IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 248 of 2017 (IKJ)

IN THE MATTER OF A TRUST KNOWN AS THE STINGRAY TRUST

AND

IN THE MATTER OF THE TRUSTS LAW (2011 REVISION)

BETWEEN:

GENEVA TRUST COMPANY (GTC) SA

Plaintiff

AND

(1) IDF (by her Court Appointed Guardian GM)

(2) MF

Defendants

Appearances:	Mr Dakis Hagen QC of counsel and Ms Rachael Reynolds and Deborah Barker Roye of Ogier for 1st Defendant/Applicant (the "Guardian")
	Mr Hector Robinson QC and Mr Zachary Hoskin and Ms Jessica Vickers of Mourant for the Plaintiff/Respondent (the "Trustee")
Before:	**The Hon. Justice Kawaley**
Heard:	**10-11 November 2020**
Draft Judgment Circulated:	**2 December 2020**
Judgment Delivered:	**21 December 2020**

HEADNOTE

Forum non conveniens-application for stay of Cayman Islands trust invalidity proceedings in favour of pending Italian proceedings-trust governed by Cayman Islands law-whether forum for administration clause operated as an exclusive jurisdiction clause-construction of section 90 of the Trusts Law (2020 Revision)

JUDGMENT

Introductory

1. The present application may be described as a tale of two representatives (the Guardian and the Trustee) and two jurisdictions (Italy and the Cayman Islands). Minor roles are played by MF, the 2nd Defendant, and Switzerland. The Guardian acting on behalf of the elderly settlor and beneficiary of the Stingray Trust ("the Trust") seeks to establish the invalidity of the Trust. The Trustee seeks to uphold the validity of the Trust.

2. It was the Guardian who initially issued proceedings against the Trustee in the District Court of Lugano, Switzerland (Pretore del Distretto di Lugano*)* on December 16, 2015; the proceedings concluded in the Appeal Court of the Republic and Canton of Ticino (Tribunale d'appelo (Cantone Ticino)) on November 11, 2016 (the "Swiss Proceedings"). She then commenced a second set of proceedings against the Trustee and the Italian resident beneficiary of the Trust, the 2nd Defendant, before the Court of Milan (Tribunale di Milano) on May 16, 2017 (the "Milan Proceedings") by filing a Writ of Summons (Atto di Citazione). It was in response to the Milan Proceedings that the Trustee commenced the present proceedings by an Originating Summons dated November 10, 2017. That Summons sought, *inter alia*, the following relief:

> "*3. A declaration that the…Stingray Trust…is an irrevocable discretionary trust validly established and subsisting under Cayman Islands law and subject to the exclusive jurisdiction of the Courts of the Cayman Islands, pursuant to art. 10, par. 2 of the Irrevocable Declaration of Trust dated 5 July 2005;*

4. A declaration that the First defendant has no legal right, title or interest in the shares of Expressway Management Corp., a company incorporated in Panama, or in any other property held by the Plaintiff as Trustee of the Stingray Trust…"

3. Paragraphs 1-2 of the Originating Summons, however, sought directions in relation to the Milan Proceedings (*Beddoe* relief). By an Order dated September 17, 2018 (the "First *Beddoe* Order"), Parker J approved the Trustee's defence of the "Jurisdiction Action", namely the Trustee's challenge to the jurisdiction of the Milan Court before that Court and (after the Guardian applied for a pre-trial determination of the jurisdiction question) the determination of the Milan Court's jurisdiction by Italy's highest appellate court, the Supreme Court of Cassation (Suprema Corte di Cassazione). The First *Beddoe* Order directed that the Trustee could seek further directions if the Jurisdiction Action did not succeed. The Supreme Court of Cassation determined that the Milan Court did have jurisdiction over the Guardian's claim on March 18, 2019 and the Milan Proceedings (which had been stayed pending the determination of the jurisdictional issue) resumed.

4. Further directions were given by Parker J in an Order dated July 11, 2019 (the "Second *Beddoe* Order"), including an amendment to reflect a change in the Trustee's name and directions in relation to the "Ancillary Lugano Proceedings". However, for present purposes, the most significant directions given were in the following terms:

"*2. The Plaintiff is at liberty to continue to defend the claim brought by the Court Appointed Guardian against the Plaintiff and the Second Defendant, by Writ of Summons dated 16 May 2017 filed in the Court of Milan…Italy…on its merits and to prosecute any appeal in connection with the Milan Proceedings, if so advised.*"

5. By a Summons dated August 16, 2019, however, the Trustee applied to amend the Originating Summons to seek an anti-suit injunction restraining the Guardian from further pursuing the Milan Proceedings. By a Summons filed on September 4, 2020, the Guardian sought orders, *inter alia*:

"*1. That these proceedings, commenced by the Plaintiff's Originating Summons dated 10 November 2017 (the Originating Summons); alternatively the claim for relief set out at paragraphs 3 and 4 of the Originating Summons; alternatively such part of that relief as the court sees fit, be stayed pursuant to the inherent jurisdiction of the Court on the grounds that the Cayman Islands is not the appropriate forum*

for the trial of this matter, and that the more convenient and appropriate forum is the Court of Milan, Italy."

6. By the time the Guardian's stay application was heard, the Court of Milan had apparently given directions for a final hearing in December 2021. Based on the respective written submissions, the following issues fell to be decided:

   (a) whether section 90 of the Trusts Law (2020 Revision) (the "Law") provides that all questions relating to, *inter alia*, the validity of a Cayman Islands trust can only be adjudicated by the Cayman Islands courts;

   (b) whether the Trust contains an exclusive jurisdiction clause which was binding on the Guardian in relation to the invalidity claim;

   (c) whether the Cayman Islands is the most convenient forum to adjudicate the invalidity dispute in any event.

Preliminary Factual Findings

The Guardian's Evidence

7. The Guardian in her First Affidavit deposed that she was a relative in the fifth degree of IDF and the closest relative willing to assume the responsibility of serving as Guardian. She was appointed in place of the temporary appointee on May 15, 2012, when IDF was 88 years old and had lost the capacity to manage her own financial affairs. The appointment order was made by the Tutelary Judge (Il Giudice Tutelare) of the Court of Milan.

8. Charged with taking control of IDF's affairs, the Guardian learned of the Trust in 2013, that a Mr Travisano was Protector and also identified potential assets belonging to IDF in Italy. In September 2015, Italian lawyer Mr Alberto Banfi, after initially contacting the original trustee, was put in touch with the Trustee and sought information about the Trust.

9. By letter dated December 4, 2015, the Guardian's concerns about the validity of the Trust were expressed. The Guardian strongly suspected that IDF had been taken advantage of and did not know that she was setting up a trust. These suspicions were compounded by:

(a) the apparent reluctance of the Trustee to disclose basic information about the Trust and the addition of MF (a charitable foundation) as a beneficiary to the Trust in 2015 without prior notice to the Guardian; and

(b) the appearance that those administering the Trust were financially benefitting from it while IDF herself was not.

10. This prompted the Guardian to commence the Swiss Proceedings on December 17, 2015 seeking disclosure of assets, preservation of assets and delivery up of assets and, after these proceedings were determined in the Trustee's favour, to commence the Milan Proceedings. The Ancillary Lugano Proceedings were commenced on April 10, 2019 for protective relief preserving the Trust's assets pending the determination of the Milan Proceedings.

11. As regards the convenience of a trial in the Cayman Islands, the Guardian averred as follows:

(a) it would be inconvenient for her to travel to the Cayman Islands as a full-time Primary School teacher who only speaks Italian;

(b) the Trustee is based in Geneva, Switzerland and administers the Trust from Switzerland;

(c) the Trust assets are located in Lugano Switzerland;

(d) the beneficiaries and settlor reside in Milan, Italy;

(e) the main witnesses are located in Milan and Lugano

(f) the witnesses are not native English speakers and most documents are written in Italian.

12. The First Banfi Affidavit explains how the Trust was established, with funds derived from IDF's late sister's husband and IDF's husband, who were a businessman and doctor respectively. He avers: "*The issue is whether IDF understood what was being done on her behalf with her own funds and her sister's funds*." Reliance is placed on a November 21, 2005 letter from IDF to her lawyer Mr Stucchi requesting assets that had been transferred a few months earlier to the Trust as indicative of a want of understanding on her part.

13. As far as the Swiss proceedings are concerned, Mr Banfi deposes that these were only made necessary by the failure of the Trustee to be more cooperative in providing information about the Trust. As far as the Milan Proceedings are concerned, Mr Banfi deposes that the primary relief sought is a declaration of invalidity in relation to the Trust based on IDF's "*lack of knowledge, understanding and agreement to the terms of the trust*" (paragraph 81). As regards the important question of the application of Cayman Islands law to the validity question, the deponent avers as follows:

> "*85. The Milan Wit…expressly states that Cayman Islands law should apply for the resolution of the case…*
>
> *86. Furthermore, whilst the Milan Court is willing and able to apply Cayman law when it is required to do so, certain matters pertaining to the capacity of IDF and Concetta to transfer money from their personal accounts into the Expressway account, are not matters 'arising in regard to a trust governed by Cayman law'. These points fall to be determined as a question of fact, and…so far as they concern matters of law, would have nothing to do with Cayman law.*"

14. A detailed summary of the Supreme Court of Cassation's determination of the jurisdictional issue, on the Guardian's application, is then set out. Reference is made, *inter alia*, to the fact that the findings included the following:

(a) clause 10.2 of the Declaration of Trust did not constitute an exclusive jurisdiction clause, having regard to sections 89-90 of the Trusts Law and the Privy Council decision in *Crociani-v-Crociani*;

(b) the Guardian had not waived the Milan Court's jurisdiction by having previously sought ex parte relief in the Swiss Proceedings;

(c) the Milan Court had jurisdiction in a relation to a Cayman Islands trust in circumstances where the Cayman Islands was not a Lugano Convention country and trust beneficiaries were domiciled in Italy.

15. With the jurisdiction question determined, the deponent explains that the Ancillary Lugano Proceedings were commenced to obtain ex parte precautionary relief analogous to a freezing order. These proceedings appear to me to have been based on the premise that IDF was indeed a beneficiary of a valid trust. This relief was obtained on April 10, 2020 and confirmed by the Lugano District Court (seemingly subject to a further review) on September 17, 2019. In a third stage of the Ancillary Lugano Proceedings, oral evidence was given by Mr Travisano (the Protector and longstanding advisor to IDF and her sister) and Mr Stucci (the lawyer who was directly involved in establishing the Trust). Final Statements were filed in March 2020 and a decision is awaited.

16. Mr Banfi avers that the Trustee actively participated in the Milan Proceedings, having delayed them by three unsuccessful interim applications (the "*Authority Challenge*", the "*Conflict Challenge*" and the "*Jurisdiction Challenge*"). In contending that Milan is the most appropriate forum, the following main points are advanced:

(a) the validity dispute depends on primarily factual disputes relating to events which occurred in Lugano between European witnesses;

(b) the Milan Court is already seised of the matter and both the Trustee and the Protector have submitted to the jurisdiction of the Milan Court;

(c) determining the validity issue in the Cayman Islands will result in a duplication of costs;

(d) the Trustee, the Protector and the Guardian are all resident in Europe, not in Cayman.;

(e) less than 10% of the documents are written in English. They are mostly written in Italian;

(f) the Milan Court can apply Cayman Islands law to the extent required.

17. Following a procedural hearing on October 13, 2020, it is deposed in the Second Banfi Affidavit, the Milan Court directed that the evidence of Messrs Travisano and Stucci before the Lugano Court could be admitted without the need for them to give oral evidence in Milan. The next hearing before the Court is scheduled for December 15, 2021 at which time the parties will be permitted to file further submissions before a final decision is delivered in 2022.

18. The First Affidavit of Edy Salmina confirms that the issue of validity has not been determined in the Lugano Proceedings.

The Trustee's evidence

19. Mr Rodney Hodges, a Director and Partner of the Plaintiff, opposed the Guardian's stay Summons through his Fourth Affidavit. A non-practising UK barrister, he has some 40 years' experience as a director of regulated trust companies. He firstly describes the history of the present proceedings, which were commenced after the Milan Proceedings and initially involved obtaining *Beddoe* relief which :

(a) directed that the Trustee should participate in the Milan Proceedings to challenge the jurisdiction of the Milan Court (Order dated September 4, 2018); and

(b) directed that the Trustee should defend the Milan Proceedings on their merits and participate in the Ancillary Lugano Proceedings (Order dated July 11, 2019).

20. On August 16, 2019, the Trustee filed its 'Amendment Summons' seeking to add to its Originating Summons herein a prayer for an anti-suit injunction against the Guardian to restrain her from pursuing the Milan Proceedings and the Ancillary Lugano Proceedings. This was said to be in order to "*progress its application for other relief sought in these Proceedings, in particular, for a declaration that the Trust is an irrevocable discretionary trust validly established and subsisting under Cayman Islands law and subject to the exclusive jurisdiction of the courts of the Cayman Islands*" (paragraph 23). The deponent accepted that this application had not yet been heard, over a year after it was filed.

21. Mr Hodges then describes the background to the Trust, the key provisions of the Declaration of Trust, the establishment of the Trust and the Guardian's attacks on the validity of the Trust beginning with a "hostile" letter from Mr Banfi on behalf of the Guardian dated October 1, 2015. The Affidavit then responds to the evidence filed in support of the Guardian's 'Stay Summons'. Most of this response, perhaps understandably, seeks to counter complaints made by or on behalf of the Guardian by way of justifying her validity attack. These matters were of peripheral concern for the purposes of the present application. The case that this jurisdiction is the most appropriate forum is supported by reference to the following main averments:

(a) the validity of the Trust was finally determined in the Lugano Proceedings, and this decision bound the Guardian;

(b) there is no natural connection between the Trust and the issue of its validity and Milan or Italy;

(c) the Guardian initially obtained permission from the Tutelary Judge of the Court of Milan to challenge the validity of the Trust in Switzerland or the Cayman Islands, which confirms that this is an appropriate forum;

(d) using MF as a basis for gaining a jurisdictional foothold in Italy lacks substance as MF has no connection with the validity dispute;

(e) the governing law of the Trust is the most important jurisdictional consideration;

(f) the asserted grounds of invalidity are untenable in common law terms and there is a "*significant risk of the Italian courts falling into error when they seek to apply the applicable principles of Cayman Islands law*" (paragraph 170);

(g) the key witnesses are likely to be the Trustees' witnesses who are both fluent in English. The most important documents are in English and the Guardian's case is primarily based on drawing inferences from documents. Moreover, travel difficulties can be obviated through remote evidence being given;

(h) any duplication of costs will have been caused by the Guardian choosing to belatedly sue in Milan after getting permission to sue in Cayman or Switzerland.

22. Maria Cristiana Felisi's First Affidavit provided the Trustee's Italian lawyer's perspective of the Milan Proceedings. She deposed that as Italy was a party to the 1985 Hague Convention on the Law Applicable to Trusts, Article 6 of which applied the law chosen by the settlor to questions of trust validity, the Milan Court should accordingly apply Cayman Islands law. She sought to clarify the limited nature of the Guardian's validity claim, which was based merely on a lack of consent, not on mistake or a lack of capacity. As regards the Italian law approach to expert evidence, she deposed that the Judge can conduct his or her own research although the power to admit expert evidence through a foreign live witness or a report did exist.

Factual findings

23. The Trustee's evidence, perhaps understandably, failed to address what I regarded as the "elephant in the room". The present proceedings were not commenced pre-emptively but in response to the Lugano Proceedings and, primarily, the Milan proceedings. The Trustee took no steps to actively seek the adjudication of the contentious validity question in this Court. Instead, it obtained approval from Parker J on a *Beddoe* application to challenge the jurisdiction of the Milan Court and to recover the related costs from the Trust assets. In *Re Stingray Trust*, FSD 85 and 248 of 2017 (RPJ), Judgment dated September 17, 2018, (published in redacted form) Parker J pivotally held as follows:

> "*81. In my judgment the Trustee is entitled to an order that it was entitled to participate in the Milan Proceedings for the purpose of challenging the jurisdiction of the Milan court in the Court of Cassation. At that stage if unsuccessful the Trustee should return to this court for specific approval of any engagement to defend the case on its merits and to seek further directions*…"

24. The Supreme Court of Cassation determined that the Milan Court had jurisdiction over the Guardian's trust invalidity claim on March 18, 2019. The Trustee made the second application for *Beddoe* relief which was heard on July 11, 2019, four months later. The overarching consideration was that if the Trustee did not defend the Milan Proceedings on their merits, then the Guardian would obtain an Italian judgment which could be enforced against the Trustee and the Trust assets in Switzerland. In paragraph 1 of his ex tempore Ruling, Parker J held:

"*…The decision of the Trustee that it should continue to defend the interest of the beneficiaries in both the Milan Proceedings and the Ancillary Lugano Proceedings is a reasonable one*."

25. It is difficult to discern why, apart from the obvious likelihood that seeking any such direction would have been robustly rebuffed, the Trustee did not ask Parker J to also approve a decision to simultaneously seeking a declaration on the validity of the Trust from this Court. Only a month later, the Trustee flirted with the idea of litigating substantively and simultaneously on two fronts without *Beddoe* approval by filing the Amendment Summons, but then (it seems) thought better of it. But having engaged with substantively defending the Milan Proceedings for over a year, and having represented to Parker J that this was an essential strategy, the Trustee's present litigation stance seemed quite surprising, absent either (a) *Beddoe* approval and/or (b) a rational explanation for such a dramatic change of course. The Milan Proceedings, after all, have been on foot for three years.

26. This aspect of the wider litigation history, which the Guardian's counsel was keen to highlight, I consider to be central to the *forum non conveniens* analysis. Putting to one side the legal effect of section 90 and whether or not the Trust contains an exclusive jurisdiction clause, I find that it tips the scales decisively in favour of the Court of Milan as, *prima facie*, the most appropriate forum. The other considerations, standing by themselves, are less clear-cut:

    (a) the fact that Cayman Islands law is the governing law is counterbalanced by the fact that the Court of Milan will apply the Trust's governing law to the validity question;

    (b) the fact the witnesses are located in or near Italy and are not native English speakers is counterbalanced, to some extent, by the fact that the two main witnesses are fluent English speakers;

    (c) the inconvenience to the Guardian of travelling to the Cayman Islands is counterbalanced by the fact that she is not a key witness and could testify remotely;

(d) the legal nexus of the Trust with the Cayman Islands is counterbalanced to a significant extent by the fact that the Trustee administers the Trust from Switzerland and the Trust assets are located there; and

(e) the significance of Cayman law governing the validity issue is somewhat diminished by the fact the Guardian's invalidity case appears to turn primarily on issues of fact.

27. It remains to consider the merits of the Guardian's Stay Summons in light of the determination of (a) whether section 90 of the Law requires all matters falling within its purview to be determined by this Court, (b) whether the Trust contains an exclusive jurisdiction clause and (c) how the legal principles governing the doctrine of forum non conveniens impact on the factual matrix of the present case.

Legal findings: can section 90 of the Trusts Law be construed as containing a mandatory statutory jurisdiction clause?

Primary construction of the statutory provision in its context without reference to judicial authority

28. Section 90 of the Law, so far as is material for present purposes, provides as follows:

"*90. All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including questions as to* -

(a) the capacity of any settlor;

(b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof;

(c) the administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal; or

(d) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined according to the laws of the Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected…" [Emphasis added]

29. Section 90 is found in Part VII ("*Trusts-Foreign Element*"). The territorial scope of Part VII is defined by section 88 as follows:

"*88. This Part applies to every trust and every disposition of property in trust made before, on or after the 31st May, 1987, whether such property is situate in the Islands or elsewhere.*"

30. The seemingly unlimited scope of the extra-territorial reach of this Part of the Law is tempered by subsequent provisions of Part VII. Section 89 ("governing law") provides in salient part as follows:

"*89. (1) In determining the governing law of a trust, regard is first to be had to the terms of the trust and to any evidence therein as to the intention of the parties; and the other circumstances of the trust are to be taken into account only if the terms of the trust fail to provide such evidence.*

(2) A term of the trust expressly selecting the laws of the Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances.

(3) A term of the trust that the laws of the Islands are to govern a particular aspect of the trust or that the Islands or the courts of the Islands are the forum for the administration of the trust or any like provision is conclusive evidence, subject to any contrary term of the trust, that the parties intended the laws of the Islands to be the governing law of the trust and is valid and effective accordingly…"

31. Reading section 88 and section 89 together, it appears that Part VII is intended to apply, not to every trust anywhere in the world, but to trusts governed by Cayman Islands law by virtue of the fact that either:

(a) local law is expressly selected as the governing law of the trust in the relevant trust instrument; or

(b) this forum is expressly selected as the forum for administration of the trust.

32. None of these provisions including section 90 itself (as Mr Hagen QC for the Guardian pointed out), expressly deal with this Court's jurisdiction at all, let alone confer express statutory jurisdiction over all trusts governed by Cayman Islands law as the Trustee contended. The marginal note to section 90 is "*matters determined by governing law*". Mr Robinson QC for the Trustee rightly responded that the absence of an express jurisdiction clause (as in the Bermuda[1] and Jersey[2] legislative schemes) was immaterial. And section 48 of the Law ("*Application to the Court for advice and directions*") does confer express supervisory jurisdiction over trusts. Which trusts that jurisdiction may be exercised over is not defined in express statutory terms, but it seems obvious from the express terms of sections 88, 89 and 90, that the jurisdiction would embrace trusts governed by Cayman Islands law, irrespective of whether the trust assets are located within the jurisdiction of this Court.

33. The so-called "firewall provisions" of Part VII provide no support for the proposition that section 90 contains a statutory exclusive jurisdiction clause either. Section 91 ("*Exclusion of foreign law*") simply provides that no trust governed by Cayman Islands law should be held to be invalid or defective through application of a foreign law on the grounds that:

> "*(a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or*
>
> *(b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or any beneficiary (whether discretionary or otherwise) or by way of heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests.*"

34. This is a very narrowly defined exclusion of foreign law clause which does not even hint at the notion that no foreign court is entitled to exercise jurisdiction over a trust governed by Cayman Islands law. Section 92 ("*Heirship rights*") provides, further to section 91, that heirship rights conferred by a foreign law in relation to "*the property of a living person*" shall not be recognised as :

> "*(a) affecting the ownership of immovable property in the Islands or movable property*

[1] Trusts (Special Provisions) Act 1989, section 9.
[2] Trusts (Jersey) Law 1984, section 5**.**

wherever situate for the purposes of paragraph (i) of section 90 or for any other purpose; or

(b) constituting an obligation or liability for the purposes of the Fraudulent Dispositions Law (1996 Revision) or for any other purpose.

35. This exclusion of foreign law provision, which also presumably applies to trusts governed by local law, does not by its terms support an inference that section 90 by necessary implication confers exclusive jurisdiction on this Court in relation to such trusts. The position is made clearer by section 93 ("*Foreign judgments*") which might, quite extravagantly, have provided that no judgment of a foreign court dealing with a matter within the scope of section 90 shall be recognised. Instead it merely provides:

"*93. A foreign judgment shall not be recognised, enforced or give rise to any estoppel insofar as it is inconsistent with section 91 or 92.*"

36. Section 93 only expressly renders unenforceable foreign judgments which are inconsistent with sections 91 or 92. The Guardian's counsel submitted that if there was any ambiguity as to the intended legislative effect of section 90, which there was not, the Hansard record of the Second Reading of the Trusts (Foreign) Element Bill which introduced Part VII into the Law did not support the Trustee's construction. Then Leader of Government Business Mr. Thomas Jefferson explained the purpose of the Bill (on its Second Reading) to the Legislative Assembly as follows:

> "*….if it was to put it to the test as to which law governs the Trust, there is a very good chance that some other jurisdiction's law may apply….some countries of the world prohibit the establishment of Trusts, or the transfer of assets outside of their country. In this case, it is uncertain which country's law would be deemed by the Court to govern the Trust….the rationale behind it, and the gist, is that whatever Trust is created here, we want to make it abundantly clear to the Court that it is our wish that the Cayman Islands Law apply to all of them.*"

37. This legislative history supports both the Guardian's contention that section 90 is merely a governing law clause and the Trustee's contention that the jurisdiction of this Court over Cayman Islands law governed trusts is implicit in the legislative scheme, despite the absence of an express jurisdiction clause in Part VII of the Law. Against this background,

Mr Hagen QC submitted that, construing section 90 in its statutory context "unburdened by authority", it was "*counterintuitive*" to suggest that section 90 provided that only this Court could adjudicate issues relating to, *inter alia*, the validity of a trust governed by Cayman Islands law. I agree. The Trustee's counsel did not have the temerity to challenge this prima facie view of section 90 of the law, rightly electing to rely primarily on case law which appeared to support a contrary construction.

Is the primary construction of section 90 displaced by binding or persuasive authority?

38. Legal practice for judges and lawyers in offshore jurisdictions throws up unique challenges because complex legal questions frequently arise out of *sui generis* legislation in an environment which is not intellectually nourished by access to in-depth academic and/or practitioner texts. As a result:

(a) first instance judges are frequently required to consider complicated questions of law without the benefit of any or any substantial guidance from judicial or academic authority and/or without the benefit of full argument. In attempting to explain the legal context in which a decision is made, we often make passing observations (*obiter dicta*) which are never intended to be construed as considered statements of the law. Such observations should not be confused with reasoned judgments on points which are both directly in issue and which have received the benefit of full argument;

(b) because published judgments have a heightened significance as sources of local law, both judges and practitioners may well place greater weight on first instance *obiter dicta* relating to important but obscure areas of the law, resulting in comparatively insignificant judicial statements being accorded an inflated status within the profession; and

(c) it is in all instances necessary to remember that most judicial statements of legal principle, particularly emanating from first instance judges, lose their coherence and meaning when extracted from the factual and legal matrix of the case in which such statements are made. Such statements will rarely achieve the transcendence of Shakespeare's Mark Anthony, who "*dolphin-like…showed his properties above the element he lived in*". The first instance judicial function is first and foremost a practical and case-specific one.

39. It is against this background that the following submission in the Plaintiff's Written Submissions, and the case law cited in argument, fall to be assessed:

> "*48. These 'firewall provisions' have been the subject of a number of decisions by the Grand Court since they were introduced by the Trusts (Foreign Element) Law in 1987. The Grand Court has consistently held that, properly considered, the firewall provisions are intended to confer exclusive statutory jurisdiction on the Cayman Islands courts to determine all matters concerning Cayman Islands law governed trusts that fall within the scope of section 90 of the TL (which includes 'any questions as to any aspect of the validity of the trust').*"

40. In *Grupo Torras S.A.-v-Bank of Butterfield International (Cayman) Limited et al* [2000 CILR 452], the plaintiffs commenced proceedings in 1995 to recover allegedly stolen monies settled on trust. Five years later, having obtained discovery, they applied to vary the implied undertaking so as to use documents obtained in proceedings in The Bahamas and Jersey. The first application was refused on prematurity grounds. As regards use of the discovered documents in the Jersey proceedings, Smellie CJ recorded, *inter alia*, the submission of counsel for certain defendants as being "*very persuasive in the end*" (at page 467):

> "*…only this court has the jurisdiction to determine the nature of the Comfort Trust (s.90 of the Trusts Law (1998 Revision)).*"

41. This was one sentence out of three paragraphs summarising counsel's submissions. Nonetheless, the following observation was recorded (at page 468):

> "*…It is clear to my mind that GT will seek to invite the Jersey court to draw inferences and conclusions not only about the affairs of the Jersey trusts, but about those of the Comfort Trust as well. Those influences and conclusions will of course not be determinative of any rights or obligations under the Comfort Trust because only this court is seised of jurisdiction over the Comfort Trust. As Mr. Murray submits, s.90 of the Trusts Law (1998 Revision) governs the position.*"

42. This was at most a preliminary finding in a case in which there was "*no dispute about the governing principles*" (page 470). It was also a case in which this Court had in practical

terms been seised of the relevant dispute for some 5 years and the Jersey proceedings were at an early stage. Any inconsistent Jersey findings on matters properly before the Grand Court would probably not be recognised at common law. If Jersey law was applied to any matter covered by section 90, there would be a statutory basis for not recognising such findings. It is unarguably clear that no *decision* was made that only this Court had jurisdiction. Smellie CJ concluded his Judgment by inviting the Jersey court to submit a letter of request specifying (once pleadings had been filed) what documents from the Cayman discovery were sought (page 472). What issues relating to the Cayman trust the Jersey court would be assisted by the Cayman court to adjudicate was the subject of a preliminary view rather than a positive determination.

43. *Groupo Torras SA* does not constitute authority for the proposition that section 90 confers exclusive jurisdiction on this Court in relation to the specified matters which must be determined through the application of Cayman Islands law. However this case and others like it do provide some general support for the central thesis advanced by Mr Robinson QC: the orthodox view has historically been that section 90 confers exclusive jurisdiction on this Court in relation to the specified matters concerning Cayman Islands law governed trusts.

44. *Merrill Lynch-v-Demirel* [2010 (2) CILR 75] at first blush provides the strongest support for the proposition that section 90 confers exclusive jurisdiction on this Court, although Mr Hagen QC fairly noted that it was an unopposed application. Mr Robinson QC primarily relied on the following seemingly unambiguous statements by Smellie CJ:

"16. *It appears that the words 'without reference to the laws of any other jurisdictions with which the trust or disposition may be connected' are intended to abrogate the English common law rules of* forum non conveniens *and the exercise of judicial discretion which they imply insofar as those rules may otherwise apply to Cayman trusts. Thus, insofar as the application of the common law* forum non conveniens *rules would point to another jurisdiction as the appropriate forum for the resolution of disputes involving a Cayman trust by virtue of factors connecting the trust to that jurisdiction, then s.90 would operate to negate such factors…*

20. By the express operation of s.90 of the Trust Law, it is my conclusion, therefore, that service of the originating summons on Mr. and Mrs. Demirel and TMSF out of the

jurisdiction is permissible without the leave of the court on the basis that the Beddoe *application is one that must be taken before this court in any event.*" [My emphasis]

45. However, a careful reading of the decision as a whole is required to gain a clearer sense of what this statement means. The question under consideration was whether a *Beddoe* application under section 48 of the Trusts Law, as read with section 90, fell within the ambit of GCR Order 11 rule 1(2). The latter rule (as reproduced at paragraph 14 of *Demirel*) provides that leave to serve out is not required if "*every claim made in the action.…is one by which by virtue of a Law the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the court or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction.*" The Chief Justice's substantive decision was a finding that an application under section 48 of the Law for *Beddoe* relief in relation to a trust with both (a) a governing law clause which selected Cayman Islands law and (b) a Cayman Islands administration forum clause was an application which "*must be taken before this Court in any event*". In other words, having been conferred jurisdiction to entertain such applications, it would require extraordinary circumstances to entitle this Court to decline to exercise the statutory jurisdiction to grant *Beddoe* relief. Such a straightforward and orthodox legal finding cannot fairly be equated to a legal opinion that section 90 requires all matters which must be determined in accordance with Cayman Islands law to be determined exclusively by this Court.

46. A fair reading of Smellie CJ's judgment in *Demirel*, following what was effectively an ex parte hearing, does not support construing this case as deciding more than that. The alternative findings were that because of the governing law and forum for administration clauses, combined with the fact that the trustee was a Cayman company and the trust assets were most closely connected with Cayman, this jurisdiction was in any event the most appropriate forum. This view finds indirect support from an academic critique of *Merrill Lynch-v-Demirel* [2010 (2) CILR 75], which proceeds on the assumption that it merely decided the impact of section 90 on the need to obtain leave to serve out under GCR Order 11(1(2): Jonathan Harris, '*Jurisdictions and judgments in international trusts litigation-surveying the landscape-surveying the landscape*' (2011) Trusts & Trustees Vol. 17 pages 236-260. The relevant article does not seek to provide more than a sketch of the landscape it covers. Nonetheless, the force of the criticism made of the decision in *Demirel* is significantly undermined by the learned author's failure to have regard to section 48 of the Law and its jurisdictional impact in relation to applications for

Beddoe relief such as that in *Demirel*. However, I am assisted by the following observations of Professor Harris (at page 256) upon which Mr Hagen QC relied:

> "*Section 90 is clearly a set of choice of law rules for Cayman Islands trusts. But it does not contain any rules of jurisdiction of the Cayman Islands courts.*"

47. *Re B Trust* [2010 (2) CILR 248], decided a few months after *Demirel*, was a case which merely mentioned section 90 of the Trust Law. The beneficiaries of the Cayman law governed trust with an (express) exclusive jurisdiction clause included a husband and wife. The wife commenced divorce proceedings in Hong Kong and sought to vary the trust. Before participating in the proceedings, the Caymanian corporate trustee applied to the Grand Court to seek directions as to whether or not to submit to the jurisdiction of the Hong Kong Court. Henderson J described the exclusive jurisdiction clause in the trust deed being "*expressed in …wide and emphatic terms*" (paragraph 29). Section 90 was not mentioned in the section of the Judgment setting out the Judge's reasoning under the heading "*Should the trustee submit to the jurisdiction of the foreign court?*" The exclusive jurisdiction clause appears to be what was positively relied upon.

48. The mere mention of section 90 was what the Trustee relied upon, although it was admittedly for present purposes a very pertinent one. In discussing the legal framework established by sections 90, 91 and 93 of the Law, Henderson J stated:

> "*23… A trust in the Cayman Islands can only be varied in accordance with the law of the Cayman Islands and only by a court of the Cayman Islands. These overarching rules are provided for expressly in the Trusts Law (2009 Revision), in ss. 90, 91 and 93…*"

49. Mr Robinson QC sensibly conceded that the quoted sections did not expressly confer exclusive jurisdiction on the Cayman courts to vary a Cayman Islands trust. However, I find that *Re B* did not actually decide that sections 90, 91 and 93 conferred exclusive jurisdiction on this Court to vary a Cayman Islands law governed trust in any event. The passing comment on the effect of section 90 in a respect which was not in issue in that case has, for present purposes, neither binding nor persuasive effect.

50. It is true that Mangatal J cited the quoted passage from Henderson J with approval in *Re The A Trust*, FSD 163 of 2016 (IMJ), Judgment dated December 1, 2016. The trustee in

that case applied ex parte for directions under section 48 of the Trusts Law seeking approval for its decision not to submit to the jurisdiction of the England and Wales High Court Family Division or provide further information to the beneficiaries. Mangatal J's approval of the trustee's decision was plainly primarily based on her analysis of the substantive decision in *Re B Trust* [2010 (2) CILR 248] and *Re H Trust* [2006] JLR 280 on the principles governing (a) submission by a trustee to the jurisdiction of a foreign court, and (b) the provision of information about a trust for use in proceedings abroad. The existence of a statutory exclusive jurisdiction clause in sections 90, 91 and 93 of the Law was not the subject of any meaningful consideration and the suggestion that these provisions had this effect did not form any discernible part of the actual ex parte decision which the Learned Judge made.

51. Two more recent decisions of this Court reflect a clear finding that section 90 does <u>not</u> confer exclusive jurisdiction on this Court to adjudicate questions which section 90 requires to be determined under Cayman Islands law in relation to a trust governed by Cayman Islands law. Most pertinent is the first *Beddoe* ruling in relation to this very case, *Re Stingray Trust*, FSD 85 and 248 of 2017, Judgment dated September 17, 2018 (unreported), where Parker J held as follows:

> "*88. By section 90 of the Trusts Law (2018 Revision) questions regarding the validity or capacity of the settlor in relation to a trust governed by the laws of the Cayman Islands, or with regard to any disposition of property upon the trust, are to be determined in accordance with Cayman Islands law, without reference to the law of any other jurisdiction with which the trust or disposition may be connected. The Trustee anticipates therefore that the Italian courts will interpret and apply Cayman Islands law to the matters in issue.*"

52. The Order based on that Judgment approved the Trustee's decision to contest the jurisdiction of the Milan Court. After the jurisdictional battle was lost, Parker J on July 11, 2019 approved the Trustee's decision to contest the Milan Proceedings on their merits and to submit to the jurisdiction of that Court. Parker J initially expressly found that section 90 was only a governing law clause and secondly, by necessary implication, found that the present validity dispute could validly be determined by the Milan Court as a matter of Cayman Islands law.

53. Another decision, *HSBC International Trustee Limited-v- Tan Poh Lee et al*, FSD 175 of 2019 (IKJ), Judgment dated October 16, 2019 (unreported) adopted a more ambiguous position. In the latter case, in the context a *Beddoe* application in relation to proceedings relating to a Cayman Islands trust (with an exclusive trust administration forum clause), in my Ex Tempore Ruling in that case, I observed:

> "*31. In my judgment, it is not clear that the legal position is that a foreign court cannot under any circumstances, even applying Cayman Islands law, deal with the issues that appear to arise for determination in the present case, and in those circumstances, I would instead grant a declaration substituting the word "may" for 'will' because it seems to me that the position is certainly arguable. Although the decisions of Justice Henderson in Re B Trust and Mangatal J in Re A Trust did not fully consider the question of the mandatory need for the Cayman Islands court to deal with such matters, I accept entirely that it is arguable that those decisions*[3] *should be followed, but I propose to adjourn these proceedings, await further argument before deciding that issue.*"

Summary: jurisdictional effect of section 90 of the Law

54. In summary, there was no binding or persuasive authority placed before me which displaces the initial view that section 90 does not confer exclusive jurisdiction on this Court to adjudicate all the issues which the section expressly requires to be determined under Cayman Islands law. I find that section 90, applying a purposive construction which is entirely consistent with the natural and ordinary meaning of the section in its wider statutory context, does not require all matters which must be determined under Cayman Islands law to be determined exclusively by this Court.

55. This finding in no way undermines the proposition that the combination of sections 48 and 90 applied to a trust expressly governed by Cayman Islands law will usually mean that an application for *Beddoe* relief is one which "*must be taken before this Court in any event*": per Smellie CJ in *Merrill Lynch-v-Demirel* [2010 (2) CILR 75] at paragraph 20.

[3] *And the common law cases on refusal of recognition and enforcement on public policy grounds referred to in paragraph 19 above.*

Findings: is the trust administration forum clause an exclusive jurisdiction clause?

56. The following opening salvos were fired on this point in the Trustee's Written Submissions:

> *"64. Clause 10.2 of the Declaration of Trust provides that:*
>
> *The courts of the Cayman Islands shall be the forum for administration of this Trust.'*
>
> *Clause 10.2 is an exclusive jurisdiction clause*
>
> *65. It should not be controversial that 'forum for administration' clauses of this type confer exclusive jurisdiction on the courts named in the clause. This has been confirmed in at least three decisions of the Grand Court: Helmsman Limited & Anor v. Bank of New York Trust Company (Cayman) Limited [2009 CILR 490], T Co v. AA& Ors (Unreported, 13 March 2018) and HSBC International Trustee Limited v. Tan Poh Lee & Ors (supra).*"

57. Despite the rigid formulation of this opening submission, it was conceded that there were nuances to the analysis of what the effect of such a clause was to the extent that Parker J in *T Co v. AA& Ors*, FSD 188 of 2017 (unreported, 13 March 2018)[4] qualified his primary finding that a similarly worded clause conferred exclusive jurisdiction on the forum for administration court as follows:

> *"51. The clause nominating the Cayman Islands as the exclusive forum for the administration of the trust does not seem to me to be apt to catch trust litigation by beneficiaries in another jurisdiction against a sister company also in that jurisdiction. There are many aspects of the administration of a trust to which section 48 of the Trusts Law is directed and where the assistance of the Cayman court can be properly sought by the trustee. For example, the true construction of certain powers or obligations in the deed itself, or as to the prudence of distributing assets in circumstances where there are many and different claims pertaining to those assets. The court is*

[4] This decision is noted at [2018 (1 CILR Note 3].

familiar with such applications and to those relating to sanction required to defend legal actions and as to disclosure. They are all aspects of the administration of the trust upon which the court can opine…"

58. In my judgment the question of whether a forum for administration clause, irrespective of whether it is expressed to be exclusive or not, confers exclusive jurisdiction on the relevant court is an arid debate if the context in which the question arises is not taken into account. Clearly the nature of the dispute is relevant. An application for *Beddoe* relief under section 48 of the Trusts law made in the Cayman Islands in relation to a trust containing a forum for administration clause would in most (but not necessarily all) cases justify this Court in viewing itself as vested with exclusive jurisdiction for the purposes of such an application. It is difficult to imagine such an application being contested on jurisdictional grounds, save in the unlikely event that another court had already been invited by the trustee to grant prior or concurrent relief. In reality, when this Court accepts jurisdiction in such circumstances, the substantive finding will generally in reality be that the forum for administration jurisdiction is the natural forum for the application because there is no competing forum. However, it may exceptionally happen that a beneficiary wishing to litigate matters embraced by the clause will be restrained by the forum for administration court from so doing: see e.g. *Re A Trust* [2012] SC (Bda) 72 Civ (12 December 2012) at paragraphs 64-67. In that case an important contextual consideration was the fact that the trust itself had been established to resolve a substantial dispute which the threatened foreign litigation sought to reopen. So the analogy with a contractual exclusive jurisdiction clause was stronger than would ordinarily be the case in the trust context.

59. Mr Hagen QC challenged the Trustee's right to oppose the Guardian's Stay Summons on three important bases of principle. Firstly he submitted that the Trustee was bound by the decision of the Supreme Court of Cassation on jurisdiction. Secondly, he submitted that the Guardian's challenge to the validity of the Trust was made in her capacity as a stranger to the Trust and not as a beneficiary. And thirdly he submitted that the Court should in any event decline to enforce Clause 10.2 even if it was assumed to be an operative exclusive jurisdiction clause. I shall deal with the second and third points first because they were addressed more fully in argument.

60. On the capacity issue, the Guardian's counsel relied on the following passage in '*Lewin on Trusts*', Twentieth Edition at paragraph 11-079:

> "*It is different where the claimant asserts a claim against the trust, as where he claims to be the beneficial owner of the assets held by the trustee by reason of a prior title. In such a case there is no reason why he should be bound or affected by the terms of a trust against which he claims and under which he claims nothing. Accordingly, a jurisdiction clause in the trust instrument, whether exclusive or non-exclusive, has no direct significance…*"

61. In my judgment, despite sympathy for the Trustee's pointing out the apparent inconsistency between the Guardian challenging the validity of the Trust and seeking information *qua* beneficiary under it, the claim brought by the Guardian in the Milan Proceedings is not caught by the forum for administration clause in all the circumstances of the present case. Nonetheless, it is important to note that same paragraph from Lewin partially reproduced above goes on to opine as follows:

> "*…Nonetheless, the clause may be relevant to the question of the appropriate forum, in that because of the clause any Beddoe application about the claim will ordinarily have to be brought in the designated jurisdiction; and since one of the matters to be considered in a Beddoe application in this context is whether beneficiaries should be added as parties to the main action, and the claimant may be involved in the Beddoe application, it may be better for the main action also to be brought in the same jurisdiction.*"

62. The latter observations clearly contemplate what might fairly be described as the usual context in which the issue of which jurisdiction the main litigation should take place in ordinarily arises: before rather than after the main proceedings have not only commenced but the trustee has elected to contest on their merits before a foreign court. I will return to this pivotal factor below.

63. The second (and alternative) point of principle which Mr Hagen QC relied upon to neutralize the effect of the forum for administration clause as excluding the Guardian's right to pursue the Milan Proceedings was the different character of exclusive jurisdiction clauses in trust instruments as contrasted with contractual clauses. Even if the Guardian was regarded as bringing her invalidity claim in her capacity as a beneficiary, reliance was placed on the Judicial Committee of the Privy Council decision in *Crociani-v-Crociani* [2014] UKPC 40. In that case, concerning an express exclusive administration forum clause, Lord Neuberger (delivering the advice of the Board) held as follows:

"30. In the Board's view, (i) the Court of Appeal was right in concluding that no part of clause 12(6) of the 1987 Deed was concerned with identifying which country's courts should have jurisdiction to determine disputes relating to the Grand Trust, but (ii) if that conclusion is wrong, (a) it may well be that the clause would only confer non-exclusive jurisdiction on the courts of the country to which it refers, and (b) there would seem to be a strong case for saying that its effect was that the Jersey courts had jurisdiction in relation to three out of the four principal claims brought in these proceedings.

31. It is right to mention that counsel referred to a number of cases (including EMM Capricorn Trustees Ltd v Compass Trustees Limited [2001] JLR 205, Green v Jernigan (2003) 6 ITELR 330, Koonmen v Bender (2002) 6 ITELR 568, Helmsman Ltd v Bank of New York Trust Company (Cayman) Ltd [2009] CILR 490, Re Representation of AA [2010] JRC 164 and Re A Trust [2012] Bda LR 79) where different courts have considered provisions in trust deeds which bore significant similarities with clause 12(6) of the 1987 Deed. The decisions are not all mutually consistent, some of them involved concessions and the remainder depended on the arguments advanced, they all inevitably turn on the precise wording of the clause in question, and none of them is binding on the Board. No disrespect is intended to the Judges involved in those decisions by not referring to them further, but they do not cause the Board to change its view. If, by the time the 1987 Deed had been executed, there had been a well-established judicial consensus that either or both expressions relied on by the appellants had the meaning for which they contend, then the Board may well have reached a different conclusion…

34. As Lord Hobhouse of Woodborough explained in para 45 of that case, the defendant to such a claim 'has a contractual right to have the contract enforced' and his 'right specifically to enforce his contract can only be displaced by strong reasons being shown by the opposite party why an injunction should not be granted'. Thus, where a claim has been brought in a court in breach of a contractual exclusive jurisdiction clause, the onus is on the claimant to justify that claim continuing, and to discharge the onus, the claimant must normally establish 'strong reasons' for doing so. Counsel referred to other cases where judges have expressed themselves somewhat differently, but the Board considers that the

position is accurately stated by Lord Bingham and Lord Hobhouse, and that any statement which is said to involve a different approach should not be followed.

35. The question of principle which arises in this case is whether the same test applies to an exclusive jurisdiction clause in a deed of trust. Contrary to the appellants' argument, the Board is of the opinion that it should be less difficult for a beneficiary to resist the enforcement of an exclusive jurisdiction clause in a trust deed than for a contracting party to resist the enforcement of such a clause in a contract. The Board is of the opinion that in the case of a trust deed, the weight to be given to an exclusive jurisdiction clause is less than the weight to be given to such a clause in a contract. Given that a balancing exercise is involved, this could also be expressed by saying that the strength of the case that needs to be made out to avoid the enforcement of such a clause is less great where the clause is in a trust deed.

36. In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where, as here (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption that the clause should be enforced. In the case of a trust, unlike a contract, the court has an inherent jurisdiction to supervise the administration of the trust – see eg Schmidt v Rosewood Trust Ltd [2003] UKPC 26, [2003] 2 AC 709 para 51, where Lord Walker of Gestingthorpe referred to "the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts". This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for present purposes, significant distinction between trusts and contracts.

37. Accordingly, the Board considers that, while it is right to confirm that a trustee is prima facie entitled to insist on and enforce an exclusive jurisdiction clause in a trust deed, the weight to be given to the existence of the clause is less (or the strength of the arguments needed to outweigh the effect of the clause is less) than where one contracting party is seeking to enforce a contractual exclusive

jurisdiction clause against another contracting party. It is right to mention that counsel referred to some cases (including some of those identified in para 31 above) in which it seems to have been assumed that the weight was the same, but it does not appear to the Board that the issue was fully discussed or considered in any of those cases, which are in any event not binding on the Board."

64. I extract the following relevant principles from *Crociani*:

(a) *prima facie*, a trustee can enforce an exclusive jurisdiction clause against a beneficiary;

(b) whether the clause is an exclusive jurisdiction clause may depend on the wording of such clause;

(c) whether a particular dispute is potentially caught by the clause depends on the nature or legal character of the dispute;

(d) it will be easier for a beneficiary to resist enforcement of an exclusive forum for administration clause than it will be for a party to resist enforcement of a contractual exclusive jurisdiction clause.

65. It is true that in considering the alternative hypothesis that the clause in *Crociani* did operate as an exclusive jurisdiction clause, the Privy Council refused to give effect to the clause on the principal grounds that at the time of the relevant events, the administration forum had been Jersey (not Mauritius) and that most issues in the dispute were governed by Jersey law. Dealing with the alternative assumption here that the Guardian's claim is caught by the relevant administration forum clause[5], I find that the Guardian is not bound by it in any event because:

(a) clause 10.2 of the Declaration of Trust is not by its terms expressed to be an "exclusive" forum for administration clause;

(b) the validity issue has not arisen as an application for *Beddoe*-type relief under section 48 of the Law; and

[5] Dealing with hypotheses which have been rejected is necessarily artificial and obviously undermines the weight that can be attached to the alternative 'findings' in analytical terms.

(c) (most significantly) it is too late for the Trustee to seek to compel the Guardian to have the validity issue determined in the forum for administration having already obtained *Beddoe* approval for the dispute to be adjudicated on its merits before the Milan Court.

66. No authority ought to be required to support a finding that the wider litigation history of an application to enforce an exclusive jurisdiction clause may be a weighty consideration in determining whether or not to enforce such a clause. This is obviously a factor which is equally pertinent in relation to the broader *forum non conveniens* issue considered separately below. In *Crociani*, the litigation history was far less stark, but it was nevertheless taken into account as a material consideration:

> "*44. Fourthly, the appellants made it clear in correspondence before the Proceedings were issued that they were 'willing and able to explain themselves to the Royal Court'. While the Board does not consider that this could give rise to an estoppel, it was a clear and unequivocal statement to the respondents that the appellants were content with, indeed expecting, the respondents' claims to be pursued in Jersey.*
>
> *45. Fifthly, reinforcing this point, the appellants were plainly content with the Jersey courts as the forum for determining disputes in connection with the Grand Trust, in so far as they arose under the 2012 Deed. As already indicated, this is a relatively small point but it has some force.*"

67. I assume for present purposes that the Trustee is <u>not</u> actually estopped from re-litigating the jurisdiction issue based on the findings of the Supreme Court of Cassation (a point considered summarily below). I find that the fact that the Trustee has already (with Parker J's express approval) elected to submit to the jurisdiction of the Milan Court on the merits and the fact that those proceedings have progressed to the stage where what appears to be a final hearing has been scheduled is a powerful factor weighing against permitting the Trustee to enforce Clause 10.2 at this stage. This conclusion is reinforced by the fact that:

(a) the Guardian first commenced proceedings against the Trustee on December 16, 2015 in Lugano, Switzerland; and

(b) the Trustee first formally signified an intention to enforce the assumed exclusive jurisdiction clause on August 16, 2019 by filing its application for leave to amend its Originating Summons;

(c) the Trustee has identified no clear explanation as to why it was considered appropriate or necessary to pursue the unusual course of litigating the same issue in concurrent proceedings just over a month after Parker J on July 13, 2019 approved the decision to contest the merits of the validity issue in the Milan proceedings

(d) that application has not been actively pursued since its filing on 16 August 2019, over three years after the Milan Proceedings were commenced and over one year after the Trustee had submitted to the jurisdiction of the Milan Court.

68. In seeking to enforce clause 10.2 against the Guardian as an exclusive jurisdiction clause, the Trustee was effectively asking the Court to decide, at least in principle, the Trustee's entitlement to an anti-suit injunction. Mr Robinson QC explained that if the Guardian's application to stay the present proceedings was refused, the Trustee would proceed with its amendment application and apply for an anti-suit injunction to restrain the Guardian from proceeding with the Milan Proceedings. I do not accept Mr Hagen QC's apparent submission in reply that I should not prejudge that application. It is impossible to accept his submission that the Court in its discretion should hold that the Guardian is not bound by clause 10.2 without, by necessary implication, deciding whether the proposed application for an anti-suit application is at least arguable. If it is arguable, that would constitute grounds for either refusing the Guardian's present Stay Summons or adjourning it for determination after the Trustee's proposed application for an anti-suit injunction had been heard.

69. Whether or not an exclusive jurisdiction clause in a contract should not be enforced on discretionary grounds typically applies in the context of an application for an anti-suit injunction. It seems to me to be fortuitous that the issue is being formally raised in answer to the Guardian's application to stay proceedings in the "agreed" forum rather than in the context of the formal hearing of the Trustee's own application for an anti-suit injunction. The Trustee's invitation to the Court to refuse the Guardian's Stay Summons on the grounds that the Guardian, *qua* settlor is bound by an exclusive jurisdiction clause in the Trust would establish the basic foundations for an anti-suit injunction being granted in its favour. Having regard to the Overriding Objective, it is clear that I should determine at this stage when all the relevant material (formalities apart) is before the

Court whether or not there is an arguable basis for granting an anti-suit injunction in favour of the Trustee. This issue is the corollary of the issue which has formally been placed before the Court: are there discretionary grounds for declining to enforce an assumed exclusive jurisdiction clause in the Trust instrument, bearing in mind that such a clause has less legal weight than its contractual equivalent.

70. Viewed through the lens of an application for an anti-suit injunction, the legal principles which are most pertinent in light of the delay the Trustee is guilty of in seeking to enforce Clause 10.2 in the present case were mentioned by the Privy Council in *Crociani-v-Crociani* where Lord Neuberger (at paragraph 33) cited a passage from Lord Bingham's speech in *Donoghue-v-Armco* [2002] *1 All ER 749* (at paragraph 24) which included his observation that "*a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct*". The same *dicta* were placed before the Court as cited in Eason Rajah QC and Anthony Robinson, '*Jurisdiction clauses in trusts*' (2015) Trusts & Trustees at page 6, to which the Guardian's counsel referred on another point.

71. These trite principles may be further illustrated by reference to an authority not referred to in argument, *Daiichi Chuo Kisen Kaisha-v-Chubb Seguros Brasil S.A.* [2020] EWHC 1223 (Comm). In that case, Henshaw J observed:

"*60. In Qingdao Huiquan Shipping Co v Shanghai Dong He Xin Industry Group Co Ltd [2018] EWHC 3009 (Comm); [2019] 1 Lloyd's Rep. 520 Bryan J identified the following three relevant principles relevant to delay:*

'(1) There is no rule as to what will constitute excessive delay in absolute terms. The court will need to assess all the facts of the particular case: see Essar Shipping Ltd v Bank of China Ltd (The Kishore) [2016] 1 Lloyd's Rep 427 at paras 51 to 52 per Walker J.

(2) The question of delay and the question of comity are linked. The touchstone is likely to be the extent to which delay in applying for anti-suit relief has materially increased the perceived interference with the process of the foreign court or led to a waste of its time or resources: see Ecobank Transnational Inc v Tanoh [2016] 1 Lloyd's Rep 360 at paras 129 to 135 per Christopher Clarke LJ; The Kishore at para 43; and see also Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd [2017] 1 HKC 153 at para 21 per Kwan JA.

(3) When considering whether there has been unacceptable delay a relevant consideration is the time at which the applicant's legal rights had become sufficiently clear to justify applying for anti-suit relief: see, for example, Sabbagh v Khoury [2018] EWHC 1330 (Comm) at paras 33 to 36 per Robin Knowles J." (§ 29)

61. Raphael summarises the principles in this way:

> *'The significance of delay will depend on all the circumstances of a particular case. But some principles have been identified in the case law. First, even where there is a binding exclusive forum clause, the injunction should be sought promptly, and before the foreign proceedings are too far advanced. Second, the questions of delay and comity are linked. The more closely that the foreign court has become involved with the matter due to delay, the greater the interference with foreign court that an injunction is likely to produce, and so the stronger the factors against the grant of an injunction. Third, prejudice to the injunction defendant due to delay is significant, and if delay is not prejudicial it may be given significantly less weight. But delay is not necessarily immaterial in the absence of prejudice to the injunction defendant. The need to avoid delay arises from a variety of reasons including, in addition to prejudice to the injunction defendant, waste of judicial resources, the need for finality, and comity towards the foreign court. Fourth, and perhaps most importantly, the courts will take into account the extent to which the delay was justifiable or excusable in the circumstances; and will weigh delay against the importance of enforcing the forum clause. Even delay that can be criticized will often not be sufficient to justify refusing an injunction and thus permitting a breach of contract to continue. It seems that time taken in challenging the foreign court's jurisdiction does not in itself justify delay in applying for an anti-suit injunction.' (§ 8.21).*"

72. Mr Hagen QC when dealing with the *forum non conveniens* point submitted that it was "*blindingly obvious*" that this Court should not assume jurisdiction. He was relying, as I understood it, in large part on the history of the various proceedings and where things now stood. I find that it is plain and obvious that the proposed application by the Trustee for an anti-suit injunction is unarguable, being first actively advanced nearly five years after the validity of the Trust was first challenged in foreign proceedings and over a year after the Trustee submitted to the jurisdiction on the merits of the Milan Proceedings.

73. It follows that assuming Clause 10.2 to be an exclusive jurisdiction clause which captures the Guardian's invalidity claim:

(a) I would in the exercise of my discretion decline to enforce the assumed exclusive jurisdiction clause; and

(b) Clause 10.2 does not provide grounds for refusing the Guardian's Stay Summons.

74. In light of the above findings, I find it unnecessary to decide whether or not the Supreme Court of Cassation's decision on jurisdiction estops the Trustee from re-litigating the jurisdiction question. It was a decision which took into account, to some extent, Cayman Islands law and cited the *Crociani* case. However, I accept Mr Robinson QC's submission that paragraph 23 of the Judgment suggests that the pivotal decision was based on the Lugano Convention, which was said to only recognise exclusive jurisdiction clauses in instruments governed by the laws of Convention countries, "*which the Cayman Islands are not*". Recognising for issue estoppel purposes a judgment under a foreign legislative scheme which appears not to recognise Cayman Islands exclusive jurisdiction clauses raises complicated policy considerations in relation to this Court's statutory duties to supervise trusts under the Law. The complexities of this point were not sufficiently canvassed in argument to justify addressing it in the present case.

75. For the avoidance doubt, my primary finding is that the forum for administration clause is not an exclusive jurisdiction clause enforceable against a party suing in the capacity of a stranger to the Trust. Nothing set out above is intended to undermine the force of such clauses in relation to applications under section 48 of the Law for *Beddoe* relief made by the trustees of Cayman Islands law governed trusts.

Findings: is the Cayman Islands the most appropriate forum?

Governing principles

76. The general principles governing *forum non conveniens* were not in dispute. In *Globalvest Management Company LP et al-v-Dantas et al*, Grand Court Cause No. 418 of 2004, Judgment dated February 28, 2006, Levers J (at pages 24-25) held as follows:

> "*The Court in considering whether there is an alternative forum will look at various factors, including looking for:*

(a) *the country with which the action has the most real and substantial connection;*

(b) *the place of residence or business of the parties. A stay for example will more readily be granted if service was effected during a temporary visit to a country. On the other hand where the defendant has an established place of business within the jurisdiction very clear and weighted grounds must be shown for refusing to exercise jurisdiction;*

(c) *The Court will also consider the availability of factual and expert witnesses;*

(d) *The law governing the dispute; and*

(e) *Whether the parties have conferred jurisdiction on a particular court.*"

77. Those principles were commended to the Court by Mr Hagen QC. Mr Robinson QC relied on substantially the same principles in the Trustee's Written Submissions at paragraphs 98 to 99. In oral argument, he referred the Court to *Lungowe-v-Vedanta Resources plc* [2019] 2 WLR 1051 at 1072 where Lord Briggs (referring to CPR r 6.37(3)) opined as follows:

"*66…The italicised phrase is the latest of a series of attempts by English lawyers to label a long-standing concept. It has previously been labelled forum conveniens and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules' requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the Spiliada case, summarised much more recently by Lord Collins in the Altimo case at para 88 as follows: 'The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; …'*

That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be

applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

78. However, the main thrust of the Trustee's legal submissions was to emphasise the importance of the governing law factor in a trust case. Reliance was placed on the following passage from '*Lewin on Trusts'* at paragraph 11-013:

"*In the case of a claim under a trust, however, a jurisdiction clause in a trust conferring exclusive or non-exclusive jurisdiction on the [Cayman Islands] court will normally but not invariably be decisive in favour of satisfaction of the requirement that [the Cayman Islands] is the proper place in which to bring the claim, even though this country would not otherwise be the natural forum…The fact that the trust is governed by [Cayman Islands law] may be a factor of some weight in favour of treating the [Cayman Islands court] as the appropriate forum…Other things being equal, it is preferable for a case to be heard in the country of the applicable law, a principle which applies in trust cases as in others. The significance of the proper law, however, will vary from case to case: where the issues will be primarily factual rather than legal, or the trust laws of the competing fora are similar, the proper law may not matter greatly.*"

79. I accept the principles relied upon in general terms. The Guardian's counsel relied heavily on *Navigators Insurance Company-v-Atlantic Methanol Production Company LLC* [2003] EWHC 1706 (Comm) to illustrate how these general principles are applied. Steel J held that the significance of English governing law was diminished where the primary issues were factual (paragraph 45) and the legal issues were straightforward (paragraph 48). Those findings clearly support the Guardian's forum case. However, I consider the ultimate findings in that case as most persuasive for present purposes:

"*51.This leads to the last consideration namely the progress of the Texas proceedings. I appreciate that Texas was not Ampco's first choice. The rationale for plumping for Oklahoma remains obscure. I also appreciate that the Texas proceedings were not commenced until after the issuance and service of these proceedings.*

52. But the fact remains that: -

i) The Texas proceedings have reached the stage of discovery: indeed the deposition of Navigators Insurance is scheduled for the 14th July 2003.

ii) Both Marathon and Noble Energy are co-claimants and UEII are interveners.

iii) There is no issue that Texas has jurisdiction and is an appropriate venue.

iv) The application to dismiss or stay the Texas proceedings on forum non-conveniens grounds has been denied. Although the point might be re-argued in the event that this court were to retain jurisdiction, I do not understand that that decision denying the motions has been appealed.

v) Case management orders have been made making provision for such matters as expert evidence and mediation leading up to a trial in March 2004, a date significantly earlier than that on which any trial in England would be likely to take place.

53. It is not suggested by the Claimants that concurrent proceedings are appropriate. Indeed to my mind, the usual risk involved with multiplicity of proceedings (the risk of enhanced cost and inconsistent decisions), taken with the progress already made in Texas, provides very substantial support for the Defendant's application.

Conclusion

54. In my judgment, the interests of the parties and the ends of justice are best secured (assuming that there is a triable issue) by setting aside service of these proceedings."

80. When considering which forum is the most appropriate in the context of concurrent proceedings, (a) the fact that jurisdiction has been challenged and lost in the foreign proceedings and (b) the more advanced status of those foreign proceedings, may well be dispositive of a stay application.

Is the Cayman Islands the most appropriate forum?

81. I find that it is ultimately obvious that the Milan Court is an appropriate forum in circumstances where:

(a) section 90 of the Law does not contain a statutory exclusive jurisdiction clause (a point which was previously unclear before the point was fully argued in the present case and resolved herein on the basis set out above);

(b) Clause 10.2 of the Declaration of Trust does not constitute an exclusive jurisdiction clause enforceable against the Guardian in respect of her claim that the Trust is invalid;

(c) there is no arguable basis upon which the Trustee could seek an anti-suit injunction to restrain the Guardian from continuing the Milan Proceedings if the Guardian's application to stay the present proceedings were to be refused; and

(d) there is no identifiable utility to facilitating concurrent proceedings on the same issue before this Court and the Milan Court in circumstances where the Trustee has already submitted to the jurisdiction of the Milan Court and those proceedings are far advanced.

82. The merits of the Guardian's application to stay the present proceedings do not depend on a careful weighing of the standard *forum non conveniens* factors. The dispositive consideration, in the unusual circumstances of the present case, is the stage at which the application is being heard. A trustee wishing to have a contentious issue concerning a Cayman Islands trust determined by this Court must ordinarily seek to invoke this Court's jurisdiction as first rather than as a last resort. Once a litigant has already submitted to the jurisdiction of the foreign court and concurrent proceedings are substantively proceeding abroad, the spectre which looms over a belated application to invoke this Court's jurisdiction will usually be a stark one. Should this Court permit concurrent substantive proceedings in this jurisdiction alongside proceedings in another forum? This will be the critical question, for the reasons articulated in *Navigators Insurance Company-v-Atlantic Methanol Production Company LLC* [2003] EWHC 1706 (Comm) at paragraphs 51-53 (cited above).

83. In the present case the standard forum factors, viewed in isolation from the wider litigation history, are fairly evenly balanced, for the reasons set out at paragraph 26 above. If the present application was being heard before or shortly after the Milan Proceedings were commenced in 2016, the scales might well have tipped decisively in favour of finding that the Cayman Islands was the most appropriate forum. This Court's ability to deal with the validity issue under Cayman Islands law without the need for expert evidence and probably more quickly might well have been decisive. Four years on, with the Milan Proceedings in full flow (albeit at a somewhat stately pace), the significance of the Trust's Cayman Islands law connections have materially waned. It is understandable that the Trustee felt that its own European jurisdictional ties and the location of the trust assets there made it necessary to submit to the jurisdiction of the

Milan Court. It is unclear why, apart from Covid19-related delays in the Milan Proceedings, the Trustee thereafter sought to reverse that course. Mr Robinson QC was unable to satisfactorily respond to my query in the course of argument as to what had changed since the Trustee's Court-approved decision to submit to the merits of the Milan Proceedings. To my mind, after that submission abroad, it would have required a major shifting of the tectonic plates beneath the legal landscape of this litigation to justify the subsequent finding that the Cayman Islands was the most appropriate forum after all. In all the circumstances, I find that the Guardian's case for a stay of the present proceedings on the grounds that Italy is the most appropriate forum for the dispute as to the Trust's validity to be adjudicated has been clearly made out.

84. Mr Hagen QC indicated that any concerns this Court had about whether or not Cayman Islands law would be applied by the Milan Court could be allayed by granting a stay subject to a condition that Cayman Islands law is in fact applied in determining the validity dispute. In my judgment the policy imperatives of section 90 of the Law are sufficiently strong for such a condition to be imposed when granting the proposed stay, more as a matter of principle than based on concerns about the approach likely to be taken by the Milan Court. That Court has seemingly already accepted that the validity issue will be determined in accordance with Cayman Islands law. Italian courts are unlikely to be unfamiliar with the task of applying foreign law in any event due to their modern and historical experience of the conflict of laws. It has been academically noted that:

> "*Private international law was invented as a mechanism for the reconciliation of higher level natural law with the existence of diverse laws in the different Italian city states.*"[6]

Conclusion

85. For the above reasons, the Guardian is entitled to an Order that the claim for relief set out at paragraphs 3 and 4 of the Originating Summons be stayed pursuant to the inherent jurisdiction of the Court on the grounds that the Cayman Islands is not the appropriate forum for the trial of this matter, and that the more convenient and appropriate forum is the Court of Milan, Italy, subject to the condition that the question of whether the Trust is valid or invalid is determined through the application of Cayman Islands law. I will hear

[6] Mills, '*The Private History International Law*' (2006) 55 ICLQ 1-49 at 46.

counsel, if required, as to costs and any other matters arising from the present Judgment. However, my provisional view is that bearing in mind that the Trustee has pursued an arguable point of construction on section 90 of the Law, each party's costs should be payable out of the assets of the Trust.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY

JUDGE OF THE GRAND COURT