IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NOs: FSD 112 OF 2023 (RPJ)
FSD 280 OF 2022 (RPJ)
FSD 204 OF 2022 (RPJ)

BETWEEN:

(1) FRABRAN HOLDINGS LIMITED
(2) HUSKY TRADING CO LTD
(3) KESTREL STOCK TRADING CO LIMITED
(4) KEYRAN HOLDINGS CO. LTD
(5) GOURNARI HOLDINGS LTD
(6) SIOCACO HOLDINGS CO. LTD
(7) CALUTTA HOLDINGS CO. LTD
(8) LIKEIT HOLDINGS CO. LTD
(9) BRUKER HOLDINGS CO. LTD
(10) WORRYCO HOLDINGS CO. LTD
(11) NORKEMA HOLDINGS CO. LTD
(12) ELOBELIUM TRADING CO. LTD
(13) FICTIO HOLDINGS CO. LTD

PLAINTIFFS (Cypriot Plaintiffs)

-AND-

DAVENTREE TRUSTEES LIMITED (DTL)

Before:	The Hon. Raj Parker
Appearances:	Mr Vernon Flynn KC instructed by Mr Nicholas Dunne and Ms Rebecca Moseley of Walkers on behalf of the Cypriot Plaintiffs ("Plaintiffs")
	Mr Guy Manning, Mr Shaun Tracey and Mr Jordie Fienberg of Campbells LLP on behalf of the First Defendant
Heard:	20- 24 November 2023
Draft Judgment circulated:	4 January 2024
Judgment delivered:	17 January 2024

HEADNOTE

International trust dispute-proprietary injunction-application to discharge-leave to serve out of the jurisdiction (in 2005) -full and frank disclosure-construction of jurisdiction clause-standing and size of beneficial interest-statutory jurisdiction to grant interim relief-investment management directions-supervisory jurisdiction to protect trust assets in the jurisdiction-delay and abuse of process-cross undertakings in damages-case management stay.

JUDGMENT

Introduction

1. The applications before the Court concern the Cayman based assets of two trusts (collectively, "the Trusts").

2. A critical issue between the parties is whether the Plaintiffs (the Cypriot Plaintiffs) are beneficiaries of the Trusts. This Judgment will not resolve that issue (it has been the subject of litigation in other jurisdictions, principally Cyprus for 20 years, and latterly in the Bahamas which is continuing).

3. Clause 1.3(a) of each of the trust deeds of the Trusts defines "*Beneficiary*" to mean (subject to certain immaterial exceptions) '…*each natural or legal person registered in the Security Centre in*

Czech Republic (SCP) as a shareholder of Harvardsky Prumyslovy Holdings as (HPH) on the date of the Settlement. There is no dispute that the Cypriot Plaintiffs in 2002 and 2003 when the Trusts were established, were each so registered.

4. HPH is a Czech company which was the product of a merger between various investment funds which were established for the purpose of facilitating the process of privatisation in the former Czechoslovakia in the 1990s.

5. The Cypriot Plaintiffs are all Cypriot companies. They claim that each Cypriot Plaintiff was a registered shareholder of HPH at the time when each of the Trusts was established (at that time, collectively they owned 43.7618% of HPH's shares). They have claimed for many years that DTL has not accounted to the beneficiaries and has failed to make any distributions of their share of the Trust property.

6. DTL, also a Cyprus company, is the trustee of the trusts. DTL asserts that the Cypriot Plaintiffs are not beneficiaries under the trust deeds[1] and even if they were, DTL does not accept that they are entitled to receive distributions and payments pursuant to the express conditions of each trust.

7. The Trusts comprise:

(1) A trust called "The HPH Settlement" which was made by deed under Cypriot law on 4 December 2002 between a company incorporated in the Cayman Islands called HPH Cayman Limited (as settlor), DTL (as trustee), and Mr Juraj Siroky (as protector) ("**Trust 1**").

(2) A trust called "The HPH Distribution Settlement No 2" which was made by deed under Cypriot law on 5 February 2003 between the same parties in the same capacities, on essentially the same terms, and with the same beneficiaries, as Trust 1 ("**Trust 2**").

Trust 1

The evidence shows that as at 30 June 2023, assets with a total value of US$27,669,619.62 were held in an account in the name of DTL for Trust 1 at RBC Dominion Securities Global Limited in the Cayman Islands ("the Trust 1 RBC Account": see Jiřík 1, §165)

[1] *Although the Cypriot plaintiffs contend that DTL accepted they were previously -see affidavit of Mr Sevcik 5 May 2005 §2 sworn in the Cyprus proceedings (before the criminal convictions of Mr Koženy)*

Trust 2

As at 31 January 2005, assets with a total value of US$19,362,091.85 were held in an account in the name of a Belize company, Daventree Resources Limited ("DRL-B"), as nominee for Trust 2 at RBC in the Cayman Islands ("**the Trust 2 RBC Account**") (see Barden 1, §47)**.** DRL-B was dissolved pursuant to a resolution dated 10 May 2005 (see Barden 1, §445**).**

8. The present value of the assets in the Trust 2 RBC Account is unknown, but it is thought that the assets in that account may now (due to the accumulation of interest and any increase in the value of any investments over the course of 18 years) be worth in excess of US$40 million. As at 31 January 2005, assets with a total value of US$3.75m were frozen in an account at RBC in the name of an entity called Godtrypat: see Barden 1, §339 and 342. The present value of the funds in that account is not known.

9. The parties have been involved in complex and protracted litigation for the last 20 years in various jurisdictions, principally in Cyprus, the Czech Republic, and latterly in the Cayman Islands (and prospectively now in the Bahamas). The litigation shows no signs of resolution.

10. The Cayman Islands dimension arises from the presence of assets of the Trusts in accounts in the Cayman Islands (see Barden 1, §320, 322, 326, 338, 354, 362, 375). Assets belonging to the Trusts were transferred to RBC Dominion Securities Limited ("RBC") in the Cayman Islands in December 2002 and January 2003[2].

11. These assets have been protected for the last 18 years and are presently protected by proprietary injunctive relief granted by this Court on 3 March 2005 ("the Cayman Proprietary Injunction").

Issues

12. The issues to be determined are as follows:

(1) Should the Cayman Proprietary Injunction be continued, or should it be discharged?

[2] *Paragraph 18 of Jiřík 1*

(2) If the Cayman Proprietary Injunction is continued in relation to Trust 2, should it be on terms which would enable DTL to apply to discharge it once DTL has satisfied RBC that it can properly give instructions in relation to the Trust 2 RBC Account?

(3) If the Cayman Proprietary Injunction is discharged:

(a) Should any fresh injunction in respect of the Trust 1 assets (it being common ground that in such circumstances there should be a fresh injunction in respect of the Trust 1 assets) provide a mechanism for DTL to give investment directions to RBC on the terms sought by DTL?

(b) Should there be a fresh injunction in respect of the Trust 2 assets?

(4) Should there be a stay of the Cayman Enforcement Proceedings (see below) on the terms sought by DTL?

The evidence

13. The affidavit evidence and other material relied on in these applications is substantial, including:

Barden 1 dated 4 May 2023, Barden 2 dated 31 October 2023; Barden 3 dated31 October 2023 and Barden affidavit dated 15 September 2023 dealing with the stay application; Jiřík 1 dated 22 September 2023; Demitriou 1-4 dated 30 November 2022, 15 May 2023, 22 September 2023, and 13 October 2023, together with their exhibits, which the Court has reviewed.

Background allegations and findings of Courts

14. The Cypriot Court, in a Judgment of 25 April 2017, found that the ultimate beneficial owner of the Cypriot Plaintiffs is Dr Jitka Chvatik ("Dr Chvatik").

Mr Koženy

15. Dr Chvatik's son, Mr Viktor Koženy ("Mr Koženy"), a Harvard University graduate, played a pivotal role in the Czechoslovakian privatisation process.

16. DTL relies on the fact that Mr Koženy was subsequently convicted of fraud by the Czech Courts (in absentia.)[3] Mr Jiřík asserts at §54 of his affidavit of 22 September 2023 that Mr Koženy's conviction is a "central fact".

17. Mr Barden in Barden 3 sworn on 31 October 2023 says Mr Koženy's conviction was procured by fraud and no proper reliance can be placed on it. [4]

18. Mr Jiřík in his affidavit responds in this way:

> *'I consider that any doubts over the legitimacy of the criminal proceedings conducted against Mr Koženy in the Czech Republic, such as those advanced by Mr Barden… are misplaced. [They] were not, as portrayed in Barden 1, show trials for the persecution of Mr Koženy by a communist conspiracy against him. Such objections have already been* refuted *in the proceedings before the High Court in Prague during Mr Koženy's appeal of the Municipal Court of Prague's findings that preceded the 2012 Czech Criminal Judgment'*[5]

19. DTL relies on:

a) proceedings in courts of the Czech republic which resulted in criminal convictions of Mr Kožený and Boris Vostry, which have been upheld on appeal[6];
b) a 2022 Czech civil judgment declaring that Husky (Cypriot Plaintiff 2) has never been a lawful shareholder in HPH, ("2022 Czech Civil Judgment");

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[3] *Jiřík 1 § 62 -64 provide: [62]Mr Koženy has been convicted of extensive criminal activity in the Czech Republic and in 2005 he was indicted in the United States Southern District of New York on more than 25 counts of criminal conduct. The claims against him in those United States proceedings include one count of conspiracy to defraud the United States, 7 counts of transporting in aid of racketeering and 5 counts of money laundering in relation to the privatisation of certain state-owned enterprises in Azerbaijan. It is alleged in those proceedings that he bribed senior Azeri officials in return for allowing Mr Koženy's investment consortium to invest in the Azerbaijan privatisation scheme."..and § 63 ….the Prague High Court found that [Koženy and Vostry]had defrauded HPH of at least US$458 million based on the current exchange rate in the context of the privatisation of Czech state assets in the early 1990s, the Court found that between 1995 and 1996 dozens of transactions were undertaken in respect of the Harvard Funds…[64] ..he was in possession of a power of attorney that authorised him to facilitate those transactions without the knowledge or consent of shareholders of the Harvard Funds. In that way, his intent was always to transfer assets out of the funds to entities owned and/or controlled by him for no consideration, thereby stripping valuable assets from the Harvard Funds for his own personal gain."*

[4] *Barden 3 runs to over 200 pages and deals in detail with the Czech case. On 31 August 2023 Husky filed notice of objections and evidence in opposition to the fresh evidence application in Cyprus with Mr Lazarou providing a lengthy explanation of why the Czech Judgment should not be recognised.*

[5] Jiřík 1 §66

[6] *Mr Koženy was sentenced to a 10 year term of imprisonment and Mr Vostry for 9 years for their criminal conduct. Also compensatory damages orders were made for Mr Koženy said to have amounted to US$450m in 2010*

c) and ongoing civil proceedings involving Frabran (Cypriot Plaintiff 1) and the other 11 Cypriot Plaintiffs, concerning whether any of those companies have ever been lawful shareholders in HPH.

Mr Jiřík

20. The Cypriot Plaintiffs reject that any reliance can be placed upon these proceedings and contend that Mr Jiřík intends to mislead the Court by giving the impression that DTL, which is under his control, intends in due course to distribute the trust assets to the beneficiaries of the trusts. They say that there is overwhelming evidence that his ultimate goal is to apply the trust assets to the benefit of himself and HPH and to disregard the interests of the beneficiaries. They rely on certain passages from DTL's affidavit evidence and exhibits to show that this is the case, as follows:

> "*in 2018 and 2021, my shareholding in HPH increased from 0.01% of the issued share capital and 0.02% of voting rights prior to September 2018 to 22.07% of the issued share capital and 28% voting of the voting rights after September 2018, and then to approximately 29.75% of the issued share capital (with approximately 40.50% of voting rights) after June 2021. Given the large number of shareholders in HPH, I effectively hold a controlling stake in the company*"
> **Jiřík 1, §14**

> *"The underlying subject matter of the various litigation (notably in Cyprus and the Czech Republic) concerns the purported beneficiaries' claim against the Trusts administered by DTL. The actual beneficiaries are those persons who were shareholders of HPH at the date of the establishment of Trust 1 and Trust 2 in 2002 and 2003. Therefore, any changes in the shareholding structure in HPH in 2021 (and at any other moment after the establishment of the Trusts) are irrelevant."*
> ***Jiřík 1, §142***

> *"In our opinion, it is also necessary to resolve the fact that if the assets from the Trusts are returned to HPH, a large share in HPH is still held by Viktor Koženy's mother. It would be absurd for the liquidation balance of HPH to be distributed to Viktor Koženy's family one day. In this area, too, we ask for the help of law enforcement authorities."*
> ***HPH's financial statements for 2019, §2.10.11***

> *"…the aim of [HPH] is to acquire Daventree Trustees Ltd and intervene in legal proceedings in Cyprus against [the Cypriot Plaintiffs]. The ultimate goal of HPH is, of course to gain access to the trust assets and distribute them among shareholders"*
> ***HPH's financial statements for 2020, §3.24***

> *"•What is HPH's relationship with the Cypriot company Daventree Trustees Ltd?*
> *HPH is a 100% owner of Daventree Trustees Ltd.*
> *•In what other disputes will HPH be active due to the DTL takeover?*
> *It should be taken into account that HPH and DTL are separate companies, DTL is a company that must comply with the requirements of the laws of Cyprus. It can be stated that HPH is trying, as before, to be actively involved in all property claims that are specified in the liquidators' report…"*
> ***Written response to HPH shareholder questions for HPH's 2022 AGM***

21. The Court, in order to determine these applications needs to form a view as to whether there is a serious issue to be tried relevant to the principal matters in issue in the applications: namely whether the Cypriot Plaintiffs are beneficially entitled to the trust assets and whether the trust assets need protection from the misconduct of DTL, as alleged by the Cypriot Plaintiffs.

22. Whilst the Court has to assess the matters relied on by DTL, Mr Koženy has not given evidence in these proceedings and is not directly connected to the Cypriot Plaintiffs otherwise than by being Dr Chvatik's son and the promoter of the Czech privatisation scheme which generated the enormous capital sums which are still being fought over. The Court has had regard to the points made by DTL as to Mr Koženy's motivations and conduct. It has carefully considered the available underlying material DTL has referred it to, in particular the Czech proceedings and the US Foreign Corrupt Practices Act (FCPA) related proceedings.

23. However, the Court is principally concerned with assessing the allegations concerning DTL's conduct and the reliability of Mr Jiřík[7] who has provided affidavit evidence in these proceedings. Mr Jiřík was appointed a director of DTL on 1 February 2022. Mr Jiřík has a controlling stake in HPH and is the sole director of DTL.

24. The Court has also had to review and assess the extensive factual narrative set out in great detail in Barden 1[8] as to the establishment of the trusts and the alleged conduct of DTL (and others) in relation to attempts to misappropriate trust assets. It has also reviewed the Amended Statement of Claim in the Bahamian proceedings (which is not served as yet), and the matters set out at Barden 2[9] as to why he says DTL would misappropriate further trust assets if not restrained.

25. The various proceedings the parties are embroiled in are complex and convoluted. They have been fought out for many years. Set out below is a summary of only relevant matters arising. It is based on the helpful written and oral arguments of counsel.

Factual background

26. Prior to the fall of communism in 1989, Dr Chvatik (found by the Cyprus Court to be the ultimate beneficial owner of the Cypriot Plaintiffs[10]) and her family had been persecuted by the Czech communist regime and she, her husband and children (including Mr Koženy) obtained political asylum in West Germany in 1980.

27. In 1989 following the 'Velvet Revolution', the Czech communist regime fell and in 1990 Mr Koženy returned to what was then Czechoslovakia to work for his grandfather's business, Harvard Capital and Consulting, which provided management consultancy services to Czech companies.

28. The Czech government then embarked on a policy of privatising state owned companies and Mr Koženy played a key role in promoting the privatisation scheme through six investment funds known as the Harvard Funds established by Harvard Capital & Consulting, through which Czech citizens could invest.

29. At the end of 1993, Mr Koženy's grandfather transferred his business interests to his daughter, Dr Chvatik, who then became the ultimate beneficial owner of around 53% of the shares in the Harvard Funds by acquiring them from Czech citizens who wished to realise the return on their investments. Mr Koženy having promoted the privatisation scheme apparently made a lot of political enemies and fled the Czech Republic in 1994.

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[8] *Mr Barden is senior Partner in Devonshire's, the English solicitors for Dr Chvatik. He coordinates the litigation in Cyprus and the Cayman Islands. He has no personal knowledge of the events of persons he makes reference to, but it is clear from his evidence that he and his team have reviewed a huge amount of relevant material with which to advance the Cypriot Plaintiffs cases.*

[9] *§§131-182*

[10] *Subject to appeal*

30. HPH was the product of a merger between the various investment funds which were established for the purpose of facilitating the process of privatisation.

The Cypriot Proceedings

31. In December 2003, the Cypriot Plaintiffs commenced two sets of proceedings in Cyprus ("the Cypriot Proceedings") in which they sought, *inter alia*, orders compelling DTL to make distributions to the Cypriot Plaintiffs from the Trusts. The Cypriot Plaintiffs also sought interim relief in the Cypriot Proceedings in order to identify and preserve the Trust assets.

32. On 22 December 2003, by a consent order made in the Cypriot Proceedings ("the Cypriot Consent Order") DTL was ordered by consent to give a full account of the assets of both Trusts. Despite this, the Cypriot Plaintiffs say a full and proper account of the assets of the Trusts received by DTL has never been provided by DTL and its officers.

33. Injunctions were granted in Cyprus on 12 May[11] and 31 December 2004[12] to maintain funds in Cyprus and not to dispose of or keep property outside Cyprus.

34. Litigation was then commenced in Cayman. On 3rd March 2005, Henderson J made an *ex parte* proprietary injunction order over all Trust Property (defined as all property of the Defendants and/or an Associated Person) in the Cayman Islands following an application by Kestrel Stock Trading Co. Limited ("Kestrel")) (Cypriot Plaintiff 3).[13]

35. On 5 May 2005, Mr Demetris Ioannides ("Mr Ioannides") was appointed by the Cypriot Court as an interim receiver over the assets of both Trusts. The Cypriot Plaintiffs say DTL and its officers failed to cooperate with Mr Ioannides or provide him with proper information about the Trust assets.

36. On 9 September 2005, Henderson J recognised the Cypriot receivership order in the Cayman Islands and varied the Kestrel injunction at a second *ex parte* hearing.

37. On 8 April 2015, prior to the trial in the Cypriot Proceedings, the Cypriot Plaintiffs other than the First Cypriot Plaintiff ("Frabran") and the Second Cypriot Plaintiff ("Husky") (i.e. the Third to

[11] US$5.5m
[12] US$45m
[13]The Cayman Court was told that the Cyprus Court had accepted that trust property was *prima facie* in danger and that the Cyprus Plaintiffs had a good arguable case-see Passmore 1 ,1 March 2005 § 26

Thirteenth Cypriot Plaintiffs) were deleted from the Cypriot register of companies because they did not have sufficient financial resources to pay for the preparation and submission of financial statements and annual reports and to pay the necessary fees. The Third to Thirteenth Cypriot Plaintiffs were then restored to the Cypriot register by orders of the Cypriot Court on 19 April 2021.

38. The trial of the claims for distributions in the Cypriot Proceedings eventually took place 13 years after the case was commenced, in March 2016, with judgment being delivered on 25 April 2017.

39. In its judgment, the Cypriot Court ordered DTL to make distributions from Trust 1 to Frabran in the principal sum of US$690,000 and to Husky in the principal sum of US$5,514,756, together with interest and costs ("the 2017 Cypriot Judgment").

40. The claims for distributions from Trust 2 were dismissed on the basis that DTL had failed to declare a Distribution Term for Trust 2, so that the claims were deemed to be premature.

41. On 2 June 2017, DTL submitted appeals[14] against the 2017 Cypriot Judgment ("the Cypriot Appeals") but it did not (at that stage) seek any stay of enforcement of the 2017 Cypriot Judgment.

42. The Cypriot Appeals have not yet been listed for a substantive hearing. The Cypriot Plaintiffs say it may well be many years before they are heard and determined. In relation to the Cypriot Appeal against the judgment in favour of Husky, one reason for the delay is the Fresh Evidence Application as described further below.

43. DTL has also indicated that it intends to apply to stay the Cypriot Appeal concerning Frabran pending the determination of proceedings in the Czech Republic which were commenced in 2022 in order to attack the basis on which Cypriot Plaintiffs other than Husky obtained their shares in HPH[15].

44. The Cypriot Plaintiffs say the implication of this is that DTL intends in due course to make a further fresh evidence application in Cyprus if it obtains the outcome it seeks in the Czech Republic. They add that experience suggests that it is likely to take several more years for the Czech and Cypriot Courts to resolve these matters so that the Cypriot Appeal concerning Frabran can proceed to be determined on the merits.

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[14] *Since the Cypriot Proceedings comprised two sets of claims (one by Husky and the other by Frabran and the remaining Cypriot Plaintiffs), there are appeals in relation to both proceedings*
[15] *see §7.9 of Mr Demetriou's affidavit dated 22 September 2023.*

Developments since 2022

45. On 3rd January 2022, the Cypriot Court terminated the Cypriot Receivership Order, after 17 years.

46. On 18 November 2022, DTL applied in Cyprus for an order suspending enforcement of the 2017 Cypriot Judgment ("the Cypriot Stay Application").

47. On 10 January 2023, certain Cypriot Plaintiffs commenced a new action against DTL in Cyprus.

48. On 29 March 2023, certain Cypriot plaintiffs made an application to revive their claims in the Cyprus proceedings.

49. On 26 May 2023, DTL filed an application in the Cypriot Appeal relating to the Czech judgment in Mr Jiřík's favour (by which it was determined that Husky never had been a shareholder of HPH) for permission to adduce fresh evidence in that Appeal ("the Fresh Evidence Application").

50. The judgment of the Czech Court is dated 10 October 2022 ("the 2022 Czech Civil Judgment"), and DTL uses it in support of its argument that Husky is not a beneficiary of Trust 1. It is apparently a final determination.[16] The Fresh Evidence Application is opposed and has not yet been determined by the Cypriot Court.

51. If the Fresh Evidence Application is granted then it is likely that, before the underlying substantive Appeal concerning Husky could be heard or determined, there would need to be a lengthy trial concerning the circumstances in which a criminal judgment against Mr Koženy in 2012 and the 2022 Czech Civil Judgment (which relies on the findings in the earlier criminal judgment) were obtained. Husky's case is that those judgments were procured by fraud and should not be recognised or otherwise given effect to.

The Cayman Proceedings in more detail

52. By an Originating Summons dated 3 March 2005 ("the Kestrel Proceedings"), one of the Cypriot Plaintiffs commenced proceedings in the Grand Court concerning the Cayman based assets of the Trusts.

[16] *There are similar proceedings in respect of each of the Cypriot Plaintiffs on foot 240117- Frabran Holdings Limited and Ors.-v- Daventree Trustees Limited and Ors – FSD 112 of 2023 (RPJ), FSD 280 of 2022 (RPJ) & FSD 204 of 2022 (RPJ) - Judgment*

53. The Defendants to the Kestrel Proceedings are DTL and various other individuals and companies who have been involved in the administration of the Trusts or have dealt with the assets of the Trusts.

54. The Originating Summons sought various forms of relief in respect of the Trusts including (a) that the Trusts be carried into execution by the Court, (b) that if and insofar as necessary the Trusts be taken into administration by the Court, (c) that an inquiry be made as to the property in Cayman which is subject to the Trusts, and (d) that all necessary and proper consequential directions, accounts and enquiries be made. Accordingly, the Cypriot Plaintiffs say the Kestrel Proceedings engaged the Court's supervisory jurisdiction over the Trusts.

55. On 3 March 2005, Henderson J granted the Cayman Proprietary Injunction against the Defendants in the Kestrel Proceedings. The basis on which Henderson J did so is disputed. The Cypriot Plaintiffs say the Cayman Proprietary Injunction was granted in support of the substantive relief sought in Cayman in the Kestrel Proceedings (and not, as DTL say, in aid of the Cypriot Proceedings).

56. Subsequently, on 9 September 2005, Henderson J made an order in the Kestrel Proceedings recognising the appointment of the receiver, Mr Ioannides, in Cayman ("the Cayman Receivership Order").

57. On 28 September 2022, Frabran and Husky issued a writ in this Court seeking enforcement of the Cypriot judgment (the "Cayman Enforcement Proceedings"). This was 5 years after the Cypriot Judgment in 2017.

58. On 6 December 2022, 18 years after it was granted *ex parte* by Henderson J, DTL applied in the Kestrel Proceedings to discharge the Cayman Proprietary Injunction (and the Cayman Receivership Order) ("the Discharge Application"). Kestrel opposes the discharge of the Cayman Proprietary Injunction but there is no objection to the Court confirming that the Cayman Receivership Order is discharged (see Barden 1, §60).

59. By an Originating Summons dated 4 May 2023 (Cause No FSD 112 of 2023), all of the Cypriot Plaintiffs applied for fresh injunctive relief in respect of the Trust assets in Cayman ("the Fresh Injunction Application").

60. DTL has indicated (see Jiřík 1, §161) that it is willing to consent to the Fresh Injunction Application in relation to the Trust 1 assets (but not the Trust 2 assets) subject to having liberty to apply to vary or discharge any fresh injunction and to seek fortification of the cross-undertakings in damages.

61. The Cypriot Plaintiffs say the Fresh Injunction Application only arises for consideration in so far as the Court determines that it is appropriate to discharge the Cayman Proprietary Injunction and they say that it should continue on its present terms.

62. On 12 May 2023, DTL applied to stay the Cayman Enforcement Proceedings ("the Stay Application") until the determination of the Cypriot Stay Application with a corresponding extension of time for the service of DTL's defence until 14 days after the determination of the Cypriot Stay Application. The Stay Application also includes a provision for DTL to be restrained, until further order of the Court, from dealing with the assets held in the Trust 1 RBC Account up to a value of US$12.2m. The Stay Application is opposed by Husky and Frabran.

63. On 2 October 2023, DTL applied (in the same proceedings as the Fresh Injunction Application) for the inclusion of certain provisions in any fresh injunction in relation to Trust 1 which would permit DTL (on terms which would require DTL to give prior notice to the Cypriot Plaintiffs) to give investment directions to RBC in respect of the assets in the Trust 1 RBC Account ("the Investment Application"). The Cypriot Plaintiffs oppose the Investment Application.

The Bahamian Proceedings

64. On 24 April 2023, Frabran and Husky commenced proceedings in the Bahamas against DTL and various other defendants in which they seek relief (including the removal of DTL as trustee of Trust 1 and of Trust 2) in relation to allegations of the fraudulent misappropriation of the assets of the Trusts ("the Bahamian Proceedings"). In the Bahamian Proceedings, the Cypriot Plaintiffs also seek relief in relation to assets worth approximately US$600 million that were placed under the control of HPH and its then liquidator, Mr Vostry, which they allege have been dishonestly misappropriated (as described in detail in Barden 1 and Barden 2).

65. The Bahamian Proceedings were issued on 24 April 2023 apparently in order to address a potential limitation issue in relation to certain claims advanced by Frabran and Husky in respect of Trust 1.

66. On 19 October 2023, the Claim Form in the Bahamian Proceedings was amended, including by adding the remaining Cypriot Plaintiffs as claimants and certain additional defendants including Mr Jiřík, the sole director of DTL. The Bahamas proceedings have not been served.

Summary of the Parties' submissions

Injunction

DTL

Mr Guy Manning appeared for DTL.

67. Mr Manning made the following general points. When in 2005 Kestrel was granted an *ex parte* proprietary freezing injunction over the assets of the Trusts located in the Cayman Islands, the maximum amount of its claim was a very small fraction of the value of the assets frozen by the injunction.

68. There has been no *inter partes* return hearing in respect of the injunction over the last 18 years, and so DTL's present application to discharge the injunction (save for an order sought by DTL restraining itself from dealings with Trust 2 assets pending further order of this Court) is the (belated) return hearing in respect of the injunction granted to Kestrel.

69. Whilst the Cypriot Plaintiffs' position is that their application for a fresh proprietary injunction should only be heard if the Court grants DTL's application to discharge the injunction granted to Kestrel, DTL's position is that this should not be necessary, irrespective of the outcome of the discharge application, because DTL has itself cross applied for a fresh proprietary injunction in respect of the assets of Trust 1 in the Cayman islands (while seeking an order in the Kestrel Proceedings preventing dealings with Trust 2 assets).

70. DTL has confirmed its willingness to consent to a fresh injunction (on standard terms) in favour of Kestrel and all the other Cypriot Plaintiffs in connection with the new proceedings that they have brought in Cyprus and the Cayman Enforcement Proceedings, over the very same assets of Trust 1 that are currently frozen by the Cayman Proprietary Injunction.

71. DTL's position is that the Cayman Proprietary Injunction should be discharged, but the assets of Trust 2 should remain held at RBC pending further order of the Court in due course.

72. All assets of both Trusts will therefore remain frozen on DTL's case, and it is DTL's position that the Cypriot Plaintiffs should have consented to the relief sought and have refused unreasonably to do so.

73. Mr Manning made the following specific submissions. Each of the Cypriot Plaintiffs has claimed substantial entitlements to assets of the Trusts in the proceedings in Cyprus although, even on their own cases, the Cypriot Plaintiffs claim entitlements to fractional beneficial interests in the Trusts.[17] In this regard he referred the Court to clause 6 of the deed of settlement of each Trust, *"No Beneficiary shall be entitled to any interest in individual assets comprised in the Trust Fund*".

74. Although the Cypriot Plaintiffs have proprietary claims in the sense that they claim to be beneficiaries of a trust, it is not the case that they can claim that the assets of the Trusts held at RBC belong to them alone or are the traceable proceeds of other assets belonging to them alone.

75. At the time that the Trusts were settled there were approximately 240,000 beneficiaries.[18]Approximately US$45m was distributed by DTL to pay the claims of 118,953 of those beneficiaries in 2003 and 2004, but it has not been possible for DTL to make distributions to the remaining approximately 121,000 beneficiaries since then because of the injunctions and receivership orders which were put in place.

76. If the Cypriot Plaintiffs are beneficiaries of the Trusts, which DTL denies, they would only comprise 13 of some 121,000 beneficiaries, and those other beneficiaries would all also have proprietary claims against the Trusts in the same sense.

77. Mr Manning went on to submit that only the claims of Frabran and Husky were successful at first instance in respect of their claims for a payment from Trust 1 assets. The claims of the other 11 Cypriot Plaintiffs (including Kestrel) in respect of Trust 1 were all dismissed by the Cyprus Court because they failed to appear at the trial of the action in 2017. The claims of all 13 Cypriot Plaintiffs in relation to Trust 2 were also dismissed in their entirety in 2017, some six years ago[19].

78. None of the Cypriot Plaintiffs filed an appeal against any of those decisions. On 10 January 2023, however, all of the Cypriot Plaintiffs other than Frabran and Husky belatedly commenced a new action against DTL in the Cypriot Court[20] (the "New Cypriot Action"). The Cypriot Plaintiffs (other than Frabran and Husky) seek distributions from the Trust 1 assets in the sum of approximately US$43 million.

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[17] *The deeds of settlement of the Trusts contain provisions in relation to "Quotients" (per clause 1.19 each "Quotient""…means a unit representing an equal undivided share of the Trust Fund in which a Beneficiary is interested…").*
[18] *Paragraphs 5.15 and 5.16 of Demetriou 2*
[19] *Paragraph 21b. of Barden 1*
[20] *Paragraph 41g. of Barden 1*

79. However, as addressed in Demetriou 1, Mr Manning submitted DTL considers that those claims are likely to be struck out on the grounds of *res judicata* given that essentially the same claims were dismissed by the Cyprus Court in proceeding no. 13792/2003 for want of prosecution[21].

80. On 6 February 2023, DTL filed an application to strike out the New Cypriot Action on the basis of *res judicata*. The Cypriot Plaintiffs (other than Frabran and Husky) opposed (and continue to oppose) the strike out application, but filed an application on 29 March 2023 seeking, inter alia, an order that their claims in the original proceedings were revived when they were restored to the register, alternatively an order that the 2017 Cypriot Judgment dismissing their claims be set aside in order that they can pursue their claims in the original proceedings.

81. DTL maintains that it is not as a matter of Cyprus law and procedure open to the other Cypriot Plaintiffs to seek to revive or re-litigate their claims in this (or any other) way.

82. Further, Mr Manning submitted that the Cypriot Plaintiffs are ultimately beneficially owned by Mr Viktor Kožený (a Czech citizen, convicted of fraud in the Czech Republic in connection with the Trusts and who remains a fugitive from Czech justice, having resided in exile in the Bahamas for many years), and not (as the Cypriot Plaintiffs claim) by his mother, Dr Chvatik.[22]

83. He pointed out that the Czech courts have found the Cypriot Plaintiffs were used by Mr Kožený as corporate vehicles in connection with the Trusts through which he perpetrated a wide-ranging and complex fraud that involved the asset-stripping of Czech companies following privatisations of Czech state enterprises in the early 1990s to the detriment of many members of the Czech public whose interests in those companies were rendered practically worthless.

84. Moreover, he argued the Cypriot Plaintiff claims lack proper causes of action and none of them qualifies for, or has ever satisfied, the conditions of the Trusts for distribution and payment thereunder; and accordingly, the Cypriot Plaintiffs are not among the approximately 121,000 lawful beneficiaries of the Trusts, the vast majority of whom are members of the Czech public.

85. Mr Manning submitted that there has never been an *inter partes* return date hearing of Kestrel's *ex parte* application. The Court has therefore never previously heard DTL's case with regard to the Cayman Proprietary Injunction. Meanwhile, on 25 April 2017, Kestrel's claims against DTL in

[21] *Paragraph 13 of Demetriou 1*
[22] *No direct evidence in support of Mr Kožený's ultimate beneficial ownership has been adduced*

Cyprus were dismissed in their entirety, and the injunction which the Cyprus Court had granted over the Trusts' assets was discharged, without any appeal being filed.

86. In 2022, some five years later, the receiver who had been appointed in 2005 over the Trusts' assets by the Cyprus Court, and recognised by this Court on 9 September 2005, was belatedly dismissed.

87. It was in those circumstances that DTL, by then under entirely new management, finally took steps to resume control of Trust 1's assets in the Cayman Islands after an 18-year hiatus, by filing its application on 6 December 2022 to discharge the Cayman Proprietary Injunction.

DTL proposals

88. Mr Manning further submitted that despite the volume and contentiousness of the Cypriot Plaintiffs' evidence, upon a proper analysis, the issues between the parties concerning the Discharge Application and the Fresh Injunction Proceedings are narrow and ought to have been capable of agreement between the parties.

89. He submitted that by DTL's proposals:

> (a) The Cayman Proprietary Injunction would be discharged with respect to the assets of Trust 1 and Trust 2, but as regards Trust 2 the assets could still not be dealt with without further order of the Court (with any such application obviously being made on notice to Kestrel);
>
> (b) A fresh proprietary injunction would be granted in favour of the Cypriot Plaintiffs in the Fresh Injunction Proceedings in respect of the assets of Trust 1, subject to a liberty for DTL to apply to the Court (which liberty would be available to DTL in respect of the Cayman Proprietary Injunction in any event) to discharge or vary such injunction (including, if so advised, to seek fortification of the cross undertakings in damages to be given by the Cypriot Plaintiffs); and
>
> (c) Consequently, the entire assets of the Trusts held in the Cayman Islands would remain frozen pending any subsequent applications to / orders by the Court, with any such applications being made on notice to the Cypriot Plaintiffs.

90. He argued that DTL's proposals have unreasonably been rejected apparently to avoid the need for the Cypriot Plaintiffs (other than Kestrel) to give the standard cross undertakings in damages that are required to be given by any plaintiff seeking an injunction.

91. Those parties apparently seek to continue to benefit from the continued operation of the Cayman Proprietary Injunction (for which they have not given cross-undertakings in damages), even though:

(a) The claim by Kestrel against DTL which provided the grounds for the Cayman Proprietary Injunction was dismissed by the Cypriot Court in 2017, without being appealed, and, in any case, the pleaded value of that claim is less than 3% of the total value of the frozen assets; and

(b) The new claims made against DTL in Cyprus have been brought by all of the Cypriot Plaintiffs (other than Frabran and Husky) and, therefore, if and insofar as any injunction is to be granted, it is right and proper for each of those parties to provide a cross-undertaking in damages.

The present position

92. As to the Order of Henderson J, he submitted that it should now be discharged despite the length of time that has passed, because until now there has never been a return date hearing in respect of either the Cayman Proprietary Injunction, which remains in place, or the appointment of Mr Ioannides as receiver (who has since been discharged automatically pursuant to the terms of his appointment order).

93. As a consequence, DTL has had no control over the assets of either Trust located in the Cayman Islands (i.e. cash and securities held at RBC) for more than 18 years. The assets of Trust 1 at RBC have a current value of approximately US$27.4 million,[23] yet they have remained frozen in their entirety for almost two decades pursuant to an injunction granted in support of a proprietary claim by Kestrel for just US$720,636 (representing less than 3% of the value of the frozen assets).

94. He reminded the Court that on 25 April 2017, the Cyprus Court handed down the 2017 Cypriot Judgment in relation to separate actions against DTL by Frabran and Cypriot Plaintiffs 2-12 (no.

[23] *Paragraph 165 of Jiřík 1*

13792/2003) and Husky (no. 13842/2003).[24] The claims of Frabran and Husky were successful in respect of claims as to entitlements to Trust 1 but failed in respect of Trust 2. The other Cypriot Plaintiffs' claims were dismissed in respect of both Trust 1 and Trust 2 in circumstances where they failed to appear at the trial of the action.[25]

95. He emphasised that by the 2017 Cypriot Judgment, the Cyprus Court dismissed Kestrel's Cyprus Proceedings in respect of both Trusts. No appeal was filed, and so the underlying overseas proceedings in respect of which the Grand Court had granted *ex parte* injunctive relief to Kestrel in March 2005 ended over six years ago.

96. Meanwhile, DTL has filed appeals in respect of the judgments in favour of Frabran and Husky in respect of Trust 1 (the "Cypriot Appeal") and has applied to adduce fresh evidence in the appeal proceeding concerning Husky, i.e. to adduce judicial findings in the Czech Republic that Husky was never a shareholder in HPH (at the time of the Trusts being settled or otherwise) and therefore, notwithstanding and without prejudice to all other grounds of appeal, it has never been and it is not a beneficiary of either Trust (the "Fresh Evidence Application").[26] Specifically, on 10 October 2022, the Municipal Court of Prague delivered the 2022 Czech Civil Judgment where it was found that the shares in HPH purportedly held by Husky were obtained unlawfully and, as a matter of Czech law (being the law applicable to shareholdings in HPH as a Czech company), are deemed never to have been held by Husky. As the beneficiaries of Trust 1 and Trust 2 are those persons who were shareholders in HPH at the time of the settlement of the trusts he submitted that it follows that Husky is not a beneficiary of either Trust and has no valid claim in respect of either Trust's assets. He pointed out that these Czech judicial findings are conclusive and not subject to any appeal.[27]

Investment management

97. A further matter raised by DTL is whether it should be permitted to give investment management instructions to RBC in respect of the injuncted Trust 1 assets, in circumstances where a large proportion of those assets have been held in cash for 18 years earning very modest investment returns.

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[24] *Mr Manning referred to Mr Jiřík's evidence that they were struck off,not due to resources,but to avoid the consequences of the Czech Securities Commission which would have forced them to buy out other shareholders due to the size of their shareholdings*
[25] *Paragraph 48.1 of Jiřík 1*
[26] *Paragraph 48 of Jiřík 1:*
[27] *Paragraph 86 of Jiřík 1:*

98. DTL wishes to have authority to direct RBC to invest the frozen Trust 1 assets in different investment products offered by or through RBC, upon giving notice to the Cypriot Plaintiffs of DTL's intention to give any such directions (such that any Plaintiff may object and, if appropriate, apply to the Court for directions in that regard before any investment instructions are acted upon).

99. No such direction is sought in respect of Trust 2, because Trust 2's assets at RBC are held in an account in the name of DRL-B, and as that company has been dissolved DTL presently has no right or ability to direct RBC with regard to that account.

Specific arguments directed at discharge of Henderson J Order

100. DTL emphasises that it is willing to agree to, and indeed seeks, a fresh proprietary injunction in favour of all of the Cypriot Plaintiffs in respect of the assets of Trust 1 in Cayman. For reasons of practical expediency, namely the dissolution of the Trust 2 account holder, DTL also consents to and seeks an order which will restrain any dealings with Trust 2's Cayman assets pending further order of the Court.

101. Mr Manning argued that DTL does not however seek the discharge of the Kestrel Injunction only as a matter of legal principle. The principal, practical consequence of leaving the Cayman Proprietary Injunction in place would be that it is only Kestrel which has provided a cross-undertaking in damages in respect of losses caused to the Trusts by the injunction.

102. In circumstances where the maximum amount of Kestrel's proprietary claim is for a tiny fraction of the value of the assets which have been frozen, and the only evidence before the Court as to Kestrel's financial situation shows that it is balance sheet insolvent, that undertaking appears to be of little value, and the other Cypriot Plaintiffs are benefiting from the injunction without "paying the (standard) price" of providing a cross undertaking in damages. Mr Manning submitted that is not right as a matter of legal principle, nor is it equitable.

103. The principal orders made in the Cayman Proprietary Injunction for present purposes were the orders granting Kestrel:

a) a proprietary injunction over the assets of each Trust in the Cayman Islands (paragraph 1); and
b) leave to serve DTL out of the jurisdiction "pursuant to GCR Order 11" (paragraph 9).

104. As Kestrel could not in 2005 (the law was subsequently changed) rely on the proceedings which it had commenced against DTL in Cyprus as a basis for seeking leave to serve DTL out of the jurisdiction, it instead pleaded its cause of action in its Originating Summons as being that the Trusts be "*carried into execution*" (paragraph 1) and "*taken into administration"* (paragraph 2) by this Honourable Court".

105. In paragraphs 4 and 5 of its ex parte summons Kestrel sought leave to serve DTL out of the jurisdiction pursuant to:

a) GCR O.11, r.1(1)(f): "*the claim is founded on a tort or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction"*; and

b) GCR O.11, r.1(1)(j): "*the claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by or ought to be executed according to the laws of the Islands or in respect of the status, rights or duties of any trustee thereof in relation thereto".*

106. DTL applies to discharge the Cayman Proprietary Injunction, and seeks the dismissal of Kestrel's *ex parte* application, on four independent grounds:

a) serious breaches of Kestrel's duties of full and frank disclosure and fair presentation at the two ex parte hearings in respect of the Cayman Proprietary Injunction on 3 March 2005 and 9 September 2005; and/or

b) Kestrel's underlying proprietary claims against DTL in respect of both Trust 1 and Trust 2 were dismissed by the Cyprus Court in 2017, with no appeal ever being filed'; and/or

c) the very same proprietary claim which Kestrel has recently sought to revive or re-litigate against DTL in the Cyprus Court in relation to Trust 1 is for just US$720,636, which is less than 3% of the US$27,430,839 of Trust 1's assets which are held (principally in cash) and frozen in the Cayman Islands; and/or

d) as regards Trust 2, Kestrel has not attempted to re-litigate any proprietary or other claim against DTL before the Cyprus Court in respect of Trust 2 in the New Cypriot Action and Kestrel's more recent attempt to revive its dismissed claims in respect of Trust 2 within the original proceedings is (even if any such revival were permitted)

bound to fail, just as the claims made by Frabran and Husky were dismissed after a merits hearing.

107. Mr Manning referred to Mr Barden's evidence, which effectively acknowledged that the other Cypriot Plaintiffs are also insolvent, and submitted that obtaining cross-undertakings from them is not therefore DTL's "ultimate objective"; rather, Mr Barden speculates that DTL's real objective is to seek and obtain an order for fortification of the cross-undertakings once they have been provided, thereby securing the discharge of the injunction when fortification is not provided, and then "*place [the assets] beyond the reach of the Cypriot Plaintiffs, and the Cayman Enforcement Proceedings will be rendered nugatory".*

108. In response to this Mr Manning relied, amongst other matters, on Mr Jiřík's confirmation in his evidence that:

> "*DTL has no intention (and has never held an intention) to distribute the assets of Trust 1 until the entitlement to those assets has been finally determined. Rather, DTL's concern is to ensure that the assets of Trust 1 be invested in a way that maximises the return to its true beneficiaries (once the disputes as to their identity have been finally resolved)*"[28].

109. In addition, he made the point that assets should not as a matter of basic legal principle be frozen to the extent that they exceed the maximum amount of the plaintiffs' proprietary claim to those assets[29].

110. He maintained that the other Cypriot Plaintiffs should provide cross undertakings in damages if they wish to receive the benefit of the injunction while they pursue claims which, if successful, they will then seek to enforce against the trust assets.[30]

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[28] Jiřík 1 at §156

[29] Gee on Commercial Injunctions at 3 -0002

[30] *Demetriou 2 at § 5.12 in dealing with the point that DTL has no personal interest in the trust assets says:"…DTL does not have any personal entitlement to Trust 1 assets. But if DTL distributes Trust 1 assets to the Plaintiffs, and it is subsequently found that they are not entitled to them, the Defendant [DTL] could be exposed to a liability to the true beneficiaries of Trust 1. This risk is recognised in the 2017 Cyprus judgments and by the terms of the trust deed both of which require the Plaintiffs to indemnify the Defendant in respect of claims by any other party (e.g. the true beneficiaries) against DTL in respect of the distribution to the Plaintiffs. If the (balance sheet insolvent) Plaintiffs are unable to repay the enforcement proceeds (e.g. because they have paid them away to third parties, such as Dr Chvatik, as is clearly their intention) then they will have no assets from which to meet their liability under the indemnity which they have provided to the Defendant. That indemnity will therefore be worthless, and the Defendant will personally be prejudiced"*

111. He submitted that it is open for DTL to apply for fortification of Kestrel's cross undertaking in circumstances where the evidence shows that it is insolvent in any case.

112. Furthermore, he made the point that Mr Barden's argument is premised on the Cypriot Plaintiffs being unable to comply with any order for fortification as a result of their insolvency. This is unrealistic when vast amounts of legal costs are being incurred in the various proceedings in the Cayman Islands, Cyprus and most recently the Bahamas. It is, he submitted, clear that the Cypriot Plaintiffs have access to substantial funds.

Full and frank disclosure

113. Mr Manning's case also relies on the evidence and other material obtained in relation to the 2005 applications before Henderson J (which the parties accept is not complete) to show that material facts and legal principles were not brought to the court's attention or presented in a fair way by Kestrel and its counsel.

114. He submitted that each of the breaches was sufficiently serious to justify the Cayman Proprietary injunction being set aside on that basis alone.

115. He relied on two matters in particular which he argued were not disclosed or presented fairly: an 'exclusive jurisdiction clause' and the quantum of Kestrel's claim relative to the value of the trust assets. These matters are more fully explored below.

Cypriot Plaintiffs

116. Mr Vernon Flynn KC appeared for the Cypriot Plaintiffs.

Injunction

117. His submissions in summary were as follows. There is no proper basis for discharging the Cayman Proprietary Injunction. Since DTL now accepts that injunctive relief should continue in respect of the Cayman based assets of both trusts, at least for now, the application to discharge should not have been pursued. Instead by pursuing it DTL seeks to evade the inevitable consequence of its

own 18 year delay in making any attempt to seek fortification of Kestrel's cross undertaking in damages.

118. The argument that Kestrel's underlying proprietary claims against DTL in respect of both Trust 1 and Trust 2 were dismissed by the Cyprus Court in 2017, with no appeal ever being filed, and that its attempts to revive its claims in relation to Trust 1 'are very likely to fail', is misconceived.

119. He submitted that the Cayman Proprietary Injunction was not granted on the basis of Kestrel's Cyprus case. Similarly, Kestrel's entitlement to injunctive relief in respect of the Trust 2 assets is not dependent on the Cypriot proceedings, so it makes no difference that there are no ongoing claims in Cyprus for distributions from Trust 2.

120. Moreover, the fact that the value of the injuncted assets greatly exceeds Kestrel's claims is no basis to discharge the injunction, because the beneficiary of a trust has standing to seek an order preventing a breach of trust even if that beneficiary only has a relatively small interest in the trust estate. It is in any case too late to raise this objection more than 18 years after the injunction was first granted.

121. Similarly, the time for DTL to complain about the sufficiency of Kestrel's cross undertaking has long since passed and any challenge could and should have been made in 2005. It is now too late to discharge the injunction on that basis.

122. As to full and frank disclosure, this argument, that has also been made very late in the day (in November 2023), is, he argued, unsustainable.

123. It is made 18 years and 8 months after the 2005 hearing and was not even advanced in any of the evidence served by DTL since it issued its discharge application on 6 December 2022.

124. Mr Flynn KC submitted that it is an abuse of process to advance this application now. DTL raised the possibility of a forum challenge a few days after the hearing in 2005 and referred to the extent of Kestrel's interests under the trusts, stating that it was not clear the extent to which that had been disclosed to the Court at the *ex parte* hearing[31].

[31] *Campbells letter of 7 March 2005*.

125. No such challenge was ever made, even though issues as to whether Cayman was the appropriate forum and the size of Kestrel's interests in the trust was material were identified by DTL at the time. Mr Flynn KC submitted that in any case neither point has any merit.

126. He argued that the argument concerning the size of Kestrel's interests is bad in law and as a matter of fact was clearly disclosed to the court at the *ex parte* hearing.

127. As to the clause which DTL claims is an exclusive jurisdiction clause, the argument is only relevant to forum /jurisdiction issues and DTL has well and truly submitted to the jurisdiction of the Cayman court on many occasions, most recently by making the Discharge Application and Investment Application. There would be no point in setting aside service of the Kestrel proceedings on DTL given its subsequent submission to the jurisdiction.

128. Even if there had been no submission to the jurisdiction by DTL the clause in question, clause 68 of each trust deed, is not an exclusive jurisdiction clause. Clause 68 provides:

> *"The settlement is established under and shall be governed in all respects by the International Trust Law 1992 and the other laws of the Island and its courts shall be the forum for its administration"*

129. On its proper construction this is, he submitted, not a jurisdiction clause, let alone an exclusive jurisdiction clause.

130. Mr Flynn KC submitted that the extensive evidence from Mr Barden, which has not been engaged with by DTL (except for bare denials), shows that DTL had misappropriated trust property, failed to provide a proper account of the trust property, and wrongfully moved it to the Cayman Islands without notifying the beneficiaries.

131. He argued that it would be most surprising if this Court could not assist a beneficiary by exercising its inherent supervisory jurisdiction to safeguard and preserve the Cayman based trust assets, even in circumstances where the trust deed did contain an exclusive jurisdiction clause.

132. As to the argument that the Cypriot Plaintiffs were used by Mr Kožený as corporate vehicles in connection with the Trusts through which he perpetrated a fraud that involved the asset-stripping

of Czech companies following privatisations, he referred the Court to Barden 3[32] in which he describes how the Czech convictions were procured by fraudulent means.

Investment application

133. Mr Flynn KC argued that the application is unfair and misconceived and should be rejected. It amounts to a request by DTL that it should be permitted to disregard the express terms of the Trust 1 trust deed which strictly limits the investment powers of the trustee[33].

134. The only permitted forms of investment are deposits in interest bearing U.S. dollar accounts with first class banks and short term bonds of up to one year or similar type of securities.

135. There is no power for the trustee of Trust 1 '*to invest trust assets in any manner across the global capital markets*[34].

136. Furthermore, the proposed mechanism in the investment application would impose an unreasonable burden on the Cypriot Plaintiffs because they would only have seven calendar days to evaluate and if necessary provide reasons for any objection.

137. Given the value of the fund is in excess of US$27 million, DTL might propose a range of different investments all of which would need to be considered and fully evaluated within seven days, so that any reasoned objection could be articulated.

138. The proposal effectively creates a presumption that DTL's directions will be permitted by placing the onus on the Cypriot Plaintiffs to apply to court to prevent the instructions being given.

139. If DTL identifies potential investments which it wishes to direct and which it considers it would be permitted to direct in accordance with the terms of Trust 1, then the onus should be on DTL to seek the Cypriot Plaintiffs' agreement, or in the absence of such agreement, apply to the court for approval of the proposed investment or investments.

140. If DTL could show that the proposed investment through RBC was within the scope of clause 10 and would result in an improved return then this should be straightforward.

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[32] *§§1-74*
[33] *Clause 10*
[34] *See Jiřík1 §§166-167*

141. It is telling that in over 18 years since the injunction was first granted DTL has never previously identified any new investment which it wished to direct.

The law

Proprietary injunction

Standing

142. The general position is that a beneficiary of a trust has the right to make the trustee account for the trust property as a whole: see *Armitage v Nurse* [1998] Ch 241, 261G per Millett LJ (as he then was).

143. Halsbury's Laws of England, Civil Procedure (Volume 12) at §1139 states:

> *"One of several beneficiaries may sue and obtain an injunction to restrain a breach of trust. The smallness of his interest, the fact that he is a minor and that the proceedings may have been instituted with other motives are not reasons for depriving him of his remedy."*

144. The leading authority on the question of the size of the applying beneficiary's interest is the old decision of the English Court of Appeal in *Dance v Goldingham* (1872-73) LR 8 Ch App 902.

145. In that case, an infant beneficiary with a relatively small interest in a trust fund sought an injunction to restrain the completion of the sale of trust assets at an undervalue which would (if completed) have been in breach of trust. The English Court of Appeal (overturning the first instance judge's decision) granted the injunction and in so doing rejected the argument advanced by the defendant to the effect that injunctive relief should be refused because of the relatively small interest of the beneficiary who made the application.

146. James LJ held at 911-2 that:

> "*Then the Vice-Chancellor was also of opinion that even on evidence to shew that a larger price might possibly have been obtained, the Plaintiff's share would be very small, and that the Court ought not to interfere in such a case.*
> *If all the rest of the cestuis que trust were anxious to settle it, they might have said to this cestui que trust, "You take your share, and we will make the loss good to you." But that*

> *case is not before us. The cestui que trust has a right in this Court to prevent the sale when a breach of trust has been committed; and it would be pessimi exempli for us to say, "A breach of trust has been committed, but the amount which any one cestui que trust suffers by reason of that breach of trust is not sufficient to justify a Chancery suit." That is not an effectual answer in this Court."*

147. Mellish LJ concurred, holding at 913-4 that:

> *"I also agree that the small interest of the infant can make no difference. The interest of each of them may be so small that no one of them might think it worth while to file a bill at his own risk; but the bill being filed on behalf of one infant, we must look at the whole substantial interest which is in question, and not merely at the individual interest of the infant.*

Statutory Jurisdiction

148. The Court's jurisdiction to grant interim relief by way of injunction arises under the Grand Court Act (2015 Revision) (the "Grand Court Act") sections 11(1)(a) and 18, in conjunction with GCR O.29, r.1 and r.2.

149. Procedurally, the Court's power to grant interim relief by way of an injunction is set out in GCR O. 29, r.1. The Court also has the power to make orders for the preservation of the subject matter of a cause in accordance with GCR O. 29 r.2.

150. Sections 11(1)(a) and 18 of the Grand Court Act (2015 Revision) provide that the Grand Court has the same jurisdiction and applies the same law and rules as the English High Court save where displaced by Cayman Law.

151. Section 37 of the (UK) Senior Courts Act 1981 empowers the Court to grant an interlocutory injunction restraining a person from dealing with assets located within the jurisdiction whether or not that person is within or outside the jurisdiction.

Supervisory jurisdiction

152. The purpose of a proprietary injunction is to protect and preserve trust property which the plaintiff beneficiary claims is his. As Templeman LJ (as he then was) said in *Mediterranean Reffineria Sicilliana Petroli SpA v Mabanaft GmbH* (unreported, 1 December 1978):

"A court of equity has never hesitated to use the strongest powers to protect and preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone."

153. The Court has an inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts: see *Schmidt v Rosewood* [2003] 2 AC 709, §51 and §66 (per Lord Walker).

154. In applications for proprietary injunctions, the matter is one for the discretion of the court. On ordinary principles, a plaintiff beneficiary would have to show:

a) a *prima facie* case the property is his,

b) a serious issue to be tried that the trust property is in danger pending the hearing of his claim,

c) that damages would not be an adequate remedy,

d) that the balance of convenience favours the grant of an injunction,

e) and that it is just and convenient to order an injunction.

155. In *The Pensions Regulator v Dalriada Trustees [2013]* EWHC 4346 (Ch) Nugee J (as he then was) said at §28 (in the context of refusing an application to discharge an injunction which had been made to preserve trust assets):

"I have not the slightest doubt that the Court has jurisdiction to make orders of this type. The court has a general supervisory jurisdiction over trusts. It was referred to by Lord Walker in Rosewood v Schmidt at paragraph 51 as being the Court's inherent jurisdiction to supervise and if necessary to intervene in the administration of trusts. This is not the occasion on which to explore the nature and limits of this jurisdiction but three points can briefly be made. Firstly, the governing principle of the jurisdiction is what is in the interests of the beneficiaries. Secondly, it follows that unlike for example a claim for breach of

contract or a claim in tort, the Court is not concerned with a cause of action in the sense of facts proved by the Claimant entitling the Claimant to redress for a legal wrong."

156. Nugee J went on to say at §30:

"..insofar as it makes sense to talk of a cause of action in this context, this means no more in my judgment than circumstances justifying the exercise of the Court's supervisory jurisdiction. This jurisdiction undoubtedly includes power to remove and appoint trustees and I think there is no real doubt either that it extends to conferring powers on trustees in regulating the exercise of those powers. Therefore the appointment orders were properly made as a matter of jurisdiction. Mr Cogley in his written argument at paragraph 38 referred to four points in particular. The first was that there must be an underlying cause of action to support the appointment order. He referred to the well known case of Siskina (Cargo Owners) v Distos Compania Naviera SA [1979] AC 210. I do not think that this is quite right. While there must be circumstances which justify the invoking of the court supervisory jurisdiction in this, particular jurisdiction, that of supervising a trust, that in my submission is sufficient."

157. The Court's inherent power to supervise the administration of a trust, and to make orders relating thereto, applies regardless of the proper law of the trust, provided that the Court can establish *in personam* jurisdiction over the trustee.

158. As Scott J (as he then was) said in *Chellaram v Chellaram (No 1)* [1985] Ch 409, 428A-G (a case which concerned the exercise of the Court's inherent jurisdiction to remove a trustee*):*

"The jurisdiction of the court to administer trusts to which the jurisdiction to remove trustees and appoint new ones is ancillary, is an in personam jurisdiction. In the exercise of it, the court will inquire what personal obligations are binding upon the trustees and will enforce those obligations. If the obligations are owed in respect of trust assets abroad, the enforcement will be, and can only be, by in personam orders made against the trustees. The trustees can be ordered to pay, to sell, to buy, to invest, whatever may be necessary to give effect to the rights of the beneficiaries, which are binding on them. If the court is satisfied that in order to give effect to or to protect the rights of the beneficiaries, trustees ought to be replaced by others, I can see no reason in principle why the court should not make in personam orders against the trustees requiring them to resign and to vest the trust assets in the new trustees. The power of the court to remove trustees and to appoint new ones owes its origin to an inherent jurisdiction and not to statute, and it must follow that

the court has power to make such in personam orders as may be necessary to achieve the vesting of the trust assets in the new trustees. This is so, in my judgment, whether or not the trust assets are situated in England, and whether or not the proper law of the trusts in question is English law. It requires only that the individual trustee should be subject to the jurisdiction of the English courts. It does not matter, in my view, whether they have become subject to the jurisdiction by reason of service of process in England or because they have submitted to the jurisdiction, or because under R.S.C., Ord. 11 the court has assumed jurisdiction. In every case, orders in personam are made by the courts on the footing that those against whom they are made will obey them."

159. The circumstances in which the Court may grant injunctive relief to preserve trust property are summarised by the authors of *Underhill & Hayton on the Law of Trusts* (20th ed.) at §95.1 in the following terms[35]:

"An application by interim claim can be made to safeguard trust property in the following circumstances:

(1) Where the court is satisfied that trust property is in danger:

(a) by reason of the active or passive misconduct of the trustees; or
(b) by reason of the trustees residing out of the jurisdiction of the court;

an injunction will be granted on an interim claim at the instance of any person with a right to make the trustees account for the trust property (including a co-trustee, even if he himself has committed a breach of duty) either compelling the trustees to do their duty, or restraining them from interfering with the trust property, as the case may require; and, if expedient, a receiver will be appointed."

160. In determining whether to grant an injunction to safeguard trust property, the Court will apply *American Cyanamid* principles (adapted to the circumstances where the Court's inherent supervisory jurisdiction is engaged).

[35] *See also, to similar effect, Lewin on Trusts (20th ed.), §40-012.*

161. The plaintiff must show (a) that there is a serious issue to be tried, (b) that damages would not be an adequate remedy, (c) that the balance of convenience favours the grant of an injunction and (d) that such an order is also just and convenient[36]: see *Lewin on Trusts* (20th ed.), §40-012.[37]

Fortification of cross undertakings in damages

162. In relation to an assessment of cross undertakings in damages the approach is (i) for the Court to make an intelligent estimate, being informed and realistic although not necessarily entirely scientific, of the likely amount of any loss which might be suffered by the applicant for fortification by reason of making the interim order; (ii) find whether the applicant has shown a sufficient level of risk of loss to require fortification, by showing a good arguable case to that effect; and (iii) find whether the making of the interim order is or was a cause without which the relevant loss would not be or would not have been suffered: see *Energy Venture Partners v Malabu Oil and Gas* [2015] 1 WLR 2309.

Delay and abuse of process

163. The Court notes that DTL makes no application at present to fortify the Cayman Proprietary Injunction. Nevertheless, the point has been canvassed in argument and the Court's views are therefore set out below.

164. Following on from the principles to be applied above, a respondent to an injunction who wishes to seek fortification ought to do so promptly at the return date.[38]

165. Where an injunction continues without a return date hearing because the injunction is not challenged by the respondent then, unless there has been a material change of circumstances, it may be an abuse of process for that respondent (at some later stage) to challenge the injunction on any grounds which it was, or ought to have been, aware of when it originally decided not to challenge the injunction, including any argument about the sufficiency of the cross-undertaking provided by the applicant.

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[36] *As Flaux J (as he then was) said in Madoff Securities v Raven [2012] 2 All ER (Comm) 634, at §141, it is "extremely unlikely that the court would say it was not just and convenient, having decided the balance of convenience in favour of the claimant".*

[37] *American Cyanamid v Ethicon Ltd [1975] AC 396,*
Polly Peck International plc v Nadir (No 2) [1992] 4 All ER 769 and Rogachev v Goryainov [2019]

[38] see the commentary in *Volume 2 of the 2023 English White Book* at §15-32.

166. As Popplewell J (as he then was) said in *Orb v Ruhan* [2016] EWHC 850 (Comm) at §82 (having identified at §81 an argument advanced by the respondent as to the alleged insufficiency of the cross-undertaking provided by the applicant in that case and that the argument had been known to the respondent at an earlier stage but not advanced):

> *"That is fatal to this ground for discharge: see Chanel Ltd v FW Woolworth & Co Ltd [1981] 1 WLR 485. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions*."

167. The same principle would seem to apply whether or not a formal *inter partes* hearing takes place[39].

168. In *Apollo Ventures Co Ltd v Manchanda* [2020] EWHC 2206 (Comm) the English Court refused (at §35), in the exercise of its discretion, to require fortification in circumstances where more than four years had passed since the original injunction had been granted on the basis that it would not be appropriate, at that distance in time, to require such fortification.

Leave to serve out of the jurisdiction

Foreign proceedings

169. Pursuant to section 11A(1) of the Grand Court Act (2015 Revision), the Court may grant interim relief in relation to proceedings which have been or are to be commenced in an overseas court and are capable of giving rise to a judgment which may be enforced in the Cayman Islands.

[39] see *Stephens McBride Piercy Taylor Ltd v McBride* [2014] EWHC 1231 (QB), §78 per Slade J.

170. GCR O.11, r.1(1)(n) provides a jurisdictional gateway for the Court to grant leave to serve a defendant out of the jurisdiction in respect of a claim brought for any relief or remedy under section 11A(1) of the Grand Court Act.

171. When the Cayman Proprietary Injunction was obtained in 2005 it would not have been possible to have served an application for interim injunctive relief in support of foreign proceedings out of the jurisdiction[40]. This is common ground between the parties.

172. The GCR were only updated to permit service out in such cases by the introduction of a new GCR O.11, r.1.(1)(n) in 2014[41].

173. In 2005, in order to obtain leave to serve a defendant out of the jurisdiction, an applicant needed to show:

a) A good arguable case;
b) A strong possibility that the case fell within the "letter and spirit" of the sub-paragraph of GCR O.11, r.1(1) upon which the application for leave to serve out was based; and
c) That the Cayman Islands would be the appropriate forum for the trial in the interests of all the parties and of justice.

Duties of full and frank disclosure and fair presentation

174. A party seeking an *ex parte* injunction, or other *ex parte* relief such as leave to serve out of the jurisdiction, is subject to duties to give full and frank disclosure and make a fair presentation.

175. The principles governing those duties were summarised in *Ritchie Capital Management L.L.C. et al v Lancelot Investors Fund Limited & Anor* [2021 1 CILR 128] at [272]-[280] *per Parker J:*

> *' ..the duty is important and broad and extends to disclosure of all facts which reasonably would or could be taken into account by the judge in deciding whether to grant the application; such material facts extend beyond those which are actually known to the applicant and include matters which he would have known had he made proper enquiries*

[40] see *VTB Capital v Malofeev* [2011] (2) CILR 420, §§25-27 per Chadwick P.

[41] see *Classroom Investments Incorporated v China Hospitals* [2015] (1) CILR 451, §1 per Smellie CJ.

([274]);

the presentation must be fair and even-handed in all material respects; the applicant has a

duty to signal and explain the significance of the relevant legal tests, points of defence and relevant evidence in a fair and balanced way. That includes pointing out material flaws and difficulties with the applicant's case ([276-279]); and

the consequences of a finding of material non-disclosure at a without notice hearing is to deprive the plaintiff of any advantage derived, which means that the order will be set aside ([280]).'

176. When this statement was considered by the Court of Appeal[42] it held that:

"[t]here is no doubt that the mere fact of breaches of the obligation of full and frank disclosure will not necessarily lead to the consequence of setting aside an ex parte order" and the Court must consider "the relevance and gravity of the omissions", as Parker J had done ([24], [29] and [30]); and

the obligation to make full and frank disclosure is no less serious in an ex parte application to freeze assets than in an ex parte application for leave to serve out of the jurisdiction, and the consequences of a breach may be no less severe ([25], [29] and [30])."

Decision

177. The Court now decides this issue: Should the Cayman Proprietary Injunction be continued in its present form, or should it be discharged?

178. A subsidiary issue is, if the Cayman Proprietary Injunction is continued in relation to Trust 2, should it be on terms which would enable DTL to apply to discharge it once DTL has satisfied RBC that it can properly give instructions in relation to the Trust 2 RBC Account?

Determination on Cayman Proprietary Injunction

Are the trust assets at risk?

[42] *Unreported judgment of the Court of Appeal (Moses JA, Morrison JA and Goldring P) dated 18 July 2022 240117- Frabran Holdings Limited and Ors.-v- Daventree Trustees Limited and Ors – FSD 112 of 2023 (RPJ), FSD 280 of 2022 (RPJ) & FSD 204 of 2022 (RPJ) - Judgment*

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179. The key question the Court needs to consider is whether the circumstances in this case justify invoking its supervisory jurisdiction to restrain DTL from dealing with the trust assets.

180. The Court is satisfied that there is a serious issue to be tried as to whether the trust assets in Cayman are in jeopardy. It is also satisfied that the Cypriot Plaintiffs were arguably entitled to those assets as beneficiaries when the Trusts were created and remain so.

181. The beneficiaries of the Trusts are no longer the same as the present shareholders of HPH. It follows that any distribution to HPH's present shareholders would lead to a different outcome from any distribution made to the original beneficiaries of the Trusts. If the assets were distributed to the current shareholders of HPH, Mr Jiřík would receive almost 30%. HPH is now DTL's 100% shareholder.

182. Mr Jiřík, who has been involved in the management of HPH since at least 2018, not only owns 29.75% of HPH's issued share capital personally, he has 40.05% of the voting rights in HPH, which gives him a controlling stake.[43] His personal shareholding has increased from an initial 0.01% shareholding.

183. It appears arguable to the Court from HPH's financial statements, and by information that it has provided to its shareholders, as published on its website, that its strategy has been to establish control of DTL and use that control to appropriate trust assets to itself.[44] The Court does not accept the argument that these extracts are taken out of context or are in some way without weight.

184. In addition, in the Court's view it is clear that in all the circumstances damages would not be an adequate remedy, and that the balance of convenience favours the grant of an injunction[45].

Bayer

185. The evidence in relation to the Bayer money shows the motivation of HPH and indicates that Mr Jiřík has had some success in his endeavour to obtain trust assets.

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[43] *Jiřík 1 §§14-15. DTL's corporate register reveals that HPH acquired 100% of the shares of DTL at the end of January 2022 and Mr Jiřík was made its sole director on the 1st of February 2022.*

[44] *§ 3.3 HPH financial statement summary 2019*

[45] *See Barden 1 § 254 in relation to DTL's capital base*

186. The available evidence shows that the Bayer money was settled into Trust 1 but remained in the Bayer account for over two decades, initially because the Czech authorities wished to seize it and then more recently because it was claimed by HPH. The evidence indicates that an amount of about US$20 million had been frozen in the Bayer account since December 2001.

187. There was a dispute in civil proceedings in the Czech Republic as to the ownership of the Bayer money between DTL, on the basis that it was a Trust 1 asset, and HPH which claimed the funds for itself. There was then an announcement that the money had been paid to HPH and that the legal proceedings had been terminated[46]. This took place just over three months after HPH had become the registered sole shareholder of DTL and Mr Jiřík had become DTL's sole director.

188. It seems to the Court, on the available evidence, that it is a reasonable inference that Mr Jiřík caused DTL to surrender its claim and the claims of the Trust 1 beneficiaries to the Bayer money. The Cypriot receiver had been discharged in January 2022 which it is reasonable to propose allowed the moneys in the Bayer account to be taken.

189. The Court has noted that the evidence Mr Jiřík gives at § 100 of Jiřík 1 provides no correction of Mr Barden's mistaken belief that the money was still frozen in the Bayer account.

190. A response to a shareholder in May 2022 when HPH was asked to comment on the amicable settlement of the Bayer dispute reads (in translation):

> *"HPH or DTL is conducting other disputes, which, unlike in the case of funds secured in the escrow account of Dr. Bayer, have not yet been terminated. However, disclosure of the circumstances which led to the success in Bayer, which are not publicly known, could jeopardise HPH's assets and, as the case may be, DTL's interests and, consequently, the shareholders. Therefore, further information cannot be communicated with reference to Section 359 of the BCA".*

191. Another question is:

> *"Does the company expect to pay taxes on the amount raised in the 'Bayer' case?"*

HPH answers:

[46] *HPH website 4 May 2022*

"The company accounts for the funds obtained in the 'Bayer' case as recoveries taken out of the company by criminal activities."

192. This suggests that HPH does not regard the Bayer money as Trust 1 assets. Indeed Mr Manning confirmed that HPH regarded the Bayer money as being owned by HPH.

193. The Court is satisfied that there is a good arguable case that causing DTL to surrender trust assets which properly belong to the beneficiaries of the Trusts when they were settled permits Mr Jiřík to wrongfully deal with assets belonging to the beneficiaries, to benefit himself and the other shareholders of HPH.

Inconsistent statements

194. In this regard the Court notes Mr Jiřík's statement at Jiřík 1 § 142:

"The underlying subject matter of the various litigation (notably in Cyprus and the Czech Republic) concerns the purported beneficiaries' claim against the Trusts administered by DTL. ***The actual beneficiaries are those persons who were shareholders of HPH at the date of the establishment of Trust 1 and Trust 2 in 2002 and 2003. Therefore, any changes in the shareholding structure in HPH in 2021 (and at any moment after the establishment of the Trusts) are irrelevant***" (emphasis added)

And consistently with this at § 156:

"*In any event, DTL has no intention (and has never held an intention) to distribute the assets of Trust 1* ***until the entitlement to those assets has been finally determined****. Rather, DTL's concern is to ensure that the assets of Trust 1 be invested in a way that maximises the return to its true beneficiaries (once disputes as to their identity have been finally resolved).*" (emphasis added)

And contrasts it with the evidence at Demetriou §§ 5.15 and 5.16 of 13 October 2023 on behalf of DTL:

"*5.15 As shown above, a total of US$45,413,213.55 was distributed to 118,953 beneficiaries [of Trust 1] up to December 2004. Distributions then stopped, because in 2005 a receiver was appointed, and injunctions were granted, over Trust 1's assets by the Cyprus Court and this Honourable Court, as a result of an application advanced by [the Cypriot Plaintiffs]. The receiver was only discharged in January 2022. The injunctions*

remain in place. As a result of this state of affairs DTL has not declared another distribution period in respect of Trust 1. It would be pointless to do so because DTL would still be unable to make any distributions to beneficiaries while the Trust 1 assets remain frozen.

5.16 The receiver failed to maintain records and accounts properly during his 17 years in office, and so [DTL] is currently investigating the affairs of Trust 1 during that period with a view to compiling reliable accounts as the foundation for making further distributions of Trust 1 assets in the future. ***If and when the injunctions are lifted, DTL would then be able to declare another distribution period, and a further approximately 121,000 beneficiaries (i.e. the other shareholders in HPH as of the establishment of Trust 1, mostly comprising individual Czech citizens) would be entitled to make a distribution application and, subject to approval, to receive distributions of the Trust 1 assets.***" (emphasis added).

Unanswered allegations

195. The Court notes that the extensive evidence put forward by the Cypriot Plaintiffs set out in great detail in Barden 1[47], 2 and 3[48] and in the Bahamian ASOC [49] (hundreds of pages of detailed allegations) has not been factually engaged with by DTL and Mr Jiřík, not even at a high level.

196. Mr Manning asserted that the evidence served by the Plaintiffs is very extensive and is in many instances '*excessive, disproportionate, incorrect, irrelevant and/or does not constitute evidence at all'*. He pointed out that these allegations are not advanced in the Cyprus proceedings.

197. He said that insofar as those allegations concern alleged wrongdoing by DTL, they are denied. He submitted that the Court should not concern itself with them.[50] He submitted that where DTL is

[47] *4 May 2023*
[48] *31 October 2023*
[49] *Which is based on Barden1*
[50] *Including the six serious episodes outlined by Mr Flynn KC concerning the theft of trust assets: under the Bahamas Agreement, over $600 million worth of assets were under the control of HPH and Mr Vostry, in 2000 and 2001.; tens of millions of dollars of trust fund money sent to a Slovakian company owned and controlled by Mr Siroky called Druhá Strategická; Christina Sarris, the company secretary of DTL, had control of tens of millions of dollars of trust money in an account in her name and caused it to be transferred in an attempt to hide the trust assets from the beneficiaries; valuable shares in Czech companies were placed into the Trust 2 structure through a Slovakian company called Tass Holding which for many years was controlled by Mr Sevcik; more recently those assets have been transferred into the control of Mr Jiřík and HPH. HPH has apparently merged with Tass Holding.; $20 million of Trust 1 assets frozen for a long time in the Czech Republic in an account in the name of a Czech lawyer, Dr Bayer, stolen by HPH and Mr Jiřík.*

prepared to consent to a fresh injunction and where DTL has stated that it has no intention of distributing assets wrongfully, it was reasonable for it not to spend an enormous amount of time and money responding to all of the allegations which are vehemently denied. That would not be in the interests of the true beneficiaries.

198. The Court takes the view that this is not a case where these detailed allegations can be put to one side. Having reviewed the relevant evidence from Mr Barden and the Bahamas ASOC the Court is of the view that if there was no injunction in place the Cayman assets would be in jeopardy because there is a real risk DTL and Mr Jiřík would misappropriate them.

199. The Bahamian proceedings allege conspiracy, knowing receipt and dishonest assistance against 36 named defendants including DTL, HPH[51], Mr Vostry, Mr Siroky, Mr Sevcik, Polakis Sarris[52], Christina Sarris and Mr Jiřík[53]. The case broadly alleges that there has been a fraudulent misappropriation of assets which are said to be worth approximately US$1.3 billion today. US$ 600m was transferred to the control of HPH and Mr Vostry in 2000. Some of those assets were settled in the Trusts.

200. The Court has concluded on the available evidence that there is a serious issue to be tried as to whether Mr Jiřík and HPH intend to use their control of DTL to obtain trust assets for their own benefit and absent an order protecting and preserving the Cayman assets, they would do so. There is clearly a good basis for injunctive relief to continue and DTL has seemingly accepted as much with regard to its fresh injunction proposals.

The application to discharge

201. The Court has also concluded that there is no good reason to discharge the 2005 Order.

Size of entitlement

202. DTL's submissions that Kestrel is not entitled to injunctive relief over assets which exceed the value of its potential entitlement to distributions is rejected. On the contrary it makes sense for Kestrel to have applied in view of the hundreds of thousands of other potential beneficiaries who are entitled to distributions from the assets in jeopardy.

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[51] *HPH has been 100% shareholder of DTL since January 2022*
[52] *Mr Sarris and Mr Sevcik were the original directors of DTL, Christina Sarris was a director of DTL from April 2003-May 2005 and was appointed company secretary in May 2022*
[53] *Mr Jiřík has been the sole director of DTL since January 2022.*

203. The size of Kestrel's interest cannot affect its standing and entitlement to the relief claimed, once the supervisory jurisdiction of the Court had been invoked, to protect all of the assets in jeopardy.[54] Indeed it makes good case management sense that the Court can make orders safeguarding all of the trust assets at the behest of a beneficiary[55]. The size of Kestrel's interest was also notified to Justice Henderson, albeit indirectly[56].

204. There is no principle which limits the amount of monies caught by an injunction to the size of the applicant's proprietary claim in restraining orders made pursuant to the Court's inherent supervisory jurisdiction to supervise trusts. The *Mareva* jurisdiction in relation to freezing orders may apply such a principle, but it is different from and has no application to this case[57].

Cross undertaking

205. The Court rejects DTL's submissions that Kestrel's cross undertaking is deficient and since the other Cypriot Plaintiffs have had the benefit of the injunction for all this time they too should provide cross undertakings in damages. The Court takes the view that it is far too late to be making those points now with regard to the application to discharge.[58] The circumstances in which Mr Justice Popplewell in the *Orb* case refused an application to fortify a cross undertaking in damages are relevant here:

> [*81] "The first and short answer to this argument is that it was open to the Orb Parties to take the point before Mr Justice Cooke and they failed to do so. None of the material relied* on *has come to their attention subsequently*."
>
> [82] *"That is fatal to this ground for discharge [Chanel v Woolworth]. Mr Drake emphasised that that case involved a consent order. But the principle is well established, and often applied, in relation to contested interlocutory hearings. It is that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time*

[54] *Dance v Goldingham supra*
[55] *There are possibly hundreds of thousands of beneficiaries with an entitlement under the Trusts who have not been paid*
[56] *See § 22(2) of the written argument dated 2 March 2005*
[57] *Gee on commercial injunctions [3-002]*
[58] *Orb v Ruhan supra*

of the first hearing. It is based on the principle that a party must bring forward in argument all points reasonably available to him at the first opportunity; and that to allow him to take them serially in subsequent applications would permit abuse and obstruct the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions"

206. The Court respectfully agrees with this analysis and applies the principle to the facts of this case to find that DTL's challenge is abusive, particularly with regard to the arguments made on full and frank disclosure. It has concluded that Mr Flynn KC was right to submit that it is an abuse of process to advance this application now.

Jurisdiction

207. As to the arguments on jurisdiction to make the Order in 2005, DTL indicated that it reserved the right to challenge the jurisdiction soon after it was granted. It has not done so but instead has since repeatedly submitted to the jurisdiction of this Court[59]. There has been no challenge to the continuation of the injunction. The Court has concluded that it is impermissible now for DTL to apply to discharge an Order which it had a full opportunity to challenge in a reasonable time, some 18 years later.

208. Having reviewed the available underlying materials for the *ex parte* relief from 2005 (which are not complete) it is clear Henderson J was told by Kestrel that the trusts were governed by Cypriot law.

209. Notwithstanding the view the Court has come to on the lateness of the application to discharge, it has re-examined the jurisdictional basis on which Henderson J granted the *ex parte* Order and is satisfied it was properly made.

210. The basis for the relief sought in the originating summons was for the Court to exercise its supervisory jurisdiction to 'carry the trusts into execution' or 'for the trusts to be taken into administration'. That involves invoking the Court's supervisory oversight of the administration and affairs of the trusts.[60]

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[59] *By agreeing to a variation of the Cayman Receivership Order in March 2007(with no reservation of rights as to jurisdiction); by applying to discharge the 2005 Order in December 2022 which invites the Court to assess the merits of whether the Cayman Proprietary Injunction should continue*

[60] *See §§ 19 and 29-31 of the written argument*

211. The Court is satisfied that this jurisdiction exists and can be properly exercised, whether or not the trusts are governed by a foreign law[61]. The proceedings were brought in 2005 by originating summons. Order 11, rule 1 applies to originating summons as it does to writs.[62]

212. One of the grounds relied on in 2005 was GCR O.11, r.1(1)(f): "*the claim is founded on a tort or breach of duty whether statutory at law or in equity and the damage was sustained, or resulted from an act committed, within the jurisdiction.'* Mr Passmore's evidence[63] for Kestrel focussed on the breaches by DTL by failing to account properly pursuant to consent orders obtained in Cyprus, and in Cayman by moving trust assets to Cayman.

213. The allegation was that by bringing trust assets to the Cayman Islands and investing them in the manner which it did DTL committed a breach of duty in this jurisdiction. DTL accepts that at least one of the investments made was contrary to the terms of Trust 1[64].

214. Another gateway was rule 1(1)(j): *"the claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by* ***or ought to be executed according to the laws of the Islands*** *or in respect of the status, rights or duties of any trustee in relation thereto'.* (emphasis added)

215. It seems clear to the Court that this gateway was invoked because the originating summons sought execution of the trust by this Court. This is a different question to what law governs the trust, and gives effect to the otherwise redundant words '*or ought to be executed in accordance with'.*

216. The necessary or proper party gateway under rule 1(1)(c) was invoked on the basis that jurisdiction was established against one of the defendants (sometimes called the anchor defendant). The allegation that the other defendants were all part of a dishonest scheme and they were necessary or proper parties to the case against the anchor defendant was made.

217. In the result Henderson J took the view that he was satisfied that a gateway applied, but that it was not necessary to specify each applicable gateway in the order. This Court is satisfied that Henderson J was correct that one or more of the gateways applied to found jurisdiction.

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[61] *Chellaram* [1985] Ch 409
[62] *Order 11 r,9 (1)*
[63] *Passmore 1 §§25 and 44 and Passmore 2 §9*
[64] *DTL written argument §120.2 (d)*

Basis of 2005 Order

218. However, those underlying materials also show that it was not an application made in support of the relief claimed in the Cyprus proceedings. There is therefore no force in the argument that Kestrel's underlying proprietary claims against DTL in respect of the trusts were dismissed by the Cypriot Court in 2017. It is to be noted they were dismissed not because of a finding that the Cypriot Plaintiffs were not beneficiaries, but because some of them had been struck off the register.

219. The Court is satisfied that the 2005 order was made pursuant to the Court's inherent jurisdiction to supervise trusts and to safeguard trust assets which is the basis on which it ought to be continued. The status and merits of the proceedings in Cyprus and latterly in the Bahamas do not strictly need to be considered, but nonetheless in the Court's view would provide additional bases[65] to support the original injunction being continued, were it to be necessary. Having reviewed the ASOC in the Bahamian proceedings there is clearly a serious issue to be tried in respect of the Trust assets.

Full and frank disclosure

220. As to the arguments on full and frank disclosure, regarding in particular an 'exclusive jurisdiction clause' and the quantum of Kestrel's claim relative to the value of the trust assets, the Court agrees with the Cypriot Plaintiffs that it is too late and abusive to attempt to take these points now.

221. Quite apart from the fact that at this distance the Court does not have the full picture of what happened from the available evidence, DTL should not be permitted to fail to challenge for so many years (having reserved rights to do so at the time) and then mount a very belated challenge.

222. The Court has found that DTL has in any case since submitted to the jurisdiction on various occasions.[66].The Court is satisfied that a fair presentation was made to Henderson J.

General points

223. It may be that the key purpose of the application to discharge by DTL was to put a fresh injunction in place so as to fortify the cross undertaking in damages that Kestrel gave. Again the Court takes

[65] *As to the Cyprus proceedings it seems to the Court that there is a serious issue to be tried that there is no res judicata.*

[66] *By agreeing to the consent order in the Kestrel proceedings in 2007, by applying to discharge and asking the Court whether the injunction should continue on the merits and by making the investment application (all with no reservation as to jurisdiction).*

the view that, just as is the case with the full and frank disclosure arguments, not only is it too late to make this argument now, but also the merits are with the Cypriot Plaintiffs[67] .To the extent that the Cypriot Plaintiffs are financially distressed that may well be, in the Court's view, be because they have wrongfully not had Trust distributions over the years.

224. The Court is also not persuaded that there is a good arguable case DTL has suffered a loss. DTL is a trustee with no personal interests in the Trust assets. It does of course have a duty to safeguard the Trust assets and may in certain circumstances be a proper party to enforce a cross undertaking to recover any loss suffered by the beneficiaries.[68] In all the circumstances the Court declines to make the continuation of the Cayman Proprietary Injunction conditional upon the other Cypriot Plaintiffs providing cross undertakings by joining them to the proceedings, as was contended for by Mr Manning.[69]

225. As to the jurisdiction clause in the trust deeds (said to be exclusive), the argument only goes to forum and jurisdiction issues and the Court has already decided that DTL has submitted to the jurisdiction.

226. The available material shows that Henderson J was told that although the Trusts were governed by Cypriot law the Cayman Court still had jurisdiction to grant the relief sought, if it chose to do so.[70] The Court's jurisdiction to supervise the administration of a trust is an *in personam* jurisdiction which could be exercised so long as it can be established over the trustee whether by submission to the jurisdiction or by establishing an order for service out of the jurisdiction.

227. For completeness the Court has concluded that clause 68 of the trust deed is not an exclusive jurisdiction clause. It reads:

> *"The settlement is established under and shall be governed in all respects by the International Trusts Law 1992 and the other laws of the Island and its courts shall be the forum for its administration.*

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[67] *Apollo Ventures* § 35 per Christopher Hancock QC sitting as a deputy High Court judge "*I have concluded that it would not be appropriate, at this remove, to order further fortification as a condition of continuing the injunction. The appropriate time, in my judgment, for making this application would have been at the time of the return date. Four years have passed since then, and, although an application was issued in December 2016, it has not been pursued in the intervening three years or so*."

[68] Lopag v Perry § 22 per Segal J *"I am satisfied that the Trustees have shown they have a good arguable case that they have suffered loss and are entitled to material compensation under the Cross-Undertaking*" although the Court understands that in that case litigation funders were pursuing the trustee personally.

[69] *Under GCR Order 15 r6 (2)*

[70] *Scott J's judgment in Chellaram was referred to a § 28 and 29 of the written argument*

228. The words '*exclusive jurisdiction of the Cyprus courts'* are not used. The heading which appears above the clause is '*Proper law*' and indeed clause 68 is clear about that being Cyprus law. The verb '*shall*' expresses a strong intention, but it does not amount to exclusivity in the context of the clause as a whole.

229. Although the word "*courts'* is used, the words "*forum for the administration*" have been held not to amount to an exclusive jurisdiction clause (even where there was a reference to exclusive jurisdiction in the relevant clause).

230. Lord Neuberger in the Privy Council decision of *Crociani v Crociani*[71] said at § 18 "*'Forum' can be a reference to a court, but it can equally well be used to refer to a place for any purpose, and that is how the draughtsman of the 1987 Deed could have intended it to be understood'.* The Court acknowledges that given that 'courts' are referred to in Clause 68 this reasoning is unlikely to directly apply here.

231. However, at §22 of *Crociani* Lord Neuberger said;

> *"Quite aside from these three points, even if the forum stipulation does mean that the courts of Mauritius have jurisdiction as a result of the 2012 Deed appointing Appleby as trustee of the Grand Trust,* ***the Board doubts whether it is sufficiently clearly expressed to establish that it was intended that those courts should have exclusive jurisdiction. While the courts of Mauritius would have jurisdiction, it must be questionable whether the use of the definite article in the forum stipulation is strong enough on its own to confer exclusive jurisdiction****."(emphasis added)*

232. The relevant clause had the words *"which shall become* ***the*** *forum for the administration of the trusts hereunder" (emphasis added)*[72] which was said not to be strong enough on its own to confer exclusive jurisdiction. As the Court has already identified, the word '*exclusive'* is not used in Clause 68.

233. Furthermore, in relation to the specific application made in relation to the Cayman Proprietary Injunction, the Court is not on this application keeping hostile parties to a contractual bargain

[71] (2014) 17 ITELR 624

[72] *'thereafter the rights of all persons and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the law of the country which shall become the forum for the administration of the trusts hereunder'*

concerning commercial disputes between a trustee and beneficiaries, but primarily dealing with the administration of a trust with regard to the safeguarding of assets. The Court is not persuaded that the Court is exercising a function which falls within clause 68.[73]

234. In the result the Court does not construe clause 68 to be an exclusive jurisdiction clause. If the Court is wrong in its construction, the Court accepts Mr Flynn KC's submission that the Court's supervisory jurisdiction to oversee the administration of trusts to protect the interests of beneficiaries would in any case persuade the Court to protect trust assets in the jurisdiction which are in peril[74].

235. For all these reasons the application to discharge the Cayman Proprietary Injunction fails. Since the Court has decided that the original Cayman Proprietary Injunction should not be discharged the fresh injunction applications do not arise.

236. A subsidiary issue raised was that if the Cayman Proprietary Injunction is continued in relation to Trust 2, should it be on terms which would enable DTL to apply to discharge it once DTL has satisfied RBC that it can properly give instructions in relation to the Trust 2 RBC Account. The Court's decision on that is that would not be appropriate in all the circumstances.

Investment application

237. The Court has decided that the Investment Application by DTL also fails. It fails because it is pursued pursuant to the Cypriot Plaintiff's Fresh Injunction Application (which now does not arise), but even if that was not the case, the Court sees no present need for such an Order.

238. The basis of the injunction is that the Court has found that the Cayman assets are at risk of misappropriation by DTL. In view of this, DTL therefore needs to apply to the Court to justify any proposed investment which cannot be agreed between the parties. DTL has confirmed that there is no intention to direct any investments which are outside the scope of clause 10 of the Trust 1 deed. [75] That being so any investment proposals should be relatively straightforward to resolve between the parties. Clause 10 provides for reasonably tight constraints. If there is a dispute, the matter can be returned to the Court.

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[73] *See Tco (unreported) 23 February 2018 Parker J*
[74] *See Schmidt v Rosewood supra*
[75] *"…money comprised in the Trust Fund shall be deposited with such first class bank or banks in one or more interest bearing accounts denominated in US dollars on such terms and in such place as the trustee may from time to time determine. The Trust Fund can also be invested to short term bonds up to one year or similar types of securities*

Conclusion

239. The Cayman Proprietary Injunction is therefore continued in relation to Trust 1 and Trust 2. The application by DTL that it should be on terms which would enable DTL to apply to discharge it once DTL has satisfied RBC that it can properly give instructions in relation to the Trust 2 RBC Account is refused.

Stay

Summary of Parties' submissions on stay

DTL

240. Mr Manning made the following points. DTL seeks a stay of the Cayman Enforcement Proceedings brought by Frabran and Husky pending determination by the Cyprus Court of the Cypriot Stay Application. He emphasised that Frabran and Husky accept that if an injunction is maintained (as they seek) or granted (as both DTL and they seek) over the assets of Trust 1 then their claims in the Cayman Enforcement Proceedings will be fully secured[76].

241. DTL only seeks a stay of enforcement from the Grand Court while the Cyprus Court determines the application that is pending before it for a stay of the enforcement of the 2017 Cypriot Judgment. Naturally, if the Cyprus Court grants the Cypriot Stay Application pending the conclusion of the Cypriot Appeal, then DTL's position will be that the Grand Court should do likewise.

242. Mr Manning submitted that if no stay were to be granted, any successful outcome of the Cypriot Stay Application and/or the Cypriot Appeal would be rendered nugatory as enforcement would already have taken place and the assets would most likely never be returned by Frabran and Husky to DTL.

243. This point he said is acknowledged in the Cypriot Plaintiffs' own evidence, as Mr Barden refers to the alleged beneficial owner of Frabran and Husky (and the other Cypriot Plaintiffs), Dr Chavitk,

[76] *DTL's application states "Pending further order of the Court, DTL shall be restrained from removing or, in any way, disposing of or dealing with cash or other assets held in account number 245-03108-1-4 at RBC in the Cayman Islands up to a value of US$12,200,000 or such other amount as the Court may deem appropriate. In addition DTL does not object to a fresh proprietary injunction over the entire Trust 1 assets held at RBC.*

having been "*kept out of funds to which she is entitled for nearly 20 years"* and to *"…the delay in Dr Chvatik receiving the funds to which she is entitled…".*

244. He submitted that the Court may readily infer that there is also a serious risk that any such monies would, upon being distributed to Dr Chvatik, thereafter, be remitted to her son, whom he referred to as 'the convicted fraudster Mr Kožený',[77] or his accomplices or affiliates.

245. This he submitted would render the proper administration of justice impossible, to the detriment of DTL and ultimately the true beneficiaries of Trust 1.

246. Further and in any event, the grant of a stay would be in accordance with the important principles of comity, as the Cyprus Court will be hearing the Cypriot Stay Applications concerning the very same underlying judgments. The Cyprus Court is best placed to determine whether to grant a stay of execution pending determination of the Cypriot Appeals. The present application, for a stay of the Cayman Enforcement Proceedings pending the outcome of the Cypriot Stay Applications, simply seeks to preserve the status quo in the meantime.

247. Any further delay in deciding the Cypriot Stay Applications is immaterial and not prejudicial particularly given that the application will be decided, even if judgment is reserved, in the next few months.

248. He submitted that any questions of alleged delay should be considered in the broader context of the more than 5 years taken by Frabran and Husky before commencing enforcement proceedings: the 2017 Cypriot Judgment was delivered on 25 April 2017 and the Cayman Enforcement Proceedings were commenced by Frabran and Husky on 28 September 2022[78].

249. He submitted that DTL has good prospects of succeeding in the Cypriot Appeals, for the reasons outlined at length in Demetriou Stay Affidavit 1, [43]-[46] and Demetriou Stay Affidavit 2, [4.1]-[4.4].

[77] *Against whom legal proceeding remain ongoing in the United States and against whom HPH are seeking to enforce the compensation element of the 2012 Czech Criminal Judgment*
[78] *per Demetriou Stay Affidavit 2, [2.1].*

250. In particular he relied on:

a) the 2022 Czech Civil Judgment establishes that Husky has never been a shareholder of HPH and accordingly never qualified as a beneficiary for distribution under Trust 1 (which in and of itself eliminates the basis of Husky's claim for distribution under Trust 1);

b) there are no grounds upon which Husky can now seek to challenge the validity or effect of the 2022 Czech Civil Judgment;

c) the claims made by the Cypriot Plaintiffs (Fraban and Husky) lacked good causes of action and the express conditions of the Trust for distribution and payment thereunder have not been satisfied;

d) the first instance judge in Cyprus misapplied the law of evidence on key matters concerning the fraudulent and illegal activities of the Cypriot Plaintiffs that go to the heart of their alleged entitlement for distribution under Trust 1;

e) the first instance judge in any case erred in awarding Frabran and Husky interest on the damages awards made to them, as clause 21 of the Trust deeds prohibits any award of interest on any sum payable to any beneficiary (if DTL succeeds on this point, the sums potentially payable to Frabran and Husky would be substantially reduced); and

f) there are currently proceedings on foot before the Municipal Court in Prague (action no.72 Cm 55/2022) against each of the other Cypriot Plaintiffs which raise issues of fact that are very similar to those considered in the 2022 Czech Civil Judgment. Accordingly, DTL expects that the Municipal Court will reach the same determination in those proceedings as in the 2022 Czech Civil Judgment.[79]

The Cypriot Plaintiffs' arguments on the stay application

251. Mr Flynn KC submitted as follows.

[79] *Paragraphs 88-89 of Jiřík 1*

General points

252. It must be assumed that, regardless of the outcome of the Cypriot Stay Application, DTL will in due course seek a stay pending the substantive determination of the Cypriot Appeals.

253. If this Court determines that there is no proper basis for a stay in Cayman pending the determination of the Cypriot Appeals then there is equally no basis for a stay in Cayman pending the determination of the Cypriot Stay Application.

254. On the other hand, if this Court determines that there is a proper basis for a stay pending the determination of the Cypriot Appeals then a stay which would run beyond the determination of the Cypriot Stay Application would be granted in any event.

255. Accordingly, rather than awaiting the determination of the Cypriot Stay Application, Mr Flynn KC invited the Court to 'grasp the nettle' and determine the underlying issue of whether there is a proper basis for staying the Cayman Enforcement Proceedings pending the determination of the Cypriot Appeals.

256. Otherwise, he argued, a further hearing will inevitably be required in due course to determine that very issue. There is no reason in principle why it should not be determined now and, at the very least as a matter of good case management, it is in the interests of all parties that the Court should do so in order to avoid the costs of a further hearing addressing the same issues.

257. He went on to argue why no stay of the Cayman proceedings should be granted.

Specific points for refusing stay[80]

258. The starting point is that a foreign judgment *in personam* given by the court of a foreign country with jurisdiction over the matter may be enforced in Cayman at common law for the amount due under the foreign judgment if the foreign judgment (a) is for a definite sum of money and (b) is final and conclusive: see *Dicey, Morris & Collins on the Conflict of Laws (16th ed.), Rule 46.*

259. The 2017 Cypriot Judgment meets the requirements for enforcement of the obligation arising under that judgment at common law.

[80] *See Mr Barden's affidavit dated 15 September 2023*

260. The fact that a defendant has launched an appeal in the jurisdiction where the foreign judgment originated does not denude the foreign judgment of the quality of finality and conclusiveness and therefore does not provide any defence to a claim to enforce the obligation arising from such a judgment in Cayman at common law.

261. As the editors of Dicey explain at §14-030:

> *"At common law, a foreign judgment may be final and conclusive even though an appeal is actually pending in the foreign country where it was given. ''In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher court; but it must be final and unalterable in the court which pronounced it; and if appealable the English court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal. So in a proper case a stay of execution would no doubt be ordered pending a possible appeal.'*

262. Accordingly, the Cypriot Appeals (though as yet undetermined) do not provide any basis for a substantive defence to the Cayman Enforcement Proceedings.

263. Therefore, the issue which arises is whether this is a "proper case" for a stay of execution in the exercise of the Court's discretion. Mr Flynn KC submitted that an issue of paramount importance in the exercise of the Court's discretion is the potential prejudice to either party of granting or refusing the stay.

264. In the present case, the prejudice which would be suffered by Husky and Frabran (and therefore ultimately Dr Chvatik) if a stay were to be granted and the Cypriot Appeals are in due course dismissed far outweighs any possible prejudice that DTL could possibly suffer if a stay were to be refused and the Cypriot Appeals ultimately succeeded.

265. Mr Flynn KC submitted that is so for the following reasons:

> (1) Frabran and Husky commenced the Cypriot Proceedings as long ago as December 2003 (i.e. almost 20 years ago). At that time Dr Chvatik was a (comparatively youthful) 63 years old. She is now a (somewhat less youthful) 83 years old.

(2) The Cypriot Proceedings took almost 13 years to come to trial at first instance and there was no judgment until almost 13 and a half years after the proceedings were first commenced.

(3) The Cypriot Appeals were issued over 6 years ago and no final hearing date has yet been listed.

(4) Nor did DTL make the Cypriot Stay Application until 17 November 2022, well over 5 years after the 2017 Cypriot Judgment was handed down.

(5) It is no answer for DTL to say that Frabran and Husky did not take enforcement steps in the meantime. DTL must surely have anticipated that, once judgment had been entered against it, steps would be taken to enforce that judgment if payment was not forthcoming. Any reasonable litigant who believed that there were grounds for seeking a stay would have done so shortly after judgment was entered against them. The fact that DTL did not do so speaks volumes and suggests that even DTL does not believe that there is any meritorious basis for a stay in this case.

266. The position in this regard, he said, is further aggravated by the fact that DTL has not acted expeditiously in relation to the Fresh Evidence Application in Cyprus and, if the Stay Application was to be granted, DTL would have no incentive to progress the Fresh Evidence Application expeditiously in the future[81]:

267. Mr Flynn KC submitted that given the issues arising from the Fresh Evidence Application and the prospect of DTL's application for a stay of the Cypriot Appeal concerning Frabran until the conclusion of proceedings in the Czech Republic (following which it is anticipated that there will be a further fresh evidence application in Cyprus if DTL obtains the orders from the Czech Court which it seeks) the reality is that there is a strong possibility that the Cypriot Appeals will not be determined for several more years to come.

268. Mr Flynn KC urged the Court to accept that it is certainly conceivable that it could take another decade, based on past experience of the Cypriot Proceedings, and if it did so then Dr Chvatik (if she is still alive by then) could be well into her 90's.

[81] *see §52 of Mr Barden's affidavit dated 15 September 2023*

269. He emphasised that Dr Chvatik has already suffered irremediable prejudice as a result of having been deprived of the benefit of the distributions to which her companies are entitled in her retirement years. The practical effect of a stay pending the determination of the Cypriot Appeals is that there is a very strong possibility (and based on average life expectancy, probability) that Dr Chvatik will not live to enjoy the benefit of the distributions from the Trusts to which she is ultimately entitled.

270. Furthermore, the rate of interest on the sums awarded to Frabran and Husky in the 2017 Cypriot Judgment is well below the prevailing rate of inflation and therefore the value of the judgments in their favour is being steadily eroded for so long as the sums due remain unpaid[82].

271. Husky and Frabran have, for 20 years, been incurring liability to pay many thousands of dollars per year in respect of corporate management and audit fees in Cyprus which would not have been incurred if distributions had been made to them timeously in 2003 or 2004[83].

272. Mr Flynn KC pointed to the prejudice caused to Frabran and Husky as a result of the delay in the making of distributions to them which was underlined by the fact that clause 9 of the Trust 1 trust deed imposes an express obligation on DTL to "*distribute monies comprised in the Trust Fund to the Beneficiaries as soon as possible after the date of the Settlement*".

273. He submitted that by contrast, DTL has no personal interest in the Trust assets and therefore will suffer no prejudice if a stay is not granted. Nor is there any evidence that there are (aside from the Cypriot Plaintiffs) any other beneficiaries of the Trusts who are making claims against the Trust assets[84].

274. Moreover, he argued, the Court can and should take into account the conduct of the party seeking a stay in exercising its discretion. In the present case he submitted that there were a number of troubling aspects of DTL's conduct which weigh strongly against any stay in DTL's favour. In particular he argued that:

a) DTL has a long history of disregarding its basic obligations as trustee of the Trusts and misusing Trust assets.

[82] *see §64.a of Mr Barden's affidavit dated 15 September 2023*
[83] *see §64.b of Mr Barden's affidavit dated 15 September 2023*
[84] *see §59 of Mr Barden's affidavit dated 15 September 2023*

b) DTL has acted dishonestly, including in relation to the Summonses that are presently before the Court, especially by the egregious dishonesty displayed by Mr Jiřík (DTL's sole director) in seeking to mislead the Court into believing that DTL intends to apply the Trust assets for the benefit of the beneficiaries when in fact he intends to apply them for his own benefit (and the benefit of HPH) to the exclusion of the beneficiaries of the Trusts.

c) DTL delayed making the Cypriot Stay Application for almost 5 and a half years after issuing the Cypriot Appeals.

d) DTL is, to a very considerable degree, responsible for causing substantial further delays in the resolution of the Cypriot Appeals by making the Fresh Evidence Application (which is itself the product of collusion and dishonesty) and it has made clear its intention to cause further delay by seeking a stay of the Cypriot Appeal concerning Frabran pending the determination of proceedings that Mr Kristian Jiřík (presumably the son or other relative of Mr Jiřík) has initiated in the Czech Republic.

e) DTL is responsible for causing the present financial hardship of Frabran and Husky by wrongly refusing to make distributions to them for over 20 years and DTL's sole shareholder, HPH, is responsible for taking steps in the US to prevent Dr Chavtik being able to use the proceeds of her former property in Aspen to fund those companies[85]

f) DTL has needlessly put the Cypriot Plaintiffs to considerable expense in Cayman by making an unmeritorious application to discharge the Cayman Proprietary Injunction

275. Mr Flynn KC argued that DTL's assertions that its reliance on the 2022 Czech Civil Judgment is somehow bound to succeed is wrong and should not be permitted to distract the Court.

276. He also argued that the points advanced in particular, at §§4.1 to 4.4 of Mr Demetriou's affidavit dated 13 October 2023 were misconceived and referred the Court to points taken in Husky's written submissions filed in the Cyprus proceedings concerning the Fresh Evidence Application[86].

[85] *see §60 of Mr Barden's affidavit dated 15September 2023*
[86] *Dated 16 November 2023*

277. He submitted that Husky therefore considers that, far from being bound to succeed, the Fresh Evidence Application is bound to fail. That leaves only DTL's original grounds of appeal, none of which has any merit for the reasons set out in Husky's written submissions in the Cypriot Appeal.

Law

Case management stay

278. A foreign judgment *in personam* given by the court of a foreign country with jurisdiction over the matter may be enforced in the Cayman Islands at common law for the amount due under the foreign judgment if the foreign judgment (a) is for a definite sum of money and (b) is final and conclusive[87].

279. At common law, a foreign judgment may be final and conclusive even though an appeal is actually pending in the foreign country where it was given[88].

280. In the judgment of the Cayman Islands Court of Appeal in *Deputy Registrar and Attorney General v Day and Bush [2019 (1) CILR 510],* upon consideration of an application for a stay of execution pending appeal, President Goldring said at paragraph *[15]:*

> *"…a stay may be granted for good cause … As the cases make plain, a successful litigant is prima facie entitled to the fruits of his success. There must be good reason for the court to prevent that. In deciding whether or not to impose a stay, the court will consider the grounds of the appeal, their likelihood of success and the balance of convenience having regard to the interests of both parties. The overriding feature is the interests of justice in any given case."*

281. The question as to whether to exercise the Court's discretion pursuant to its inherent discretion depends upon those factors identified by Goldring P. In a proper case it will exercise its discretion and order a case management stay where a litigant seeks to enforce a foreign judgment.

[87] *Dicey, Morris & Collins on the Conflict of Laws* (16th ed.), Rule 46.
[88] Dicey at §14-030

Determination

Preliminary points

282. The issue for the Court is whether to exercise its discretion to stay the Cayman Enforcement Proceedings in the interests of justice. In practice the Court has asked itself which course is the least likely to lead to injustice.

283. The Court notes that the Cyprus appeal process has been proceeding since 2017 and there is no date for a substantive hearing. There is also a contested application by DTL to rely on new evidence which in itself may take some considerable time to resolve.

284. The Court approaches the question of its discretion to stay the Cayman Enforcement Proceedings on the basis that it would create incentives and disincentives for the parties, depending on their interests, to further or delay the progress of the Cyprus appeal proceedings and the Fresh Evidence Application.

285. The Court also bears in mind that Dr Chvatik is 83 years old and has been awaiting the outcome of the Cyprus proceedings for almost 20 years.

Decision

286. The Court has set out the competing arguments of the parties above and does not intend to repeat them.

287. The Court has carefully considered the thrust of Mr Manning's submission that a stay ought to be granted in the terms sought on the grounds of comity to leave the Cyprus court to perform the balancing exercise of prejudice with a much more informed view of the prospects of the Cypriot appeals.

288. It has carefully considered his submission that if a stay were not granted, there were the real possibilities of inconsistent judgments and further litigation as well as the fact that the moneys once distributed pursuant to the Cayman Enforcement Proceedings, would 'never be returned'.

289. Having carefully considered the substantial amounts of evidence on this application and the competing submissions of the parties, the Court has decided to allow the Cayman Enforcement Proceedings to continue pending the outcome of the Cypriot Appeals.

290. DTL has indicated that if the Cypriot Appeals fails it does not intend to contest the relief sought in the Cayman Enforcement Proceedings, such as on public policy grounds, so that judgment may be executed against the Trust account(s).

291. If the appeal succeeds no doubt steps will be taken to recover any sums paid on behalf of the remaining and legitimate beneficiaries who are entitled to make claims for distributions.[89] It is difficult to see how DTL itself would suffer real prejudice from any liability to any other beneficiary if the Cayman Court allowed its Judgment to be executed by Frabran and Husky.

292. The factor that has weighed most heavily in the Court's mind is that Dr Chvatik, who has a good arguable claim to be the beneficial owner of the amounts in dispute[90], has been litigating these claims to achieve a just outcome for 20 years and is now 83 years old.

293. This is an unconscionable length of time and the Court is not persuaded that it would be in the interests of justice overall to delay the Cayman Enforcement Proceedings for an indeterminate further length of time. Dr Chvatik would thereby suffer irremediable further prejudice.

294. The Court has carefully examined the evidence and submissions concerning the likelihood of success of the Cypriot Appeals[91] and the balance of convenience, having regard to the interests of the parties, and has come to the clear view that this is not a proper case for a stay.

295. Having regard to the conduct of the parties over the years the Court also takes the view that a stay would provide a real incentive for DTL to delay the Cypriot Appeals and the resolution of the contested fresh evidence application(s).

296. The Court has considered that the Cypriot Plaintiffs waited more than five years to commence the Cayman Enforcement Proceedings, but having examined the evidence, is satisfied that there is a reasonable explanation for this delay given the fact that the Cayman Proprietary Injunction was in place securing the assets and that they were awaiting the appeal process to get properly underway. In the result DTL's written submissions for the appeal were not provided until 21 September 2022

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[90] *§§205-223 Barden 2: the Cypriot Judgment in 2017 found Dr Chvatik to be the sole ultimate beneficial owner (this is under appeal). See also §§ 520 -533 of Barden 1 for the Cypriot court's assessment of the evidence,*

[91] *The Court notes the force in the submissions made in Frabran and Husky's submissions of 20 April 2023, in particular.*

and having considered those the Cypriot Plaintiffs commenced the Cayman Enforcement Proceedings only a week later.

Conclusion

297. The application for a stay of the Cayman Enforcement Proceedings on the terms sought by DTL is refused.

298. There is no objection to the Court confirming that the Cayman Receivership Order is discharged, so the Court will make that order.

299. Costs should follow the event. If the parties cannot agree costs the Court will determine the matter following short written submissions (of no more than 5 pages in length).

THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT