to the coordination of the further hearing with the hearing to deal with consequential matters in the main proceedings. I asked that Ms Angus KC and Mr

McPherson KC seek to agree and file within seven days a draft order containing the requisite directions (or if they were unable to agree file the forms of order they each sought with brief submissions setting out their respective positions so I could deal with any issues in dispute on the papers). Accordingly, this judgment, and the order to be made to give effect to it, only deals with and dismisses the Fifth Defendant's application for a declaration that the Trustees have breached the Injunction based on the case made in the NOM before amendment and at the 1-2 December hearing, as discussed above. The Fifth Defendant remains entitled to proceed with the claim that the Injunction has been breached based on the alternative ground relating to the Citizen Trust assets to the extent pleaded in the amended NOM.

158. I also indicated at the hearing that I considered that I should remove from the draft Confidentiality Judgment the paragraphs dealing with the Trustee Issues ([55]-[63]). It seemed to me to be right that my consideration and discussion of the Trustees' further evidence and explanations should refer to and take into account, to the extent relevant, the other evidence filed after the draft Confidentiality Judgment had been circulated, in particular D5-15 and D5-16. I directed that the Trustee have permission to file any evidence in response to the Fifth Defendant's new evidence within 14 days (such period to be subject to Mr McPherson being able to take instructions and to propose an alternative period if so instructed) and that the Fifth Defendant have permission to file evidence dealing with any new matters raised in the Trustees' further evidence within a further period after the filing of the Trustees' evidence (I suggest 14 days). I will then review all the evidence and prepare a separate judgment dealing with the Trustee Issues.

The Hon. Mr Justice Segal

Judge of the Grand Court, Cayman Islands

23 February 2023