IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 270 OF 2023 (IKJ)

IN THE MATTER OF THE G TRUST

AND IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION)

AND

ORDER 85 OF THE GRAND COURT RULES (2023 REVISION)

Before:	The Hon. Justice Kawaley
Appearances:	Mrs Elspeth Talbot Rice KC of counsel with Mr Nicholas Fox and Mr Charles Henderson of Mourant Ozannes (Cayman) LLP for the B Beneficiaries Ms Clare Stanley KC of counsel with Ms Bernadette Carey and Ms Katie Turney of Carey Olsen for the A Beneficiaries Ms Rachael Reynolds KC of counsel with Mr Chris Vincent of Ogier for the Trustee and ICTI (the "Trustee") Mr Robert Lindley and Ms Clare Bradin of Conyers Dill & Pearman LLP, for the Enforcer
Heard:	20-21 November 2024
Draft Ruling Circulated:	16 December 2024
Ruling Delivered:	24 December 2024

241223 - Re G Trust - FSD 270 of 2023 (IKJ) – Judgment (costs)

Costs of summons disposed of substantively by consent and costs reserved in relation to related interlocutory summons-whether usual costs principles applicable to Beddoe applications displaced by unreasonable conduct-whether extant ex parte anti-suit injunction never contested on an inter partes basis gives rise to an issue estoppel-ownership dispute over shares held by local trustee in companies with overseas subsidiaries being tried in foreign court-whether local court supervising trustee's control over shares has assumed jurisdiction over potential allegations of mismanagement at the subsidiary/operational level

COSTS RULING

Introductory

1. The present Costs Ruling follows a costs hearing which occupied two full days, with enough intellectual horsepower at the Bar table to sustain a full trial on the merits. The costs in issue primarily relate to:

   (a) the costs reserved by a Consent Order dated 25 March 2024; and

   (b) the costs reserved following a 17 January 2024 *Beddoe* hearing, which occupied just over half a day's hearing time including a consequential *ex parte* application for an anti-suit injunction (the costs of which were also reserved).

2. Strictly speaking, the only directions formally ordered concerned (a), the costs relating to the B Beneficiaries' Summons dated 25 January 2024 (and heard briefly on 26 January 2024) seeking to discharge the Anti-Suit Injunction ordered *ex parte* on 17 January 2024 (the "Discharge Summons"/"Anti-Suit 2"). Following a short hearing on 26 January 2024 of the Discharge Summons, an interim stay of the mandatory limb of Anti-Suit 2 was granted and the costs of that application were also reserved.

3. However, in costs submissions dated 21 June 2024, the Enforcer supported by the A Beneficiaries argued that the B Beneficiaries should also pay all costs thrown away from 11 December 2023 when the B Beneficiaries filed the first of two receivership applications in the Hong Kong

Proceedings and the costs reserved in relation to the 14 December 2023 Anti-Suit Injunction ("Anti-Suit 1") and Anti-Suit 2 on 17 January 2024. The B Beneficiaries' 21 June 2024 costs submissions solely dealt with the costs of the Discharge Summons, in relation to which directions for a hearing had been formally given.

4. Anti-Suit 1 was granted in relation to a Receivership application commenced by the B Beneficiaries in Hong Kong on 12 December 2023 (the "First HK Receivership Application"). Anti-Suit 2 was granted in connection with a second Receivership application commenced by the B Beneficiaries on 22 December 2023 (the "Second HK Receivership Application").

5. Anticipating controversy over the scope of issues to be determined, the Enforcer issued a 14 November 2024 Summons returnable for 20 November 2024 seeking an Order that:

> "*1. The scope of the matters for determination at the costs hearing presently listed in this proceeding on 20 and 21 November 2024 relate to the question of liability of the Cayman Costs in their totality, including the reserved costs referred to in the Orders dated 14 December 2023, 17 January 2024, 26 January 2024 and 23 March 2024.*"

6. At the beginning of the hearing, I directed that all issues covered by the Summons would be determined in this hearing as sensible case management demanded it. I granted the B Beneficiaries 7 days from 21 November 2024 to file supplementary submissions on the issues not formally covered by any prior directions Order, if required. By the end of the hearing, it was clear that:

(a) the B Beneficiaries had explicitly agreed not to oppose an Order that they should pay the Enforcer's and A Beneficiaries' costs of Anti-Suit 1, which were reserved on 14 December 2023, on the indemnity basis; and

(b) no convincing case for reopening this Court's Order of 11 December 2023 (which dealt with the costs in relation to the *Beddoe* Order of that date) had been advanced in oral argument.

7. The main focus of this Ruling is the costs reserved on 17 January 2024 and the costs of the consensually resolved Discharge Application. I will deal very briefly with the prior costs issue. Before recording my findings on the contested issues, I will set out:

(a) a broad overview of the underlying beneficiary dispute;

(b) an overview of the relevant procedural history;

(c) a summary of the main written and oral submissions;

(d) my legal findings on the contentious legal issues (the applicable costs principles being largely agreed); and

(e) my findings on the contentious costs issues.

8. Anti-Suit 1 and 2 were each granted on the hypothesis that it was clear that any relief in relation to the Trust's directly or indirectly held assets should have been sought from this Court. Whether that hypothesis was correct is the essential question the present Costs Ruling is pivotally required to answer. If it was clearly inconsistent with the 11 December 2023 *Beddoe* Order for the Second HK Receivership Application to be made, it seemed to follow that the B Beneficiaries had acted unreasonably in the requisite legal costs sense.

The underlying beneficiary dispute: a broad overview

9. Courts seized of trust litigation arising out of family contention are charged primarily with treating the legal symptoms of the dispute rather than its underlying causes. The underlying beneficiary dispute here is merely a variation on a familiar theme. A senior family member has sadly died; the power alignments have shifted; one group is unable to accept a perceived fall from grace and the empowered group is deeply offended that their *bona fides* (and implicitly their 'right to rule') is being questioned. The objective merits of the underlying litigation complaints advanced by the 'disenfranchised' are difficult to assess; the genuineness of their sense of grievance is impossible to fairly contest.

10. The battleground covers familiar terrain. A family business is the repository of the wider family's wealth. A prudent settlor, hoping to preserve that wealth and prevent its dissipation through profligacy or internecine struggles, has transferred ultimate control over the corporate structure to professional trustees. Here the Cayman trust vehicle of choice is a STAR trust where an Enforcer is legally empowered to enforce beneficiary rights. However, there is an important twist in the tale.

11. The F Trust and the G Trust were each settled (in Hong Kong and Cayman, respectively) by the head of the A Beneficiaries, arguably supported by the head of the B Beneficiaries, whose sudden death appears to have been a disrupting event. It left an in-law, rather than a sibling, in charge of the B Beneficiaries, with anxieties about whether their interests would be protected. The F Trust initially held the shares in the Claimed Companies and the most important legal dispute is whether those shares were validly transferred from the F Trust to the G Trust. The B Beneficiaries have commenced litigation in Hong Kong (the "Hong Kong Proceedings"), on a derivative basis on behalf of the F Trust, seeking a declaration that the F Trust remains the legal owner of the shares in the Claimed Companies.

12. The Trustee commenced the present proceedings in large part to seek directions from the Court about what stance should be adopted in relation to the Hong Kong Proceedings and, incidentally, the preservation of Trust assets and the Trustee's own remuneration in the meantime. All grist for the mill when the ownership of trust assets is disputed. In some cases, which forum should adjudicate the ownership dispute is controversial; here it is agreed Hong Kong is the appropriate forum. What is not agreed, and lies at the heart of the present costs applications, is whether this Court's jurisdiction to supervise the Trustee's preservation of the Trust assets extended to resolving concerns about the management of the underlying operating subsidiaries, which only indirectly impacted on the Trustee's duty to preserve the Trust assets.

Procedural history

13. The main procedural steps may be summarised as follows:

- **8 September 2023**: Trustee's *Ex Parte* Originating Summons herein seeking directions as to, *inter alia*, "*the preservation by the Trustee of the Claimed Companies pending the outcome of*" the Hong Kong Proceedings (paragraph 5);

- **13 September 2023**: Confidentiality Order made after *ex parte* hearing;

- **27 October 2023**: Trustee's Summons seeking directions in relation to an application for rectification of the Deed of Addition of Beneficiaries dated 4 April 2022;

- **20 November 2023**: Representation Order made by consent;

- **22 November 2023**: Trustee's Summons seeking joinder of ICTI as co-Applicant;

- **28 November 2023**: Rectification *Beddoe* Order made following *inter partes* hearing/Beddoe relief approved in principle;

- **11 December 2023**: (1) Ruling on reasons for *Beddoe* Order/decision on when Rectification Summons should be issued, and (2) *Beddoe* Order formally made re Trustee's participation in Hong Kong Proceedings and remuneration from assets of Claimed Companies for, *inter alia*, "*administration and safeguarding of the Trust fund including the Claimed Companies*";

- **12 December 2023**: First HK Receivership Application filed in Hong Kong;

- **14 December 2023**: (1) Summons for anti-suit injunction, (2) Anti-Suit 1 granted;

- **15 December 2023**: First HK Receivership Application withdrawn by consent;

- **22 December 2023**: (1) Second HK Receivership Application filed in Hong Kong, and (2) Trustee's Summons for related directions;

- **17 January 2024**: (1) *Beddoe* Order following *inter partes* hearing re anti-suit injunction application, and (2) Anti-Suit 2 (including mandatory injunctions) granted *ex parte*;

- **25 January 2024**: B Beneficiaries file Discharge Application;

- **26 January 2024**: (1) interim stay of mandatory injunctions after *inter partes* hearing, (2) stay application adjourned to 29 January 2024;

- **29 January 2024**: (1) Anti-Suit 2 varied, enabling filing of Hong Kong Consent Summons, (2) directions given re Discharge Application, (3) mandatory injunctions stayed pending determination of Discharge Application;

- **1 February 2024**: Ruling on the papers re the Rectification *Beddoe* Summons;

- **9 February 2024**: Reasons for 17 January 2024 decisions; and

- **25 March 2025 Consent Order**: (1) "*No order is made on the Discharge Application save that costs be reserved to a hearing to be fixed on the first available date after 31 May 2024 with a time estimate of 1 day*", and (2) Stay Order lifted.

14. The 11 December 2023 *Beddoe* Order was made subject to the following undertaking recorded in the recitals:

> "*AND UPON the Trustee and ICTI undertaking that, subject to further order of the Court, they shall not, without first giving the Respondents' Cayman attorneys 28 days' notice in writing,*
>
> *(a) sell, transfer, dispose of, charge, otherwise encumber, or deal with the shares in the Claimed Companies (including but not limited to by way of distribution to any beneficiary); and / or*
>
> *(c) pass or vote any resolution as shareholder of shares in the Claimed Companies or otherwise take any steps as a shareholder of the Claimed Companies save for the receipt of any dividend which shall not be dealt with in any way other than to pay the costs and expenses permitted by paragraphs 3, 5 and/or 6 below, or as authorised and/or directed by the Court;*

provided that nothing in this undertaking shall affect paragraphs 3–6 of the order below or any order of this court permitting the Trustee and ICTI to have recourse to funds derived from the Claimed Companies in respect of entitlements to costs, expenses and/or remuneration." [Emphasis added]

15. An undertaking was given by the Trustee not to deal with the Claimed Companies' shares, including their voting powers, save in accordance with paragraphs 3-6 of the Order, or as permitted by the Court. Those paragraphs were partly concerned with approving future remuneration out of the disputed assets (received on 7 April 2022) but also with ensuring no liability for past expenses as well. It is true that the Order made no direct reference to any role in connection with the underlying subsidiaries. However, it was implicit in any realistic reading of the safeguarding role that the Trustee was being authorised to play that if the Trustee became aware of any threat to the value of the shares it was holding at an operating subsidiary level, that its safeguarding duties would come into play. Otherwise, as I put it to Mrs Talbot Rice KC hypothetically in the course of argument, the Trustee would simply be paid to ensure that the share certificates were secure in a safe and ignore any threats to their real world value at the subsidiary company level.

16. I viewed the function of the *Beddoe* Order, which the B Beneficiaries represented by Leading Counsel ultimately agreed to, as formally placing the Trustee in charge of safeguarding the Trust assets in real world commercial terms while the ownership dispute played out in the Hong Kong Court. When the ownership of trust assets is in dispute, there is a need for clarity as to who is in charge of protecting and preserving them. Normally that person is the legal title holder. In my 11 December 2023 Ruling on the *Beddoe* Rectification Summons, I observed:

"*4. It cannot be doubted that when there is a dispute about the ownership of a trust fund, a trustee is entitled to continue to administer the disputed fund in an appropriately proportionate manner. In Re a Settlement [2021 (2) CILR 259], upon which Ms Reynolds KC relied in support of another point, I stated:*

*'**Continuing to administer the trust while claims are extant***

11 Trustee L v. Att. Gen. (10) ([2015] SC (Bda) 41 Com, at paras. 115–117), an earlier Beddoe judgment of Hellman, J. in the same case where directions were given for the continued administration of a trust, was aptly cited in support of the

contention that the trustee could continue to administer the trust despite the extant claims about the terms of the trust."

17. Beneficiaries' legitimate interests lie in ensuring minimum administrative expense while the ownership dispute plays out. It seems counterintuitive to suggest that the 11 December 2023 *Beddoe* Order, the terms of which were negotiated by all interested parties, was consciously intended to leave the question of who was responsible for addressing risks to the Trust fund at the operating subsidiary level unresolved, to be addressed in an *ad hoc* manner if concerns arose in the future in the forum of any concerned stakeholder's choosing. The Trustee was charged with "*the administration and safeguarding of the Trust fund including the Claimed Companies*" (paragraph 5). And its undertaking not to use its voting rights in relation to the shares in the Claimed Companies (a mechanism for exercising control over the Operating Subsidiaries where real value lay) was expressed to be subject to the substantive terms of the Order. In light of the Trustee's undertaking not to dispose of the shares in the Claimed Companies, it is difficult to identify a safeguarding function more significant in practical terms than ensuring there were no material risks to value at the subsidiary level. Indeed, in a 14 November 2023 Affidavit sworn on behalf of the B Beneficiaries in relation to the *Beddoe* applications, it was deposed as follows:

> "*70. I have serious concerns that steps have been taken already, or may be taken in future, to sell or dispose of assets within the… Group which would significantly diminish the value of the X shares or leave them almost worthless. I make it clear that I am not suggesting that the Trustee has been involved in those steps or that it would act improperly. The Trustee has limited powers in relation to the operation and management of the underlying X assets and businesses. Nevertheless, it is obviously important to ensure that the X shares themselves-which are the subject of a proprietary claim-are, and the value of those shares is, preserved pending the resolution of that claim in Hong Kong.*" [Emphasis added]

18. A professional trustee will generally be viewed as the ideal party to ensure the disputed assets themselves are not dissipated. The same will also apply, perhaps in some cases with somewhat lesser force, as regards high-level oversight of operating subsidiaries, when all the Trustee legally holds is shares in holding companies (as commonly is the case). Here the Trustee was directed to adopt a neutral position in the Hong Kong Proceedings in relation to the substantive ownership dispute:

> "*3. The Applicants may pay the costs and expenses (including any adverse costs orders) in connection with the HK Trustee Proceedings, where they shall be jointly represented, from funds derived from the Claimed Companies so long as those costs and expenses only relate to the adoption of a neutral stance, which permits the Trustee to take such steps in the HK Trustee Proceedings as they consider appropriate, consistent with a position of neutrality, which shall not mean passivity*."

19. The B Beneficiaries had concerns about loss of value at the subsidiary company level, were aware the Trustee's powers to resolve concerns at that level were limited, but accepted before the precise terms of the Order were agreed that the Trustee should be responsible for preserving the real value in the disputed shares. No alternative or supplementary mechanism was proposed. So it was against this procedural background that an urgent *ex parte* application was heard on 14 December 2023 in response to the First HK Receivership Application. Ms Barker Roye had little difficulty persuading me to grant Anti-Suit 1, including mandatory injunctions requiring the withdrawal of the application. The demeanour of Mr Peedom, unable to obtain instructions from the B Beneficiaries because of time differences and merely observing, suggested to me at the time that he was as blindsided by First HK Receivership Application as was the Trustee's counsel.

20. The impugned application sought the following relief against the Trustee from the Hong Kong Court:

(a) an injunction restraining the Trustee from doing what it had already undertaken to this Court not to do, i.e. dispose of, diminish the value of, etc. the shares; and

(b) a receiver to "*receive the legal and beneficial ownership of*" the shares the *Beddoe* Order had directed the Trustee to preserve.

21. Not only did this appear to be a flagrant collateral attack on this Court's 11 December 2023 *Beddoe* Order, it flagrantly breached the Confidentiality Order as well. The supporting Affirmation launched a fulsome critique of the G Trust, why it was said to be prejudicial to beneficiaries and (in support of the application) averred that the Trustee lacked legal competence to protect the underlying value in the shares, by reference to the anti-Bartlett clause in the Trust Deed. (This was

a flawed argument, because such a clause only disempowers a trustee from interfering when nothing is amiss at the operational level). It was also complained that the Trustee had over several weeks refused to supply adequate information. Anti-Suit 1 accordingly provided in material part as follows:

> "*1. The Respondents shall take no further steps to prosecute the Hong Kong Summons until further order.*
>
> *2. The Respondents do take all possible steps to procure that the Second Plaintiff takes no further steps to prosecute the Hong Kong Summons from the Hong Kong Court of First Instance, including by instructing the Second Plaintiff to do so, until further order.*
>
> *3. The Respondents do have leave to apply to this Court for an order varying the confidentiality provisions in paragraph 4 of the order made by this Court in these proceedings dated 13 September 2023, to the extent necessary to enable the Respondents to pursue such relief as they are advised to pursue in Hong Kong. Such application must be on notice to the Trustee, ICTI and the Enforcer.*"

22. No written reasons for this *ex parte* Order were ever given. The reasons appeared to me to be self-evident; accordingly the need to expressly prohibit further similar applications was not addressed. In any event the very next day, on 15 December 2023, the application was withdrawn in Hong Kong by consent and the affidavit containing the confidential information was expunged from the Court's record.

23. On 22 December 2023, the Second HK Receivership Application was filed. It did not seek injunctive relief against the Trustee, but still sought to appoint a receiver over the shares this Court had charged the Trustee with safeguarding. The same day, Cayman time, the Trustee issued a Summons seeking *Beddoe* relief in respect of another anti-suit injunction. That application was heard on 17 January 2023, by which time the B Beneficiaries had a newly minted legal team on board for the next leg of the journey on what Ms Stanley KC would (in the course of the present hearing) describe as the "Litigation Superhighway". I granted Anti-Suit 2, viewing the Second HK Receivership Application as more egregious than the first, essentially because it appeared to be an

inexcusable second offence. As they say in some parts of the Caribbean, "*joke is joke, but damn joke ain't no joke*".

24. Central to the disposition of the present costs applications, however, is the B Beneficiaries' contention that this provisional interlocutory view, formed in the context of an *ex parte* hearing, cannot form the basis of any findings of improper or unreasonable conduct at this stage. By an Affidavit sworn on 16 January 2024 in opposition to the *Beddoe* application in relation to Anti-Suit 2, the B Beneficiaries explained their position. After explaining that a revised application was made to cure any breaches of the Confidentiality Order, it was pivotally averred:

> "*Although the Undertakings and the Receivership Application are related, my position is that they are properly regarded as separate. The Undertakings, which were the result of negotiation and proffered by the Trustee, concern the proper administration of the Trust in circumstances in which its substantial asset is the subject of an adverse proprietary third-party claim and are designed to maintain the status quo of the trust asset. The Receivership Application is different and much broader: it seeks interim relief in support of the HK Trustee Proceedings and concerns the business as a whole.*"

25. I granted the Second *Beddoe* Order on 17 January 2024, which makes no reference to that Affidavit. When I declined to adjourn the Trustee's applications for Beddoe and anti-suit relief, Mr Fox made submissions in respect of the Beddoe relief but withdrew from the anti-suit relief and I proceeded on an *ex parte* basis for the anti-suit element of the application. The 16 January 2024 Affidavit was referred to in the B Beneficiaries' written submissions on an adjournment, but the only concern about the merits that those submissions referred to was the Trustee's concern about access to their fees. My own concerns were far more fundamental than that. Mrs Talbot Rice KC was accordingly correct to emphasise the fact that it is only at this late stage that I am for the first time evaluating the B Beneficiaries' case as to why it was appropriate for them to make the Second HK Receivership application. So far as I can recall, I first considered the 16 January 2024 'defence' in the context of the present hearing.

26. The Discharge Application was filed on 25 January 2024 and sought an Order that:

> "*1. The Injunctions made on 17 January 2024, be discharged or varied (the Discharge Application).*

> 2. *That, pending the hearing of the Discharge Application, the Mandatory Injunction requiring the Respondents to withdraw and/or procure the withdrawal of their 22 December Application in Hong Kong proceedings, be stayed.*"

27. Substantively, a discharge or variation of Anti-Suit 2 was sought. A stay of the mandatory injunctions was sought as interim, ancillary relief. On 26 January 2024, following an *inter partes* hearing, I granted a stay of the mandatory injunctions pending the determination of the Discharge application and reserved the costs of that hearing. I also adjourned the application to 29 January 2024. On that date, I ordered that:

> "*1…*
>
> 2. *The Mandatory Injunctions be stayed until final determination of the Discharge Application, provided that the Respondents sign and submit the Hong Kong Consent Summons to the Hong Kong Court by 5pm (Cayman) on Tuesday 30 January 2024.*
>
> 3. *Upon a final determination of the Discharge Application discharging or varying the injunctions contained in the 17 January Orders so as to permit the Respondents to pursue the Receivership Application, the Trustees shall not oppose, and to the extent necessary shall consent to, the restoration of the Receivership Application…*"

28. The Consent Summons referred to was filed in Hong Kong on 30 January 2024, adjourning the Second HK Receivership Proceedings *sine die*. The mandatory injunctions in Anti-Suit 2 were adjourned until the determination of the Discharge Application, on terms that if the 17 January 2024 Orders were discharged, the Trustee would not oppose continuance of the Receivership proceedings. Directions were then given for the substantive hearing of the Discharge Application over 1.5 days commencing 25 March 2024.

29. A Ruling delivered in relation to the Rectification *Beddoe* Order has no bearing on the present application, so far as I am able to discern. More pertinent is the 9 February 2024 Ruling setting out the reasons for my 17 January 2024 *Beddoe* Order. This recorded in passing the basis on which Anti-Suit 1 was made:

"7. *On 12 December 2024, the day after the Beddoe Order was perfected, the B Beneficiaries applied to the Hong Kong Court for (1) an injunction restraining the Applicants from disposing of any of the assets of the Claimed Companies and (2) the appointment of a receiver of the shares of the Claimed Companies. After urgently hearing the Applicants' 14 December 2024 Anti-Suit Summons, I accepted the oral submissions of Ms Barker Roye that the 12 December 2023 Application, inter alia:*

(a) amounted to a collateral attack on the Beddoe Order; and had
(b) involved a breach of the confidentiality provisions in paragraph 4 of the Beddoe Order."

30. These reasons also, in explaining why I permitted the Trustee to apply for Anti-Suit 2, shed light on why I granted that relief:

"9. *The B Beneficiaries withdrew their 12 December 2023 application in Hong Kong. Peace had, it appeared been restored…*

10. Appearances, of course, can be deceiving. Only 7 days after withdrawing one set of Hong Kong Proceedings which the Court had restrained the B Beneficiaries from continuing, they filed the HK Receivership Application. This appeared at first blush to be designed to undermine the Beddoe Order in an even more explicit way. Ms Reynolds KC frankly admitted that the Applicants and their legal team had not adverted to the possibility of the further application, which I observed called to mind the popular tautology, 'deja vue, all over again'. Had such an improbable course of litigation conduct been contemplated, the A-S Order 1 would have been drafted in terms which explicitly prohibited the commencement of any further similar proceedings.

11. However, at the heart of the application which the Applicants made in response to the HK Receivership Application was the proposition that, in effect, the common law is cleverer than that. The fluid and nimble abuse of process principle prevents mischievous litigants from using the infelicities of drafting, or other technicalities,

to undermine the efficacies of the Orders of this Court by which such litigants are undisputedly bound…

16… I ultimately accepted that:

(a) it was prima facie an abuse of the process of the Court for the Applicants to be confronted with the spectre of the HK Receivership Application at all;

(c) *the concerns which appeared to form the basis of that application appear to have been matters which were or could have been raised in the Beddoe proceedings…*"

31. It clearly seemed obvious to me at the time that an abuse of process had *prima facie* occurred. This was because:

(a) the Receivership Application was a collateral attack on the 11 December 2023 *Beddoe* Order; and

(b) the relief which the B Beneficiaries contended could only be obtained from the Hong Kong Court could have been sought in the present proceedings.

32. The second strand of that analysis is significant having regard to the way in which the Discharge Application was ultimately resolved. The 25 March 2024 Consent Order provided as follows:

"*1. No order is made on the Discharge Application save that costs be reserved to a hearing to be fixed on the first available date after 31 May 2024 with a time estimate of 1 day.*

2. The parties do exchange written submissions on the costs of the Discharge Application by 5pm on 31 May 2024.

3. The hearing of the Discharge Application fixed for 26 and 27 March 2024 be vacated.

4. The stay at paragraph 2 of the Stay Order be lifted. 5. Liberty to apply."

33. Two important undertakings were recorded in the recitals:

(a) a "Deed of Undertaking" would be executed by two directors of the Operating Subsidiaries; and

(b) the Second HK Receivership Proceedings would be withdrawn.

34. My provisional view at the end of the costs hearing was that the integrity of the 11 December 2023 *Beddoe* Order had been restored, so no serious argument of reopening the costs Order made therein could be pursued. Although it appeared that Anti-Suit 2 had been vindicated in real world terms, it also seemed clear that the B Beneficiaries had obtained a broader form of undertaking than was offered before the Discharge Application was filed, so it could not be said to have conducted that application in an unreasonable manner and without any measure of success.

The submissions of counsel on the contentious issues

Overview

35. It was common ground that the relevant reserved costs orders should be viewed as forming part of an overarching *Beddoe* proceeding even though the Trustee sought substantive relief in these proceedings as well. Where a beneficiary participates in a *Beddoe* application, the general rule is that their costs should be payable out of the trust unless their conduct in the proceedings has been so improper or unreasonable as to warrant either:

(a) depriving them of their costs; or

(b) in an extreme case, making an adverse costs order.

36. Argument focused on seeking to demonstrate the B Beneficiaries had not behaved unreasonably (Mrs Talbot Rice KC), or that their conduct had not merely been "*bad*" but "*very, very bad*" (Ms

Stanley KC, whose submissions Mr Lindley largely adopted). Ms Reynolds KC formally adopted a neutral stance, but defended criticisms made of the Trustee's own conduct in a robust manner.

The B Beneficiaries' submissions

37. It was ultimately obvious why the B Beneficiaries were keen to avoid disposing of the costs prior to the Discharge Application; that was their Achilles heel. Their opening written submissions focused solely on the costs of the Discharge Application and made the following highlight points, developed in oral argument, none of which could be rejected out of hand:

(a) the B Beneficiaries acted reasonably in bringing the Discharge Application;

(b) the Undertakings given showed that the Discharge Application was well-founded;

(c) even if the Undertakings also showed the Receivership Application was not needed, they were only offered after most of the Discharge Application costs had been incurred; and

(d) the merits of Anti-Suit 2 had never been argued, and it was recognised as inherently dangerous to determine the merits of a settled case at the costs stage. It was not obvious who would have succeeded in a contested hearing: *BCT Software Solutions -v- C Brewer & Sons Limited* [2003] EWCA Civ 939 (at paragraphs 4-5, 21, 23, 24, 26).

38. The 'case for the Defence' in response to the stern headmistress-like "*very, very bad*" rebuke was advanced with surprising conviction and persistence in the face of a distinctly unenthusiastic response from the Court. The key strands were as follows:

(a) this Court only assumed jurisdiction over the Trustee's safeguarding of the shares in the Claimed Companies. Because of the anti-Bartlett clause, the Trustee had no obligation to investigate mismanagement at the Operating Companies' level until put on notice of positive evidence of mismanagement. Such evidence (as opposed to mere suspicions) only emerged on 11 December 2023 when the Affirmation filed in support of the B Beneficiaries was made (albeit the Enforcer in his 24 February 2024 Affidavit confirmed he considered no investigation was required) and did not come to the Trustee's notice before 12 December 2023;

(b) it was accordingly nonsensical to view the Receivership Application as rendering the *Beddoe* Order nugatory as they dealt with different things. Anti-suit principles did not apply;

(c) issue estoppel could not apply because the merits of the Receivership Application were not before the Cayman Court. Moreover, section 90 of the Trust Act (2021 Revision) had no engagement here; and

(d) no basis existed for a clear view being formed as to abuse of process having occurred. Even if it was wrong to pursue the Receivership Application, the B Beneficiaries' conduct was not so egregious as to justify depriving them of their costs of the Receivership Application.

39. In short, the Court was primarily invited to decide costs viewing the Receivership Application as a discrete part of the proceedings. However, if the wider context was taken into account, it was argued materially egregious misconduct had not been made out. Two additional points were made which seemed clearly to lack substance:

(a) the Enforcer and/or the Trusteedid not or would not have responded favourably to requests for an investigation and urgent action was required; and

(b) Anti-Suit 2 was materially different to Anti-Suit 1, because no breach of the Confidentiality Order occurred, nor was injunctive relief sought.

40. In oral reply submissions, it was noted that the Enforcer's original position in written submissions had been that the B Beneficiaries should not recover their costs and no adverse costs order had been sought. Emphasis was given to the importance of focusing on the conduct of the Receivership Application and the fact that undertakings *qua* directors of the Operating Subsidiaries were only offered when compromising that application, which a 10 January 2024 Ogier letter had not offered. In addition, it was argued most significantly (it seemed to me):

(a) averments made in evidence about the purpose of the Receivership Application could not be rejected;

(b) in Hong Kong, the B Beneficiaries were acting as beneficiaries of the F Trust;

(c) on or about 12 December 2023 the Trustee became subject to a duty to investigate the Operating Subsidiaries; and

(d) even if relief ought properly to have been sought from this Court, a mistake had been made and it was not improper.

41. Point (a) called for care to be taken in attributing motives inconsistent with a deponent's positive evidence. Point (b) was a double-edged sword. While technically distancing the B Beneficiaries from their duties to this Court, it also highlighted the incongruity of their assuming the mantle of guardian of the underlying Trust assets. Likewise, point (c) sought to buttress the central argument that the 11 December 2023 Order was wholly detached from the Operating Subsidiaries. Yet it also supported the consequential proposition that from 12 December 2023, the Trustee's role included, by operation of law, a positive obligation to protect the value in the Operating Subsidiaries as well. This ultimately reinforces the view that the Trustee's obligations under the *Beddoe* included safeguarding the value in the Operating Subsidiaries whenever risks became apparent.

42. Point (d) was made, so far as I can recall, without reference to any evidence directly supporting the proposition. The Affidavit sworn in support of the Discharge Application on 13 March 2024 apologised for breaching the Confidentiality Order through the making of the First HK Receivership Application. The purpose of the Second HK Receivership Application is explained in considerable detail based on the premise that it is a distinct remedy involving no inconsistency with the *Beddoe* Order. Genuine concerns are said to exist which cannot be addressed other than through the Hong Kong Court. In effect, the positive case is asserted that Anti-Suit 2 was wrongly made and the alternative position is not dealt with at all. It could have been averred, but was not (two months after acquiring a new Cayman legal team), that if the primary position was found to be wrong, either:

(a) the Second HK Receivership Application was made in accordance with explicit Cayman law advice from their former attorneys; or

(b) the deponent failed to seek Cayman law advice but understood advice given in connection with withdrawing the First HK Receivership Application as being to the effect that breaching the Confidentiality Order was the sole problem with the initial application.

43. However, the Affidavit sworn in support of the Discharge Application positively avers that it was believed the Second HK Receivership Application did not undermine the *Beddoe* Order. And it implicitly suggests that the B Beneficiaries also believed it was possible to persuade this Court that this was a correct factual and legal proposition. On this basis, it is possible to infer that if these beliefs are on proper legal analysis found to be wrong, the Receivership Application was made on a mistaken basis rather than in a deliberate attempt to undermine the Order of this Court because:

(a) no Cayman law advice was sought in connection with the Second HK Receivership Application before it was made; or

(b) mistaken Cayman law advice was received referencing the Second HK Receivership Application before it was made; or

(c) the advice which was received was misunderstood by the B Beneficiaries before the application was made; and

(d) whatever Cayman law advice was received thereafter, a defiant decision was made to formally stand by the original position, while skilfully negotiating a compromise which would avoid the need for a formal adjudication of the merits of Anti-Suit 2.

44. It is important to emphasise that the overwhelming emphasis of Mrs Talbot Rice KC's submissions focused on the soundness of her clients' position, and the possibility that a mistake had been made came, as I recall, almost as a "throw-away" remark. Because my provisional view had been, having granted Anti-Suit 2, that the B Beneficiaries' position was obviously and deliberately wrong, the possibility of a mistake seemed a surprising and important proposition. It was in any event reinforced in subsequent written arguments, still leaving the question of how the mistake occurred (whether recklessly or inadvertently) unanswered. What was unsaid lent credence to the A Beneficiaries' and the Enforcer's reference, in their respective written submissions, to a "*lack of candour*" on the B Beneficiaries' part.

45. In written Reply Submissions, the following points were responded to:

(a) the A Beneficiaries submitted the present proceedings were not "*pure*" Beddoe proceedings. It was replied that this made no difference to the content of the governing costs principles: "*all the authorities sing with one voice, and that is that where a trustee applies to the Court for directions, whether Beddoe relief or more general directions in the administration of a trust, that is a Buckton category 1 case and therefore, absent disqualifying conduct, all parties' costs of the proceedings should be borne by the trust fund on an indemnity basis*" (paragraph 3);

(b) the A Beneficiaries submitted that Anti-Suit 2 had not been set aside and this estopped the B Beneficiaries from contending the Second HK Receivership Application had not been a collateral attack on the *Beddoe* Order. It was replied that no estoppel could be created by an ex parte "*prima facie*" finding, especially where costs had been reserved: "*It is respectfully submitted that that full inter partes argument has shown that the issue raised is one of some complexity such that even if, contrary to the B Beneficiaries' primary position, the Court determines that the 22 December 2023 receivership application should not have been made, it was a mistake, not a flagrant and deliberate abuse such as to amount to disqualifying conduct in relation to the costs of the Trustee's 22 December 2023 summons*" (paragraph 10);

(c) the A Beneficiaries contended the Discharge Application had been successful because Anti-Suit 2 had not been set aside. It was replied that this was overly technical: "*on any common sense basis, the Discharge Application was successful: it resulted in success on the substance of the matter at issue, to which the Discharge Application was a necessary precursor*";

(d) the Enforcer contended the B Beneficiaries were riding roughshod over the STAR Trust regime. (I also queried how this impacted on the approach to costs in the course of argument). It was replied that this point did not arise for determination in circumstances where the B Beneficiaries had been *"invited to the party"* and were exercising their right to challenge an *ex parte* Order: "*there can be no doubt that parties against whom an antisuit injunction is sought are entitled to be heard, in full, on such application. That is what is at issue in this case*".

The A Beneficiaries' Submissions

46. Ms Stanley KC launched a piercing attack on the B Beneficiaries' conduct on the *"Litigation Superhighway"*, which she contended had cost millions of dollars. In opening she noted:

(a) the documentary record showed that after the terms of the *Beddoe* Order eventually perfected on 11 December 2024 had been approved by the Court in principle on 28 November 2024 and, while the final terms were being negotiated, the B Beneficiaries' supporting Affirmation deploying confidential information from these proceedings on a "wholesale" basis was affirmed on 10 December. Why it was only signed on this date was unexplained;

(b) as regards the Second HK Receivership Application, it was clear that although it was issued returnable for 29 December 2023, no urgent effective hearing was ever in prospect;

(c) as early as 8 January 2024, the Trustee's attorneys Ogier complained that no prior indication that the Undertakings contained in the *Beddoe* Order were inadequate had been given, and offered to seek further undertakings to avoid the need for the Receivership; and

(d) it was only during the B Beneficiaries' opening submissions the previous day that a concession that the costs of Anti-Suit 1 would be paid by them was first apparent.

47. As regards the costs of the Discharge Application, she submitted:

(a) there was no invariable rule that no order should be made as to costs when a compromise was reached: *Conversant Wireless Licensing SARL-v-Huawei Technologies Co Ltd et al* [2018] Costs LR 1049 (an obviously sound submission);

(b) there was a continuum as regards conduct from the First HK Receivership Application to the Second (a very important submission);

(c) the Discharge Application was not part of a *Beddoe* proceeding. But even if it was, where a beneficiary participated in a way which advanced its own interests, the right to recover its costs might be lost: *Trustee L-v-Attorney General* [2016] SC (Bda) 50 Com (24 March 2016) (at paragraphs 23-24, 32) (a generally valid submission);

(d) Anti-Suit 2 remained in place and its merits could not be re-run at this stage (a beguiling submission); and

(e) the Enforcer's evidence was that he had examined the allegations made on behalf of the B Beneficiaries, against the Companies' financial records, and as a retired accountant found them to be unsubstantiated (a fundamental submission, because the Court cannot find that such allegations were valid).

The Enforcer's Submissions

48. Mr Lindley adopted Ms Stanley KC's submissions in relation to Anti-Suit 1 and 2, but focused on rebutting, I found effectively, suggestions that non-responsiveness to valid queries made by the B Beneficiaries justified the Receivership Applications. He:

(a) referred to a Conyers letter dated 25 September 2023, in which the Enforcer's lawyers wrote: "*While your clients do not have rights of access to Trust information under the STAR Trust regime, the Enforcer is willing to consider what information can be shared with your clients, with a preference for transparency wherever possible and appropriate*" (this undermined the portrait the B Beneficiaries painted of almost complete non-cooperation);

(b) argued the appropriate route for a beneficiary to follow in relation to concerns was to approach (1) the Enforcer, (2) the Trustee and (3) the Court. The case of *Garnham-v- PC and Others* [2012] JRC 078 (at paragraph 13, per Bailiff Birt) was distinguishable (a sound and significant submission);

(c) submitted that the Mourant 2 February 2024 letter was the first occasion on which the B Beneficiaries clearly particularised what they wanted (a seemingly valid point, but not highly material since Mourant on 15 January 2024 wrote: "*We have been engaged today*…"); and

(d) referred to the corporate organisational chart to demonstrate more jurisdictions than Hong Kong were involved (a valid point which undermined to some extent the suggestion that Hong Kong was the logical forum to supervise all of the Operating Subsidiaries).

The Trustee's submissions

49. When Ms Reynolds KC opened by referring to the First Anti-Suit Injunction, Mrs Talbot Rice KC interjected, confirming her clients did not oppose an Order that they should pay all parties' costs on the indemnity basis. The Trustee's counsel indicated that no other Trustee costs were reserved, presumably because a pre-emptive costs order was made in relation to Anti-Suit 2 in the preceding 17 January 2024 *Beddoe* Order.

50. As regards the legal standard for awarding indemnity costs, the Court was reminded that GCR Order 62 rule 4 (11) set out the applicable test under local law. This standard was met if the case for an anti-suit injunction was made out (a valid general proposition).

51. Most significantly, Ms Reynolds KC responded to criticisms of the Trustee's conduct in the *ex parte* proceeding for Anti-Suit 2 and taking time to respond to the 2 February 2024 Mourant letter. As regards the former, she noted that the B Beneficiaries declined an opportunity to contest an *inter partes* injunction application on 31 January 2024. As regards the second point, the Trustee sought undertakings from the directors of the Operating Subsidiaries who ultimately provided them. These were all valid points. The suggestion that what was ultimately agreed corresponded to a January Ogier offer did not withstand careful scrutiny, however. An important point of detail counsel noted was that the second entity which held legal title to the disputed shares in the Claimed Companies was not bound by an anti-Bartlett clause at all. This reinforces my ultimate view that the anti-Bartlett clause in the Trust Deed has no meaningful role to play in the relevant legal analysis for the present application.

52. Responding to the submission that the public policy imperatives of section 90 of the Trusts Act (2021 Revision) were not engaged by the HK Receivership Applications, Ms Reynolds KC pointed out that the evidence filed in support of the First HK Receivership Application clearly raised concerns about the Trust and its governing law which ought to have been raised before this Court. I accepted this submission, although its relevance was undermined by the agreement during the

hearing that the B Beneficiaries would pay the other parties' costs in connection with that ill-advised application.

Findings: legal principles governing costs applications in Buckton category 1 cases

53. The B Beneficiaries' counsel contended the governing principle was to be found in a case which the A Beneficiaries placed before the Court. In *L-v-Attorney General* [2016] SC (Bda) 50 Com, Hellman J held after reviewing several cases:

> "*13. These authorities speak about the costs of trustees and beneficiaries. However in my judgment all parties who have been properly joined to a Beddoe application or analogous trustees' application for directions should, absent disqualifying conduct on their part, normally be paid out of the trust fund, even if they are not trustees or beneficiaries.*"

54. Ms Stanley KC in oral argument referred to the following passages in the same case:

> "*23. Lewin on Trusts expresses the principle thus at para 27-260. A beneficiary who commences proceedings against the trustees and thereby necessitates a Beddoe application will not by reason of having done so be deprived of his costs of a Beddoe application or ordered to pay the trustees' costs:*
>
> > *'Such a beneficiary might, however, become at risk as to costs if he adopts an excessive role in the Beddoe application and seeks to use it as a forum for promoting his claim in the third party proceedings.'*
>
> *24. Obviously, conduct that results in an order for costs against a party will be more unreasonable than conduct which merely results in that party having his costs disallowed. I was referred to various cases in which a beneficiary's costs were either disallowed simpliciter or with an order that the beneficiary pay the costs of the trustee or estate representative. As each case turned on its own facts, none of which were particularly close to the facts of the Beddoe application before me, I do not propose to review them all….*

> *32. The principles set out in the preceding paragraphs will not necessarily apply to any interlocutory applications made in the course of Beddoe or analogous proceedings. Depending upon the nature of such applications, the court may treat them as hostile litigation with costs following the event. That is what happened in Trustee 1 et al v The Attorney General et al [2014] CA (Bda) 3 Civ, which was an interlocutory appeal in Beddoe proceedings regarding an order for disclosure of a document. The Court awarded the successful appellants their costs both on appeal and below.*"

55. I adopt the above principles, especially the importance of focusing on the applicable factual and legal matrix, in the present case. While there is presumption that all participants in the present proceedings should have their costs payable out of the Fund, such presumption may be displaced having regard to a party's conduct and the character of the relevant proceedings. If unreasonable conduct results in a disallowance of costs, extremely unreasonable conduct will be required for making an adverse costs order. It is clear from *Lewin*, 20th *Ed.* (paragraph 48-041), that in a proceeding such as this, beneficiaries are normally entitled to their costs by analogy with the position of a trustee. However, in the same passage *Lewin* also opines:

> "*The requirement of reasonableness may…apply differently to a claim for costs by a beneficiary who is not a fiduciary or in a neutral position, and different considerations may also apply to the question whether a beneficiary has behaved reasonably both in bringing proceedings and in the conduct of proceedings once they have started. Beneficiaries who have used construction proceedings as a vehicle for raising issues not germane to the proceedings have been not only deprived of costs but also ordered to pay the costs of the trustees in reading and responding to their evidence, the costs being assessed on the indemnity basis in view of those beneficiaries' disgraceful conduct…*"

Legal findings: other contentious issues

56. Two legal points were controversial: (1) whether the pendency of Anti-Suit 2 gave rise to an estoppel as regards is merits, and (2) whether the STAR Trust regime modified the costs principles which were otherwise applicable.

57. The estoppel point was only raised by Ms Stanley KC in oral argument and without reference to authority. Whatever the general legal effect and status of an undischarged *ex parte* injunction may be, it is impossible to sensibly construe the Consent Order which disposed of the Discharge Application as precluding the B Beneficiaries from contesting the merits of Anti-Suit 2 when the reserved costs were adjudicated. I reject Mrs Talbot Rice KC's suggestion that this is because her clients' rights to challenge the injunction were preserved; those rights (in my judgment) were waived as part of the compromise reflected in the terms of the Consent Order. Whenever costs are reserved, the right to contest the appropriate costs order are logically preserved.

58. An ancillary point is how the "result" should be approached in a case where a compromise has occurred. Mrs Talbot Rice KC relied upon BCT *Software Solutions -v- C Brewer & Sons Limited* [2003] EWCA Civ 939, and I find the following observations of Chadwick LJ generally helpful:

> "*25. It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that, as Lord Justice Mummery has pointed out, the judge will not be asked to decide that question. It will be agreed as one of the terms of compromise.*
>
> *26. The cases in which the judge will be asked to decide questions of costs – following a compromise of the substantive issues - are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs…*"

59. Who has won overall will be pivotal when the Court is applying the standard, 'party and party' rule according to which 'costs follow the event'. Here, what is under consideration, most broadly and fundamentally, is whether it was reasonable for the B Beneficiaries to create the circumstances

whereby the 17 January 2024 proceedings and Discharge Application became necessary. However, I accept that for the same forensic reasons which apply in a standard costs context where the focus is on the 'result', it would be wrong to reach any findings of unreasonable conduct unless it is clear that Anti-Suit 2 was properly granted and that the Second HK Receivership Application was improperly made. However, the result of the Discharge Application is immaterial in the usual costs sense.

60. Does the STAR Trust regime impose more onerous burdens upon beneficiaries whose interests are legally protected by an Enforcer to exercise restraint when invited to participate in a directions proceeding? I would answer affirmatively if required to resolve this question. However, Mrs Talbot Rice KC was right to submit the point does not properly arise in this case. Firstly, whether or not the disputed assets are validly held on the terms of the G Trust is in question. Secondly, the conduct in issue on the present application turns more on issues of legal probity than questions of proportionality.

Findings: merits of costs applications

The applications

61. The following reserved costs applications were before the Court:

(a) the costs reserved on 14 December 2023 (Summons for Anti-Suit 1 and Anti-Suit 1)- resolved by concession during the hearing ;

(b) 17 January 2024 (Beddoe Summons, Summons for Anti-Suit 2 and Anti-Suit 2); and

(c) 26 January and 23 March 2024 (Discharge Application and dispositive Consent Order).

62. The A Beneficiaries sought an Order that the B Beneficiaries' costs from the 28 November 2023 *Beddoe* Hearing be disallowed as a "minimum sanction" although an adverse indemnity costs order was appropriate (in their 21 June 2024 Skeleton Argument). The Enforcer sought similar orders in his Skeleton Argument of the same date. Pursuant to the Enforcer's 14 November 2024 Summons, at the beginning of the present hearing, I directed that these applications should also be determined.

What misconduct on the part of the B Beneficiaries occurred?

63. The belated concession that the B Beneficiaries' conduct in making the First HK Receivership Application was so egregious as to warrant an adverse costs order against them on the indemnity basis does not justify shielding this part of the proceedings from further scrutiny for present purposes. The concession was a beguiling one, because it sought to use undeniable contrition as a shield while deploying a supposedly fundamental distinction between the First and Second HK Receiverships as a sword which justified the second application and all that flowed from it. However, the forcefully advanced proposition that the 11 December 2023 *Beddoe* Order merely empowered the Trustee to safeguard the shares it legally held, and not their underlying value, does not withstand careful scrutiny. Where points arise out of factual matrices which have not been directly considered in previous published decisions, instinctive responses are only as good as the subconscious data the responses are based on. It looks like abuse of process and feels like abuse of process, but what reasoned basis is there for these perceptions?

64. The following facts and matters are in my judgment incontrovertible:

(a) the B Beneficiaries submitted to this Court's jurisdiction, and were bound by, *inter alia*, the 13 September 2023 Confidentiality Order and the 11 December 2023 *Beddoe* Order;

(b) the purpose of the present proceedings was in large part to decide whether or not the Trustee would continue to administer the assets of the G Trust as shareholder of the Claimed Companies while the Hong Kong Court adjudicated the dispute as to whether the F Trust had validly transferred those shares to the G Trust;

(c) the Trustee of the F Trust as a defendant to an invalidity claim brought by the B Beneficiaries on a derivative basis was not a contender for that role. The Trustee was both independent and had the benefit of incumbency as legal title holder. The purpose of the 28 November 2023 *Beddoe* hearing was to dispose of all issues relating to safeguarding the Trust assets pending the determination of the Hong Kong Proceedings;

(d) it made no commercial sense for the Trustee to be remunerated for being responsible for safeguarding the value in the Claimed Companies, the value in which derived from the

underlying Operating Subsidiaries, while leaving responsibility at that level to be dealt with on an *ad hoc* basis potentially involving additional expense by further unidentified professionals appointed by the Hong Kong Court;

(e) the legal and practical effect of the anti-Bartlett clause according to its seemingly standard terms was not to absolve the Trustee of all responsibility for administering and protecting the underlying Trust assets. It was to absolve the Trustee of responsibility for administering the underlying businesses on a routine daily and regular basis, assuming no need to investigate serious wrongdoing arose. This was Mourant's position on behalf of the B Beneficiaries in a 2 February 2024 letter:

> "*The result of the Trustees having notice of misconduct of* [the subsidiary] *companies' affairs is that they (the Trustees) are duty bound to use their shareholders' powers to ensure the proper running of the companies (see Barclays Bank v Bartlett). The anti-Bartlett clause in the Trust deed, which negates this duty is subject to a proviso which means that the duty is only negated provided that the Trustees do not have notice of dishonesty. The Trustees have such notice. The Bartlett duty is therefore engaged*";

(f) it was legally and practically possible for the B Beneficiaries to address the concerns arising out of their supporting Affirmation via the Enforcer and then the Trustee, as the Consent Order shows;

(g) there was no realistic prospect of the First or Second HK Receivership Application affording urgent immediate relief (an effective hearing of the Second HK Receivership Application was initially not expected until approximately six months after filing). Urgency affords no valid explanation for the applications;

(h) on any sensible view of the relief sought in Hong Kong in relation to each application, seeking an Order that a receiver be appointed to "*receive the legal and beneficial interest in the shares held by the*" Trustee (paragraph 2 of the draft Order in each application) was a blatant and fundamental collateral attack on this Court's *Beddoe* Order which provided:

> "*5. Until further order, the Applicants may continue to pay or reimburse themselves as to remuneration, costs and expenses, including those of the Enforcer, associated with the administration and safeguarding of the Trust fund including the Claimed Companies*…" [Emphasis added];

(i) breaching the Confidentiality Order while seeking relief which would undermine the *Beddoe* Order in such a fundamental way was simply an ancillary aggravating factor in the admitted initial abuse of process, rather than the principal 'offence', insofar as the substantive impact on the proceedings is concerned. Despite the legally more serious character of contempt of court, the Confidentiality Order was made in support of proceedings substantively designed to enable the Trustee to obtain advice and assistance from this Court; and

(j) the 25 March 2024 Consent Order restored the integrity of the 11 December 2023 *Beddoe* Order so the costs relating thereto (including the costs of the 28 November 2023 hearing) were not (ultimately) thrown away. Despite being collided with twice by the B Beneficiaries on the Litigation Superhighway, the hardy *Beddoe* ultimately remained on the road.

65. What has been far less straightforward to evaluate is what gravity of misconduct occurred in relation to the Second HK Receivership Application. My initial view at the *inter partes Beddoe* hearing and the *ex parte* injunction hearing on 17 January 2024 was that a deliberate abuse of process had obviously occurred. Some legal pictures are easier to interpret than others. Guided by Doyle J, "*I guard carefully against any sub-conscious confirmation bias*"[1]. On balance, I am bound to conclude that a mistake, albeit one bordering on recklessness, rather than a calculated, deliberate abuse of process probably occurred, primarily because:

(a) no sufficient basis has been made out for my rejecting the B Beneficiaries' positive assertions about their deposed belief that the Second HK Receivership Application did not breach the *Beddoe* Order;

[1] *Aspect Properties Japan Goda Kaisha-v-Chen et al*, FSD 263/2021 (DDJ), Judgment dated 8 April 2022 (unreported), a paragraph 88.

(b) their contention that an Order providing for the Trustee to safeguard shares in the Claimed Companies did not extend in any way to the Operating Subsidiaries was seemingly uncontradicted by any explicit judicial or other authority;

(c) the rapidity with which the First HK Receivership Application was withdrawn (one day after Anti-Suit 1 was granted) in response to Anti-Suit1 is inconsistent with a litigant who has consciously abandoned any pretence of respect for this Court's processes;

(d) the flagrancy with which this Court's Confidentiality Order was breached strongly suggests the First HK Receivership Application was filed without Cayman legal advice;

(e) the speed with which the Second HK Receivership Application, shorn of its confidential wrappings, was filed (7 days after the First HK Receivership Application was withdrawn) is consistent with an adrenaline-fuelled litigant in the fast lane of the Litigation Superhighway, with defensive, precautionary 'driving' far from their minds;

(f) in this heady, fast-moving cross-jurisdictional environment, it is plausible that either:

(1) the Cayman law advice the B Beneficiaries received referencing Anti-Suit 1 focused on the breach of the Confidentiality Order, and/or

(2) was understood by the clients as advice that the prior breaches of the Confidentiality Order were the only problematic aspects of the First HK Receivership Application;

(g) it was inconsistent with the B Beneficiaries' commercial interests to voluntarily expose themselves to the risk of adverse costs orders through a deliberate abuse of process when they seemingly well knew they were not able to abandon all future recourse to this Court;

(h) the way in which the Discharge Application was compromised was inconsistent with a considered strategy to undermine the processes of this Court generally, and the *Beddoe* Order specifically. However, it is possible the B Beneficiaries have launched an unjust war and extracted an unjust peace in the form of undertakings which were not objectively

required. This is why costs consequences must generally flow from even accidental abuses of process, when serious neglect has occurred;

(i) a lack of candour as to why it was believed the Second HK Receivership Application did not undermine the 11 December 2023 *Beddoe* Order strongly suggests appropriate Cayman law advice was not obtained. Having dispensed with their services shortly before the 17 January 2024 hearings, it would have been easy to blame one's former lawyers for negligent advice if this is what occurred;

(j) if Cayman law advice had been sought in a considered and proper manner before the Second HK Receivership Application was made, it ought to have been obvious that it was not an application which could properly have been made. And assuming the B Beneficiaries acted on such advice, all costs reserved by the Orders 17 January 2024, 26 January 2024 and 23 March 2024 could have been avoided; and

(k) no reasonable litigant in the position of the B Beneficiaries would have made the Second HK Receivership Application without obtaining clear Cayman law advice that no abuse of process was involved. It is ultimately clear that no such advice was sought.

Decision

66. Critically, none of the reserved costs would have been incurred had the abuse of process described above not occurred. I accordingly resolve the disputed costs issues as follows:

(a) the application of the Enforcer and the A Beneficiaries for an Order that the B Beneficiaries pay all costs from 28 November 2023 is refused on the grounds that the integrity of the main *Beddoe* Order remains intact, so no costs were thrown away in this regard (without prejudice to the conceded disposition of the costs reserved on 14 December 2023);

(b) the application of the Enforcer and the A Beneficiaries for an Order that the B Beneficiaries pay their costs of the matters reserved on 17 January 2024 (in relation to Anti-Suit 2) and on 26 January and 23 March 2024 (in relation to the Discharge Application) is refused. I am, despite my original provisional contrary views, not satisfied the B Beneficiaries' conduct was so disgraceful to warrant such an exceptional order; and

(c) the application of the Enforcer and the A Beneficiaries for an Order that the B Beneficiaries' costs should be disallowed in respect of the said reserved matters is granted. The Second HK Receivership Application, properly analysed, was very obviously a serious collateral attack on the 11 December 2023 *Beddoe* Order and an abuse of the process of this Court. The seriousness of this unreasonable conduct was mitigated by the way in which the Discharge Application was conducted and resolved by the B Beneficiaries. However, but for (1) this compromise and (2) my inability to find that deliberate abuse of process occurred, an adverse indemnity costs order against them would likely have been appropriate.

Summary

67. In summary, I find that the B Beneficiaries' costs of the reserved 2024 costs Orders should be disallowed because they are all attributable to their unreasonable conduct in making the Second HK Receivership Application. My provisional view is that their costs of the present costs application should also be disallowed and that all other parties' costs should be paid out of the disputed assets on the usual basis.

68. I will hear counsel if required, ideally on the papers, in relation to costs, the terms of the Order and any other matters arising from this Costs Ruling.

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THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT