



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD 50 OF 2021 (NSJ)**

**IN THE MATTER OF THE M TRUST (the *Trust*)  
AND IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT**

**BETWEEN:**

**ST LIMITED  
(in its capacity as trustee of the M Trust)**

**Plaintiff**

**- and -**

**AV**

**Defendant**

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

**Heard:           On the papers on the basis of written submissions by Charles Moore of Harney,  
Westwood & Reigels on behalf of the Plaintiff and the Defendant consenting to  
the application being dealt with on the papers**

**Handed  
down:           14 October 2021**

***Headnote***

*Application by the trustee in relation to the former protector of a Cayman trust for a declaration that a deed executed after her resignation appointing a successor protector was valid and effective – was the power given by the trust deed to a serving protector to appoint a successor without the need for an application to Court exercisable even after the resignation of that protector – if the deed and the exercise of the power were invalid, did the Court have the power to and should the Court appoint the successor protector.*



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## JUDGMENT

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### Introduction

1. This judgment deals with the Originating Summons dated 22 June 2021 (the *Application*) issued by the Plaintiff in its capacity as trustee of the M Trust (the *Trust*). The trust was created and is governed by a trust deed dated 4 April 2005 (the *Trust Deed*). The Plaintiff applies for relief in connection with the resignation and replacement of the first protector of the Trust, Ms G. On 24 July 2020, Ms G wrote to the Plaintiff (as trustee) to tender her resignation with immediate effect but failed to appoint a successor at that time. Subsequently, on 23 October 2020, she executed a deed of confirmation and appointment of successor protector of the M Trust (the *2020 Deed*) in which she confirmed her intention at the time of her resignation to exercise the power in clause 22.2 of the Trust Deed to appoint a successor protector and by which she sought to appoint Mr B as the new and successor protector. The 2020 Deed and the Trust Deed are governed by Cayman Islands law.
2. In these circumstances, the following questions have arisen on which the Plaintiff seeks a decision from the Court:
  - (a) whether Ms G was entitled to exercise the power in clause 22.2 after her resignation.
  - (b) whether, if she was, the 2020 Deed was effective to appoint Mr B as the new protector of the Trust.
  - (c) whether, if she was not so entitled or the 2020 Deed was not effective to appoint Mr B, the Court can and should now make an order appointing him as the Protector of the Trust.
3. The Application is supported by an affidavit (the Second Affidavit) of Mr S, who is a director of the Plaintiff and the Plaintiff's attorneys (Mr Moore of Harney, Westwood and Reigels) have filed a skeleton argument setting out the Plaintiff's written submissions. The Plaintiff invited the Court to deal with the Application on the papers without the need for a hearing. It does so with



the support of the Defendant who also supports the Application (AV was appointed to represent all persons who are or may be interested in or affected by the Application by my order dated 23 March 2021). In the circumstances, where the Application is unopposed, both parties wish to avoid the cost of a hearing, the issues before the Court concern the administration of a private trust and I feel able properly to adjudicate on the Application without the need for a hearing (at least on the basis of the primary case put forward by the Plaintiff), I am prepared to accede to this request.

### **The Trust Deed**

4. Clause 22 of the Trust Deed is in the following terms (underlining added):

(1). *The initial Protector shall be the first person named in the Fourth Schedule hereto. The appointment of the first Protector shall become effective on the date of the execution of this Trust.*

(2). *If the initial Protector is unable or unwilling to act, then the persons named subsequently in the Fourth Schedule, shall, in the order named, serve as Protector, PROVIDED that if no persons are named subsequently or if none of the persons named subsequently in the Fourth Schedule is able or willing to act, the person, if any, serving as Protector at the time may appoint his or her successor Protector, and PROVIDED FURTHER, that if no successor Protector is appointed and the office of Protector remains vacant for three consecutive full calendar months, the Courts of the Cayman Islands (or the courts of such other place which shall then be the Forum for the Administration hereof in accordance with the terms of Clause 19) shall appoint one or more other persons to serve as Protector, and PROVIDED FURTHER that only a person who is not the Settlor and that is independent of the Settlor and not related or subordinate to the Settlor may be appointed as Protector. In no event shall an Excluded Person be appointed Protector. Notwithstanding any other provision in this Deed, this Subclause 22.2 shall not be amended or modified in any way whatsoever.*



(3). *The Protector shall not be liable for any loss to the Trust Fund arising in consequence of the failure, depreciation or loss of any investment or investments or any mistake or omission or any other matter or thing except wilful fraud or wrongdoing on the part of the Protector and this Clause shall apply whether or not whether the Protector had or should have notice of the matter causing loss.*”

5. Clause 4.1(e) of the Trust Deed gives the following definition of Protector (underlining added):

*“THE PROTECTOR” means the persons in order of priority named in the Fourth Schedule and all references herein to the actions of the Protector shall be such actions as the Protector may take only after he assumes office pursuant to the provisions of clause 22.”*

6. Clause 11.1 of the Trust Deed deals with the power to appoint new or additional trustees. It states that (underlining added):

*“The Protector shall have the power to remove and appoint Trustees of this Trust. If Protector is unable or unwilling to act, then the [Court] shall appoint one or more other persons to be a Trustee hereof ...”*

7. The Trustee is given an express power to resign in clause 11.2 of the Trust Deed which states that:

*“A Trustee who at any time desires to withdraw and be discharged from the Trusts hereof may do so by notice in writing to the Protector and upon the posting or personal delivery of such notice the Trustee so doing shall cease to be a Trustee hereof to all intents and purposes except as to acts and deeds necessary for the proper vesting of the Trust Fund in the continuing or new Trustee or otherwise as the case may require.”*

## **The background**

8. The relevant background can be described briefly. The Trust is a Cayman Islands law discretionary trust created by the Trust Deed. The Trustee is a BVI incorporated and licensed



private trust company. The current beneficiaries of the Trust include the Defendant together with certain charities. The Trust Deed provided for the appointment of a Protector. Clause 22.1 of the Trust Deed provided that the initial Protector would be the person named in the Fourth Schedule. The only person named was Ms G. The Trust Deed as amended provided for the Protector to have various powers. The Trustee's primary dispositive power was made exercisable only with the written consent of the Protector; the Trustee's power to amend the terms of the Trust was made exercisable only with the written consent of the Protector and the Protector was empowered to designate any company, partnership, or other entity whose shares or ownership interests were comprised directly or indirectly within the Trust fund as a "*Special Company*" so that the Trustee would have no obligation and no right to interfere in, enquire as to or concern itself in the management of any such designated Special Company. The Trust Deed also provided for the exoneration of the Protector for liability save in cases of wilful fraud or wrongdoing. The Protector was also given the power to remove and appoint the trustee, and various rights of veto.

9. On 24 July 2020, Ms G wrote to the Trustee giving notice of her immediate resignation. She said:

*"I hereby tender my resignation as Protector of [the Trust], to take effect from the date of this letter."*

10. Subsequently, some three months later, the 2020 Deed was entered into by Ms G, Mr B, and the Trustee. The 2020 Deed recited (in recital E) that Ms G:

*".. [at the time of sending the 24 July letter] had no intention of leaving the office of Protector vacant ... without appointing a successor Protector, rather [her intention] was for a successor Protector to be appointed by her pursuant to the provisions in the [Trust Deed]. Accordingly, for the avoidance of doubt and to secure the appointment of a successor Protector [she] wished to confirm her intention at the time of the [24 July letter] to exercise the [power in clause 22.2] and by this Deed now to exercise that power."*

11. In the operative part of the 2020 Deed, Ms G confirmed that at the date of the 24 July letter she intended to exercise the clause 22.2 power to appoint a Protector (although she does not say that at that time she intended to appoint anyone in particular) and purported to appoint Mr B in her



place, in exercise of that power and all other relevant powers enabling her to appoint a new Protector (the 2020 Deed also purported to discharge Ms G from the office of Protector). Mr B also confirmed acceptance of his appointment. The 2020 Deed is governed by Cayman law and contains a submission to the exclusive jurisdiction of the Cayman courts.

### **The relief sought by the Plaintiff and the Plaintiff's submissions**

12. The primary relief sought by the Plaintiff is a declaration that, on a true construction of the Trust Deed, the 2020 Deed was valid and effective, and accordingly that Mr B was validly appointed. This relief was sought (a) pursuant to the Court's statutory jurisdiction to give advice or direction on a question relating to the administration of a trust under section 48 of the Trusts Act (2021 Revision) or pursuant to the Court's inherent jurisdiction to supervise the administration of trusts. The Plaintiff submitted that section 48 of the Trusts Act permitted the Court to make a declaration as to the proper construction of a term of a trust instrument (see *A v B*, unrep., 13 February 2020, per McMillan J) and that the Court's inherent jurisdiction encompassed giving trustees guidance on the proper construction of the trust (see *Re Buckton* [1907] 2 Ch 406).
13. The Plaintiff submitted that the preferable construction of clause 22.2 was that the power to appoint a successor Protector was given to the resigning Protector even after her resignation since the words "*the person, if any, serving as Protector at the time*" referred to the last-appointed Protector of the Trust. Under this construction, the words "*at the time*" referred not to the time when the appointment of the successor Protector was actually made, but the time at which there was no subsequent Protector nominated by the Fourth Schedule who would take office automatically upon the current Protector ceasing to act. The person who was the last-serving Protector was given the power to appoint his or her successor, and that power, having been so acquired, was not lost by that person's subsequent resignation from office.
14. The Plaintiff submitted that this construction accorded with the common sense and commercial approach to the interpretation of the Trust. The common sense approach to clause 22.2 was that the person who had last served as the Protector was entitled to appoint his or her successor in office. This was the essential purpose and intent of clause 22.2, which was to secure an unbroken succession to the office of Protector by the last-appointed Protector appointing his or her successor. The Plaintiff made the following points:



- (a). the rules of construction applying to *inter vivos* trusts were the same as those applying to contracts: see *Millar v Millar* [2018] EWHC 1926 (Ch), [17] applying *Marley v Rawlings* [2015] AC 129, [19].
- (b). as was held by the UK Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173, 1179, per Lord Hodge JSC, “[t]he court’s task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.” This “unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.”
- (c). the Plaintiff’s construction was a perfectly viable reading of the words used in clause 22.2. The expression “*the person, if any, serving as Protector at the time*” referred to the person who was empowered to appoint a new Protector “*if no persons are named subsequently or if none of the persons named subsequently in the Fourth Schedule is able or willing to act*”, such that the words were apt to describe the person at the end of the chain of Protectors nominated in the Fourth Schedule, i.e. the person who last served as Protector. Under this construction, the words “*at the time*” refer, not to the time when the appointment of the successor Protector was actually made, but the time at which there is no subsequent Protector nominated by the Fourth Schedule who will take office automatically upon the then current Protector ceasing to act. The person who is the last-serving Protector in the chain gains the power to appoint his or her successor, and that power, having been so acquired, is not lost by that person’s subsequent resignation from office.
15. In the alternative, the Trustee sought an order appointing Mr B as the Protector of the Trust pursuant to the Court’s equitable jurisdiction. The Plaintiff submitted that the Court had an inherent jurisdiction to appoint a new protector who occupied a fiduciary position (see *Re Circle Trust, HSBC International Trustee Ltd v Wong* [2006] CILR 323 at [23] per Henderson J, citing



*Rawcliffe v Steele* [1993-95] MLR 426 and *Re Freiburg Trust* [2004] JLR N13). Whether a protector is a fiduciary depended on the terms of his or her appointment (the office of protector was not inherently fiduciary in nature). As Justice Henderson said in *Circle Trust* at [23]:

*“[t]he nature and extent of the authority conferred upon the protector, together with the provisions exempting him from liability for negligence and providing for indemnification and remuneration for his time, demonstrate that this settlor intended the protector to act in a fiduciary capacity.”*

16. The Plaintiff submitted that in view of the powers and role given to the Protector in this case, which I have summarised above, the role was fiduciary, and the Protector was intended and required to act in a fiduciary capacity. The Plaintiff argued that if on the true construction of the Trust Deed, Ms G’s appointment of Mr B. was invalid, the Trust was currently without a Protector and since the Protector of this Trust fulfilled an important role in respect of the administration of the Trust (serving as a check and balance on the activities of the Trustee, and having the power if necessary and appropriate in the circumstances to appoint and remove trustees of the Trust) it was important for the proper functioning of the Trust for a Protector to be appointed. The Court therefore could and should exercise its inherent jurisdiction to appoint Mr B as the Protector of the Trust.

## **Discussion and decision**

17. I accept that the Plaintiff is right to rely on and refer to the Supreme Court’s judgment in *Wood* and that for the purpose of the Application the passage from Lord Hodge’s judgment set out above sets out the approach to be followed by the Court to questions of construction of the Trust Deed and the 2020 Deed.
18. The question of whether Ms G was entitled to exercise the clause 22.2 power to appoint a successor despite and after her resignation letter dated 24 July 2020 and whether the 2020 Deed was effective to do so, give rise in my view to two particular questions of construction. First, does clause 22.2 apply where a Protector has been validly appointed (and accepted his/her





appointment) but then subsequently wishes to resign and secondly, does clause 22.2 permit such a Protector who has resigned, to appoint a successor? The second question is raised and discussed in the Plaintiff's skeleton argument but the first is not.

19. In order to resolve these construction questions, it is necessary to review and have regard to the language of clause 22.2, read in the context of clause 22 and the Trust Deed as a whole and in light of the apparent purpose of clause 22.2. In my view, it is necessary to start by considering how clause 22.2 applies to the situation where the person named as the initial Protector decides that they do not want to accept the appointment (because, for the reasons given below, clause 22.2 appears on its face to be designed at least to deal with that situation).
20. Clause 22 only refers to and on its face only deals with the appointment of the initial Protector and his/her inability/unwillingness to act following the execution of the Trust Deed:
  - (a). clause 22.1 identifies who is to be the first (I assume that it is intended that there is no significance in the different references to "*first*" and "*initial*" Protector) Protector and the date from which their appointment is to take effect. It stipulates that the first person named in the Fourth Schedule is to be the first Protector and that his/her appointment is to "*become effective on the date of the execution of this Trust.*" Although the meaning is not entirely clear, I assume that the reference to "*the date of the execution of this Trust*" is intended to refer to the date on which the Trust Deed was executed (rather than some other point in time at which the trust itself could be said to come into existence – and therefore be executed and completely constituted - for example, the time at which the Trust Fund is transferred to the Trustees). Therefore, the first person named in the Fourth Schedule (a particular individual) becomes the Protector without the need for a separate appointment instrument and with immediate effect.
  - (b). clause 4.1(e) of the Trust Deed states (underlining added) that references in the Trust Deed "*to the actions of the Protector shall be such actions as the Protector may take only after he assumes office pursuant to the provisions of clause 22.*" This provision indicates that the Protector is only able to exercise his/her powers only after the requirements of and steps set out in clause 22 have been satisfied and completed. The reference to the need for the person concerned to have assumed office also suggests that the Protector's powers can



only be exercised once that person has accepted their appointment and consented to act. Of course, an attempt to exercise these powers by the first named person in the Fourth Schedule after the execution of the Trust Deed would constitute acceptance and a consent to act by conduct.

- (c). clause 22.2 deals with what is to happen if “*the initial Protector is unable or unwilling to act.*” Because clause 22.1 immediately follows the stipulation in clause 22.1 that the appointment of the first Protector is to become effective on the date of the execution of this Trust it appears to deal with the situation where immediately following the execution of the Trust Deed the first named person in the Fourth Schedule indicates that he/she does not wish to or cannot accept the appointment. Because the method by which the first Protector is to be appointed involves an automatic appointment without the need for a separate appointment document which would evidence the first Protector’s written consent to act, it is clearly necessary for the Trust Deed also to deal with what is to happen if the person appointed declines to act. This is what the first part of clause 22.1 appears to do (I discuss below whether on its proper construction it should also be taken as applying to the resignation of the first Protector after he/she has accepted his/her appointment).
- (d). clause 22.2 starts by identifying a condition to its operation: “*If the initial Protector is unable or unwilling to act.*” It then establishes the basic default rule. If this condition is satisfied, then the next most senior person listed in the Fourth Schedule is to “*serve as Protector.*” Since the first named person in the Fourth Schedule is said by clause 22.1 to have been appointed with immediate effect upon the execution of the Trust Deed, it must follow that he/she is to be regarded as ceasing to be appointed (either when another Protector is appointed or when he/she gives notice that he/she is unwilling or unable to act as the Protector) rather than as never having become the Protector. The first named person in the Fourth Schedule is to be replaced by the next named person who is automatically and without more appointed when the requirements of clause 22.2 have been satisfied.
- (e). it could be argued that clauses 22.1 and 22.2 should be interpreted so that if the first named person in the Fourth Schedule never consents to act, they are never appointed as the Protector and the next named person is to be regarded as the only Protector. However, this construction is inconsistent with the language used in clauses 22.1 and 22.2. They clearly



state that a particular named individual, the first named person in the Fourth Schedule, is the initial/first Protector and that his/her appointment takes effect from the date on which the Trust Deed is executed. The Trust Deed could have said but did not say that the initial Protector was to be either the first named person in the Fourth Schedule or if they had not given their consent to act by the date on which the Trust Deed was executed, the next person in the list in the Fourth Schedule provided that they had given their consent to act by that date and that in either case the appointment was to take effect from the date of the Trust Deed. It therefore seems to me that it was intended (that is, that the objective meaning of the language of the Trust Deed is) that the appointment of the first named person in the Fourth Schedule was to take effect immediately from the date of execution of the Trust Deed but to terminate either when a successor or replacement Protector was appointed or when the first named person in the Fourth Schedule indicated that they were unable or unwilling to act. This interpretation does not, I think, result in the first named person in the Fourth Schedule being at risk by being technically appointed and in office before they have consented to act since they will not be subject to the duties of the office (under the general law) unless and until they have consented to act (and as I have noted above the purported exercise of the Protector's powers will constitute acceptance of the appointment by conduct). In my view, it is preferable to regard the appointment of the first named person in the Fourth Schedule as terminating when they give notice (to the Trustee) that they are unwilling or unable to act (or if they are unable or refuse to give such a notice, when it is established by evidence that the first named person is unwilling or unable to act). It is one thing for the appointment of the first named person to be effective before they have consented to act, during which period they are not subject to the duties of a protector, but it is another thing to treat that person as remaining in office and their appointment as effective after they have positively declined to act.

- (f). the first proviso in clause 22.2 applies if there is no-one named in the Fourth Schedule after the first named person or if all the persons so named are unable or unwilling to act. Then *“the person, if any, serving as Protector at the time may appoint his or her successor Protector.”* It seems to me that the relevant time referred to must be the time at which the conditions set out in the first proviso are satisfied. This will be when the initial Protector has given notice – or it is established by evidence - that he/she is unable or unwilling to act, if there is at that time no-one named in the Fourth Schedule after the first named person



or all the persons so named have by that date confirmed or there is evidence to establish that they are unable or unwilling to act, *or* the date on which that confirmation is given or evidence obtained, if the confirmation is only given or the evidence only becomes available after the date on which the initial Protector has given notice or it is established that he/she is unable or unwilling to act. This is the time at which the appointment of the successor Protector is to be made.

- (g). the first proviso in clause 22.2 states that the power to appoint a successor is given to and may be exercised by the person “*serving as Protector at [that] time.*” It seems to me that this must be understood as giving the resigning Protector the power to appoint his/her successor. It does not matter that they are in the process of and about to resign. In order to ensure that the mechanism can operate effectively, the power to appoint a successor must be treated as being given to the Protector who is in office when they decide to resign.
- (h). this would include any person whose appointment as Protector has become effective even if they have indicated that they are unable or unwilling to accept it. Accordingly, even where the first named person in the Fourth Schedule decides not to accept his/her appointment, so that (in view of the approach I have explained above) his/her appointment will terminate upon the giving of notice of that fact, he/she is still able to exercise the power to appoint a successor. It would be a wholly uncommercial and unrealistic construction to say that the power to appoint a successor conferred by the Trust Deed (so as to avoid the costs and delays associated with application to the Court) should not be available in those circumstances. It would not, in my view, matter that the first named person in the Fourth Schedule had not consented to act since clause 22.2 must be understood to permit that person to exercise the power to appoint a successor before accepting their appointment and in such circumstances.
- (i). the second proviso in clause 22.2 operates where the first named person in the Fourth Schedule is unable or unwilling to act, where there is no-one else named in the Fourth Schedule after that person or where all the persons so named are unable or unwilling to act, and where the person serving as Protector at the relevant time has not appointed a successor, or there is no one serving as Protector at the relevant time. The second proviso stipulates that the Court then has the power to appoint a successor but only after “*the office*



*of Protector has remained] vacant for three consecutive full calendar months.”* In a case in which the first named person in the Fourth Schedule gave notice (to the Trustee) that he/she was unwilling or unable to act but then failed to appoint a successor, the vacancy would be treated as having occurred at, and the three-month period would be treated as having started to run from, the time at which such notice had been given.

21. This, in my view, is how clause 22 is to be interpreted and how the mechanism established thereby is intended to operate in a case where the first named person in the Fourth Schedule never wishes to accept his/her appointment as the Protector and gives notice (or his/her inability or unwillingness to act is established) on or shortly after the date on which the Trust Deed is executed. But it also seems to me that clause 22.2 should be interpreted as also applying when, as in the present case, the initial Protector has, following the execution of the Trust Deed, consented to act, and acted as the Protector.
22. This construction involves treating the reference in clause 22.2 to the initial Protector being “*unable or unwilling to act*” as covering inability and unwillingness both before and after acceptance of the appointment by the first named person in the Fourth Schedule. Clause 22.2 should therefore be read as meaning “*If the initial Protector is unable or unwilling to act or to continue to act.*”
23. This construction seems to me to be justified both by reference to the drafting of clause 22.2 and its purpose. As regards drafting, it is clear that the power to appoint a successor is given to a serving Protector. Clause 22.2 permits a serving Protector to appoint a successor without the need for there to be an application to the Court (thereby, as I have already noted, avoiding the costs and delays of such an application). As I have explained, it seems to me that this would cover the first named person in the Fourth Schedule, so that a successor can be rapidly and cost effectively appointed if that person decides that, despite being named in the Fourth Schedule, they do not wish to or cannot take on the appointment. But I do not see why the out of Court power to appoint a successor should be limited to such a case. This view is supported by the purpose of clause 22. It is the only provision in the Trust Deed dealing with the appointment and replacement of the Protector (a position which is of great importance for the operation of the governance and decision-making arrangements established by the Trust Deed). Clause 22 does not include, as clause 11.2 does in relation to the Trustees, a simple power to resign (“*A Trustee who at any time*



*desires to withdraw and be discharged from the Trusts hereof may do so by notice in writing to the Protector*"). Even though the role of Protector is critical and therefore an intention can be inferred not to include a right to resign at will unconnected with the appointment of a successor for that reason, it cannot have been the intention of the parties to the Trust Deed and in my view the objective meaning of the words they used do not support a construction to the effect that the first named person in the Fourth Schedule (or indeed a subsequently appointed Protector) once in office and once he/she has consented to act, would also be unable to resign and appoint a successor rapidly and cost effectively using the machinery for an out of Court appointment set out in the Trust Deed.

24. Accordingly, Ms G was entitled upon deciding that she was no longer willing to act as Protector, to exercise the power to appoint a successor contained in clause 22.2 of the Trust Deed. The question then arises as to whether she remained entitled to exercise this power in the circumstances of this case, where she only purported to exercise the power some three months after having written to the Trustee to tender her resignation with immediate effect.
25. As I have already noted, on 24 July 2020, Ms G wrote to the Trustee to give notice of her resignation and said that she tendered her *"resignation as Protector of [the Trust], to take effect from the date of this letter."* She did not say that her resignation was only to take effect upon a successor being appointed.
26. The 2020 Deed recites (in recital B) that Ms G has resigned (saying that she was the initial Protector *"until she resigned by letter to the Trustee dated 24 July 2020"*). Recital D refers to clause 22.2 of the Trust Deed and recital E, as noted above, and goes on to state that Ms G at the time she sent the 24 July letter *"had no intention of leaving the office of Protector vacant under the provisions of the Trust [Deed] without appointing a successor Protector, rather [her] intention was for a successor Protector to be appointed by her pursuant to the terms of the Trust [Deed]."* Recital E further states that *"for the avoidance of doubt and in order to secure the appointment of a successor Protector, [Ms G] wishes to confirm her intention at the time of the [24 July letter] to exercise [the power to appoint a successor Protector given by clause 22.2 of the Trust Deed] and by [the 2020 Deed] now to exercise that power."* This intention is further confirmed in recital I.



27. By clause 2 of the 2020 Deed, Ms G confirmed that at the date of the 24 July letter she intended to exercise the power to appoint a successor and by clause she purported “*in the exercise of [the clause 22.2 power] and all other powers so enabling her*” to appoint Mr B as the successor Protector.
28. Accordingly, Ms G acknowledges in the 2020 Deed that her resignation was effective on 24 July 2020 but asserts that at that time she (a) had no intention of leaving the office of Protector vacant and (b) intended to exercise the clause 22.2 power to appoint a successor. The Plaintiff did not in its written submissions expressly rely on Ms G’s state of mind and intentions at the time of her resignation but for the reasons explained below, I consider that the recitals to the 2020 Deed and the facts and matters referred to therein provide an important factual background and context for understanding the process by which Mr B came to be appointed. I would note though that the recitals to the 2020 Deed are, unsurprisingly, cryptic, and brief and that it would have been of assistance had the Plaintiff arranged for Ms G’s explanation of what happened and the reasons for the delay in appointing Mr B to put in evidence. Having said that, I am prepared to assume and accept, based on the statements as to her state of mind in the recitals to the 2020 Deed, that Ms G believed or assumed that she would be able to appoint a successor even after her resignation (at least after taking action to formalise her resignation by sending the 24 July 2020 letter) and that is why she said that she had no intention of leaving the office of Protector vacant. This belief or assumption was also consistent with her statement that at the time she resigned she intended to exercise the clause 22.2 power to appoint a successor, that is she intended to exercise the power *in the future*. She is saying that when she resigned, she had it in mind and intended to appoint a successor thereafter. This could have been made clearer and an explanation been provided as to why no steps were taken for nearly three months after the resignation had she put in evidence (and when Mr B was selected and contacted). I can see that the delay may well have been the result of the need to take legal advice following her resignation and the uncertainty over what was permissible and to be done to appoint a successor.
29. The Plaintiff’s argument was that Ms G was, as a matter of construction of clause 22.2 and the Trust Deed as a whole, entitled to exercise the clause 22.2 power as the last and most recently appointed Protector. Clause 22.2 should be interpreted as giving any duly appointed Protector who chose to resign (because they were unwilling or unable to continue to act) the right to appoint





their successor at any time including any time after their appointment had terminated and they had ceased to be in office.

30. I have explained above, in the context of the effect of clause 22.2 in a case where the first named person in the Fourth Schedule decides not to accept his/her appointment, that in my view the first proviso must be understood as giving the resigning Protector the power to appoint his/her successor (so that the power to appoint a successor is to be treated as given to Protector who is in office when they decide to resign) and that it does not matter that they are in the process of and about to resign. But the question arises as to whether the power remains exercisable after the resignation of the Protector is complete and at any time (and in this case three months) after the termination of his/her appointment.
31. In my view, the precise order in which the resignation and appointment take effect cannot matter but it seems to me that they should be simultaneous, contemporaneous, or linked so that it can be said that the resigning Protector appointed his/her successor as part of the process of resigning office. I do not consider that clause 22.2 contemplates a Protector, after his/her resignation has taken effect and he/she has ceased to be in office, deciding at some later time to appoint his/her successor. Instead, it contemplates the resigning Protector appointing his/her successor as part of the resignation process. This construction provides the necessary flexibility consistent with the need to allow the out of Court appointment of a successor Protector to work in practice and avoids the potential difficulties of permitting a former Protector long out of office to intervene again in trust matters. It also fits neatly with the second proviso's requirement that there be a vacancy of three months' duration before an application to Court can be made. This contemplates that the steps required to implement and give effect to the resignation of the Protector and the appointment of a successor may not all be completed at the same time or may take some time and that there is to be a relatively short period in which the parties involved should be able to complete the process. But if the successor has not been appointed after three months have elapsed after the effective date of the Protector's resignation, recourse to the Court is to be permitted as the method for appointing a successor.
32. I am prepared to accept based on the facts and matters set out in the recitals to the 2020 Deed that in this case the appointment of Mr B was done or can be treated as having been done as part of the resignation process. It appears, as I have explained, that Ms G intended and had decided to





appoint a successor when she resigned and that even though the appointment of a successor was to be made after her resignation became effective, it was in contemplation at the time of the resignation and also, I infer, contemplated that the appointment would be made promptly as Ms G confirmed that she did not wish there to be a vacancy. Even though it is unclear as to whether Ms G had Mr B in mind at the time of the resignation, it seems to me that since the decision to appoint a successor had been made at the time of the resignation and that the decision was intended to be implemented promptly, rather than at some unknown or long delayed date, I should treat the appointment of Mr B as having been made as part of and closely connected to the resignation process.

33. I therefore shall make the declaration sought by the Plaintiff by way of primary relief, namely that, on a true construction of the Trust Deed, the 2020 Deed was valid and effective, and accordingly that Mr B was validly appointed. I accept the Plaintiff's submission that the jurisdiction and power to grant the declaration sought arises both pursuant to section 48 of the Trusts Act and the Court's inherent jurisdiction.
34. It is therefore not necessary for me to deal with the Plaintiff's application for secondary relief, namely an order appointing Mr B as the Protector of the Trust pursuant to the Court's equitable jurisdiction. However, I shall make a few brief comments with respect to that application.
35. I accept that the Court has an inherent jurisdiction and power to appoint a person to exercise a fiduciary power in a trust and that this power probably extends to the appointment of other fiduciary officeholders involved with the administration of a trust including protectors. But before reaching a final view on this issue I would have wished to hear argument on and consider the relevant authorities. The Plaintiff's written submissions were brief and limited and required expansion (I note, for example, that they did not include a reference to *Schmidt v Rosewood* [2003] 2 AC 709, 711).
36. I also accept that there is a strong case for the exercise of the Court's inherent jurisdiction but before doing so I would have required further evidence to be filed so that the Court had before it all the relevant facts and background relevant to the exercise of a broad discretionary power.

37. I shall, though, make the further orders sought by the Plaintiff, namely that the Trustee be indemnified out of the assets of the Trust in respect of its costs of the Application and that the interim confidentiality orders made pursuant to my order dated 23 March 2021 be made final (however, to be clear, this judgment which is anonymised, can and should be made public and put on the public Register of Judgments).



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**Mr Justice Segal**

**Judge of the Grand Court, Cayman Islands**

**14 October 2021**