Trinity Term

[2018] UKPC 21

Privy Council Appeals No 0005 and 0006 of 2017

JUDGMENT

Gany Holdings (PTC) SA (Appellant) v Khan and others (Respondents) (British Virgin Islands)

Rangoonwala (Appellant) v Khan and others (Respondents) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed

Lord Sumption

Lord Hodge

Lord Lloyd-Jones

Lord Briggs

JUDGMENT GIVEN ON

30 July 2018

Heard on 14 June 2018

Appellant	Respondents
(Gany Holdings (PTC) SA	(Khan and others)
Jonathan Crow QC	Alan Boyle QC
Donald Lilly	Richard Wilson QC
	Zahler Bryan
	Nicholas Brookes
(Instructed by Bircham Dyson Bell LLP)	(Instructed by Stephenson Harwood LLP)

Appellant

(Asif Rangoonwala)

Sue Prevezer QC

Ted Greeno

Andrew Willins

(Instructed by Bircham Dyson Bell LLP)

LORD BRIGGS:

1.
Mohamed Aly Rangoonwala ("MAR") died intestate on 12 June 1998, aged 74, after a long and, despite vicissitudes, successful business career in Pakistan, London, Hong Kong, Malaysia and elsewhere. He left behind him his second wife Banu, four sons, (in age order) Salim (now deceased), Tariq, Asif and Khalid (born between 1948 and 1960), and one daughter Zorin, born in 1952.

2.
In September 1982 MAR caused to be established a discretionary trust, with himself, his wife, children and their spouses as the main beneficiaries, called the ZVM Trust ("the Trust"). In November 1993 MAR, as appointor under the Trust, caused the first appellant Gany Holdings (PTC) SA ("Gany"), a company he had incorporated in the British Virgin Islands, to become the sole trustee of the Trust. Gany remained in office as sole trustee until March 2017 when it was removed by order of the British Virgin Islands Commercial Court, pursuant to an order of the Court of Appeal in March 2016.

3.
On MAR's death Asif succeeded him as appointor under the Trust. By an instrument in writing executed pursuant to a resolution of the directors of Gany on 22 December 1998 ("the 1998 Appointment") Gany as trustee purported to appoint the whole of the trust fund, as then constituted, to Asif beneficially.

4.
There are two main issues in the litigation which have led to this appeal, instituted by Zorin, her husband and daughter Sasheen in January 2012. They are, first, what constituted the property of the Trust when MAR died and, secondly, whether the 1998 Appointment was voidable, because of a misconception on the part of Gany as trustee as to the identity and value of the trust property. A third issue, the resolution of which turns on the outcome of the first two, was whether Asif should be ordered to account in relation to trust property received by him from Gany pursuant to the 1998 Appointment, if avoided. Gany and (later) Asif were therefore both joined as defendants to the claim, and are the appellants on this appeal.

The First Issue - What was the property of the Trust when MAR died?

5.
Central to an understanding of the development of this dispute is the undoubted fact that (as the judge found), beginning in the 1980s and accelerating in and after 1992, MAR delegated the management and then the control of increasing proportions of his business interests and affairs to Asif to the extent that, by the time of MAR's death in 1998, Asif was in de facto control of substantially all of them, to the exclusion of his siblings, save to the extent that, thereafter, he chose to involve them. Importantly for present purposes, Asif was, immediately following MAR's death, the sole appointor under the Trust, the sole surviving director of Gany and claimed to be in possession of Gany's single bearer share. As appointor Asif had power under the terms of the Trust to appoint and remove trustees, and to appoint successor appointors. As sole shareholder and director of Gany he was in a position to control (subject to its fiduciary obligations) the exercise of the wide discretions and other powers conferred by the terms of the Trust upon its trustee.

6.

Shortly after his father's death, Asif did appoint members of his family to formal roles in connection with Gany and the Trust. Thus, in July 1998 he appointed his brother Khalid and a Mr Mohamed Salim as successor appointors in the event of his death. He appointed his mother Banu, Salim and a Ms D'Cruz as directors of Gany.

7.
Thereafter, and in two distinct phases, Asif went out of his way to make it appear to his siblings, and to Zorin in particular, that there was substantial property held by Gany on the terms of the Trust amounting in value to many millions of dollars. The first phase (shortly before the 1998 Appointment), consisted of Asif telling Zorin, Khalid and Tariq at a family meeting in London that they would each receive US$2m from the Trust in return for letters from them waiving any further claims against the Trust or against MAR's estate. Those payments were in due course made (although not, as the judge held, from property of the Trust) and the waiver letters signed. Asif also arranged for payment of US$1m to his half-brother Salim.

8.
The second phase consisted of an extended series of negotiations between 2005 and 2011 during which Asif and Khalid proposed to their siblings that the Trust would be reconstituted by the establishment of sub-trusts for each sibling. The clear implication conveyed by those discussions, and documents presented during them, was that the Trust was possessed of property with an aggregate value in excess of EUR90m, consisting of interests in a lengthy list of specified companies.

9.
Following the breakdown of those negotiations, Gany informed solicitors acting for Zorin, for the first time, that the whole of the Trust's property had been distributed by 2000 following the payments to each of the siblings in 1998. In February 2012 Gany, through solicitors, informed Zorin's solicitors that, to the best of its then director's knowledge, no companies had ever been held by the Trust.

10.
In its original form, the respondents' claim sought (against Gany only) disclosure of information and documents about the Trust and its property, including interests in companies. Gany's initial response (in the form of an affidavit sworn by its director Khalid on its behalf) in April 2012, was that the Trust had never held any property other than an initial settlement sum of US$100, that it had never had any interest in any corporate entities, and that the payments made in 1998 to the children had not come from the Trust. This case was repeated in Gany's original defence, served in February 2013. In short, Gany's case was that the Trust was, and always had been, an empty shell.

11.
By the time of trial both Gany and (after his joinder) Asif had conceded that the shareholding in one company, namely European Commodities Hong Kong Ltd ("ECL HK") had been vested in Gany on the terms of the Trust, but it was said that ECL HK owned no assets of its own of significant value, although it had, purely as nominee, held shares in another company, Valson International Limited ("Valson"), initially for MAR and later for Asif.

12.
In the witness statement which constituted his evidence in chief at the trial, Asif said that in the early 1990s MAR had agreed to transfer all his business assets to him (Asif). This was to be (and was) achieved in around 1994 and 1995. He said "the mechanism we used to transfer these assets to me was to place them all in the name of Gany and then to give me control of Gany both at shareholder and board level". Among the assets thus transferred to Gany Asif listed the following: ECL HK and the

following three companies ("the three companies"): European Commodities BVI Limited ("ECL BVI"), Schweizer Holdings SA ("Schweizer") and Cedilla Investments SA ("Cedilla"). All three companies were incorporated in the British Virgin Islands.

13.
The judge's conclusion as to the identity of the property of the Trust as at MAR's death, after a four-day trial which included cross-examination of Asif, was that no evidence had been adduced by the respondents to falsify Gany's account, which limited the Trust's property to the initial settlement sum and the shares in ECL HK. At para 65 of his reserved judgment he said:

"In this case there is no evidence that any property, other than the ECL HK shares, was the subject of a gratuitous transfer to any of Schweizerisch Finance Ltd, Maly International SA or Gany while each was Trustee of the Trust."

Accordingly, Gany and Asif succeeded at trial on the first issue.

14.
The Court of Appeal held that the conclusion of the judge, quoted above, had clearly been wrong, since there had been evidence from Asif, which the Board has summarised above, that the shareholdings in each of the three companies had been transferred to or otherwise vested in Gany while it was a trustee of the Trust. Basing its reasoning on In re Curteis' Trusts (1872) LR 14 Eq 217, the Court of Appeal concluded that there was a rebuttable presumption in law that property gratuitously transferred to a person or persons who were, at the time of the transfer, trustees of a trust previously established by the transferor, was to be regarded as transferred subject to the terms of that trust. Since the judge had rejected Asif's case that MAR had intended thereby to transfer beneficial ownership of those companies to Asif, and since there was no evidence that MAR intended to retain beneficial ownership of those companies for himself, it followed that the three companies were to be regarded as having become property of the Trust by the time of MAR's death. Accordingly, by para 2 of its Order made on 14 March 2016 ("the March 2016 Order") the Court of Appeal directed that Gany's account of the assets of the Trust be amended so as to include the shares in each of the three companies.

15.
Both Gany and Asif appeal that part of the Court of Appeal's Order. Their grounds are, in summary, that:

i)
There is no such presumption in law as that identified by the Court of Appeal as being derived from In re Curteis' Trusts.

ii)
The reversal by the Court of Appeal of the judge's decision on the first issue was therefore an illegitimate interference with unimpeachable fact-finding by a judge who had heard all the evidence, based upon an error of law.

The First Issue - Analysis

16.
The opinion of the Board is that both the judge and the Court of Appeal went wrong in their analysis of the first issue. In summary, the judge was (as the Court of Appeal rightly held) wrong to conclude that there had been no evidence probative of a conclusion that the three companies were property of

the Trust. The Court of Appeal was wrong to decide that the issue could be resolved by reference to any legal presumption, whether derived from In re Curteis' Trusts or otherwise. Nonetheless, for the reasons which follow, the Board has decided, on a re-consideration of the available evidence and of the inferences which ought to be drawn from it, that the decision of the Court of Appeal, namely that the three companies did become property of the Trust during MAR's lifetime, was correct.

17.
It is convenient to begin with a re-statement of the basic principles by which equity (which in this respect is shared by England and Wales and the British Virgin Islands) provides for identification of beneficial interests arising from a gratuitous transfer of property. First, if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them: see for example Whitlock v Moree [2017] UKPC 44. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. Finally, recourse may be had to time-honoured presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court.

18.
Gratuitous transfers of property between persons who are, respectively, the settlor and the trustees of a trust previously established are only a sub-set of cases of this kind, but the existence of that relationship of settlor and trustee between them may, and frequently will, form a powerful contextual basis for the drawing of common sense inferences as to mutual intention.

19.
This is exactly what happened in In re Curteis' Trusts. The Reverend C T Curteis directed his bankers to invest £2,000 standing to the credit of his account in consols and to hold them in the name of four persons who were the trustees of his earlier-established marriage settlement. The question arose after his death, whether the investment was to be held by them as trustees, as an augmentation of the trust fund, or upon resulting trust for him beneficially. In a short, trenchant, judgment Sir James Bacon VC said, at pp 220-221:

"I do not say that this case is so clear as to be beyond a doubt, but the evidence seems to me sufficient to enable me to pronounce an opinion as to the intention of the testator. When he directed the sum of £2000 to be invested in the names of the four trustees he did not communicate to them what he had done, and it must therefore be presumed that he intended them to take it in the character of trustees only. He placed the fund in their names by a deliberate act. What was his purpose in doing this? Why did he select these four persons out of all the rest of the world? It is contended that he intended a resulting trust for himself. What reason is there for supposing this? If he had meant the fund for his own benefit, he would have told the trustees of his intention. As he did not do so, it must be presumed that he intended it to be held upon the same trusts as the trust fund to which it was added. A

considerable time elapsed before his death, and he did no act during that period to shew any contrary intention …"

20.
While it is true that the Vice-Chancellor twice used the word "presumed" in that short passage, it is clear that he was not speaking of a legal presumption, but rather of an inference to be drawn from the facts about what the transferor said and did, set in the context of the pre-existing relationship between him and his marriage settlement trustees. It is not a case of a competition between competing legal presumptions (including for that purpose the presumed resulting trust) but a pragmatic analysis of the alternatives, and a sensible deduction as to what the transferor intended.

21.
The case was so described in Vandervell v Inland Revenue and Customs [1967] 2 AC 291, where Lord Upjohn was describing how easily the presumption of a resulting trust could be rebutted by evidence of intention. At p 313D he said:

"A very good example of this is to be found in the case of In re Curteis' Trusts where Bacon VC, without any direct evidence as to the intention of the settlor, drew a common-sense deduction as to what he must have intended. In reality the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution."

22.
This analysis was adopted in the Grand Court of the Cayman Islands by Smellie CJ in JF& MF Hexagon Investments (2015-16) 18 ITELR 470 at paras 172-174. By contrast, the opinion of the editors of Lewin on Trusts (19th ed) (2014) at para 9-034, that In re Curteis' Trusts establishes a presumption is, in the Board's view, wrong.

23.
The Court of Appeal was nonetheless correct to conclude that an error in the judge's fact-finding on this issue was sufficient to enable the question to be re-examined on appeal. It is of course true that an appellate court will not lightly depart from a judge's findings of fact, all the more so where the judge has had the benefit, of which the appellate court is deprived, of seeing and hearing the witnesses, in particular under cross-examination, and considering the case over an extended trial, at a level of detail unlikely to be practicable on appeal. Nonetheless, a plain error on a threshold finding of fact may disable the first instance judge from a reliable analysis of the factual issue. In the present case, the judge concluded (in the passage quoted above) that there was simply no evidence to show that shares in any of the three companies had been transferred to or vested in Gany at a time when it was a trustee of the Trust, that is, from 15 November 1993 until (at least) MAR's death in June 1998. On the contrary, there was such evidence in the form of clear statements in Asif's witness statement, deployed as evidence in chief, as to ECL BVI in paras 58 and 71, as to Cedilla in para 71 and as to all three companies in para 87, where Asif described them as subsidiaries of Gany. In relation to ECL BVI, Asif said that this occurred on 18 March 1994 by way of a share allotment to Gany. He provided no dates in relation to Cedilla or Schweizer, beyond the general assertion that the transfer or vesting of shares in all three companies to or in Gany was part of the same process undertaken by MAR in "around 1994 and 1995": see para 57. Taking those paragraphs of Asif's witness statement together, it is clear that he was describing the transfers as having been made by way of gift, ie as being gratuitous. There was supporting documentary evidence as to the date of the allotment of the share in ECL BVI, but nothing at all in relation to the other two companies. There was abundant documentary

evidence to show that the transfer of shares in ECL HK to Gany, two days earlier on 16 March 1994, was effected, expressly, on the terms of the Trust.

24.
By concluding that there was simply no evidence of a gratuitous transfer of shares in any of the three companies to Gany while it was a trustee of the Trust, the judge disabled himself, in the Board's view, from conducting a reliable analysis of such evidence of MAR's intention as there was, set against the relevant background, namely the pre-existing relationship between MAR and Gany as, respectively, the effective settlor and the recently appointed trustee of the Trust. Consideration of the question whether a common-sense deduction of the type carried out in In re Curteis' Trusts thus never arose for the judge, because the necessary predicate for it, namely a gratuitous transfer by a settlor to an existing trustee of the settlement, was not focused upon. Nor was that analysis carried out, at least expressly, by the Court of Appeal, because it decided the question on the basis of a wrongly assumed legal presumption.

25.
It therefore falls to the Board, if it properly can, to carry out that analysis for the first time. None of the parties suggested that this issue should be directed to be re-tried at first instance. So little is known about the assets of the three companies that a re-trial (necessarily before a different judge since Bannister J has retired as a judge of the British Virgin Islands) would risk the incurring of costs and effort which might prove to be gravely disproportionate to the economic value of the issue to any, or all, of the parties. Furthermore, the Board is no more disabled than any appellate court from deciding this question of fact, even though fact-finding forms a very small part of its routine activities.

26.
This is not a case in which the relevant issue necessarily turns upon scrutiny of the demeanour of witnesses when giving oral evidence. The only witness whose oral evidence has any significant bearing on this issue is Asif. Since he went to great efforts, over an extended period of time, between his father's death and his contribution of evidence to these proceedings in seeking to persuade Zorin and other siblings of his that the Trust was possessed of very substantial and valuable property, before presenting a diametrically opposed version of events in his evidence, it requires no face to face encounter with Asif for a court to conclude that little weight can be given to his uncorroborated oral evidence, where directed to a self-serving conclusion. Furthermore, the Board has no reason to reject the judge's firm conclusion that Asif's evidence that MAR intended to make a gift to him of the three companies in the early 1990s was untrue.

27.
In the Board's view, the determination of the first issue turns essentially upon the making of an appropriate common-sense deduction as to MAR's intention, to be derived from a review of the largely unchallenged evidence about the relevant parties' conduct at the time, assisted by the judge's findings of primary fact, to the extent that they have not been challenged successfully on appeal. MAR's intention is sufficient, because he was also the governing mind of Gany at the material time, as its only director and shareholder. The Board will summarise that evidence of primary fact in broadly chronological order.

28.
The starting point is that, looking at the matter as a question of substance rather than form, MAR was the settlor of the Trust. Formally, the settlor was Anita Lee Yuen, who established the Trust by executing the deed of settlement dated 24 September 1982 together with the first trustee

Schweizerisch Finance Limited (which MAR controlled), and contributing the nominal initial trust property of US$100. But it is common ground that Ms Yuen, a lawyer at Johnson Stokes & Master in Hong Kong, was acting in that capacity for, and at the direction of, MAR.

29.
The following points need to be noted about the terms of the Trust, as set out in the deed of settlement. First, both MAR and any spouse of his were named discretionary beneficiaries. By contrast with some tax-driven family settlements, a dedication of property by MAR to the Trust did not therefore deprive him or Banu of an expectation of benefit. Secondly, MAR's status as the first appointor under the Trust conferred on him the power to remove and appoint trustees, thereby securing to him, for the remainder of his life, significant de facto influence over the exercise of discretion as to the beneficial distribution of the trust property. In fact, the three successive trustees, between 1982 and MAR's death, namely Schweizerisch Finance Limited, Maly International SA ("MISA"), and Gany, were all companies owned and controlled by MAR.

30.
Apart from the appointment of Asif (and then Asif and Khalid) as his successor appointors, to take effect on his death, and the change of trustee to MISA (in March 1983), MAR appears to have done nothing to put flesh on the bones of this family trust structure during the remainder of the 1980s. It remained during that period, an empty shell. To this picture of apparent inactivity there may be one important exception. ECL HK had been incorporated in Hong Kong in July 1975, and became the corporate vehicle by which MAR conducted the bulk of his activities from Hong Kong. At some time after MISA became a trustee of the Trust in March 1983, nominee holders of the bulk of the shares in ECL HK were directed to hold them for MISA as trustee. This sufficiently appears from MISA's written instruction to those nominees Wai Chiu Co Ltd (of Hong Kong) dated 15 February 1994, instructing them to transfer those shares to Gany. This instruction bears MAR's signature as a director of MISA. It is impossible to ascertain from the evidence when, between 1983 and early 1994, the shares in ECL HK became property of the Trust.

31.
Subject to that uncertainty, all the steps taken by or at the directions of MAR by which he sought to divest himself of personal ownership and control of his businesses during his lifetime occurred during the five-year period between November 1989 and January 1995. Thus, Gany was incorporated by MAR in November 1989 in the British Virgin Islands and he became its first director in December. Although it is not clear when MAR formed the intention that Gany should replace MISA as trustee, the significant difference (also reflected in other steps described below) between Gany and MISA was its British Virgin Islands registration. MISA had been registered in Panama.

32.
Schweizer was incorporated in October 1990, again in the British Virgin Islands and MAR became its first and sole director in November. ECL BVI was incorporated in the British Virgin Islands in December 1992 and MAR became its first director during the same month. Cedilla was incorporated in the British Virgin Islands in March 1993.

33.
Shortly before that, MAR established the MA Foundation ("MAF") in the form of a Jersey based trust in December 1992. MAF was designed to make provision for him during his lifetime, with a gift over on his death to the Rangoonwala Foundation ("RF") which was a charity set up by MAR to help the poor and needy and, in particular, the Memon Muslim community.

34.
As already noted, Gany became trustee of the Trust in place of MISA in November 1993. The bulk of the shares in ECL HK were, on MAR's instructions as a director of MISA, transferred by nominees to Gany on 16 March 1994, expressly to be held upon the terms of the Trust. Two days later on 18 March ECL BVI (then controlled by MAR) allotted its only share to Gany. It is not known when the shareholdings in Schweizer and Cedilla were issued or transferred to Gany, but the only evidence about the timing of those events tendered at trial was that they had occurred by the end of 1994.

35.
On 1 July 1994 MAR made a hand-written declaration, which may loosely be described as a letter of wishes, which began as follows:

"I hereby declare that I have given and already allocated whatever I wanted to give to my family members and nothing is pending.

I do not owe anything to anyone."

36.
Following the writing of the letter of wishes, MAR took a series of steps which appear to have been consistent with his retirement from active participation in the management of his business. In July 1994 he appointed Asif as an additional director of Gany and in October appointed him as his successor appointor under the Trust. In December 1994 Gany appointed VM Finance & Holdings AG to be Trust Manager.

37.
Minutes of a board meeting of ECL HK on 3 January 1995 record Asif stating that shares in Valson held by ECL HK were held for his benefit as from the beginning of 1995, having previously been held for the benefit of MAR. Valson was the corporate vehicle for business and property activities undertaken by MAR in the United Kingdom.

38.
There is much to be said for addressing the intended beneficial ownership of the three companies, upon the issue or transfer of their shares to Gany, together. They were all owned and controlled by MAR, and set up in the British Virgin Islands within a short time after the incorporation of Gany there in November 1989. Nothing was disclosed to the court about the assets or businesses which they owned. The only thing which sets them apart is that the evidence produced a precise date for the vesting of ECL BVI's shares in Gany, whereas it did not for Schweizer or Cedilla. For reasons explained later, this does not require them generally to be treated separately.

39.
The first question is whether the shares in the three companies were indeed vested in Gany. Notwithstanding the appellants' submission to the contrary, it makes no difference in the Board's view whether they were vested by way of transfer or allotment, because MAR both owned and controlled each of the three companies. Allotment might be said to be the exercise of control whereas transfer is the exercise of a right of ownership. But both point in the same direction, so far as concerns the ascertainment of MAR's intention.

40.
Written evidence from Asif that the shareholdings of the three companies were vested in Gany is not the same as proof, bearing in mind in particular the inevitable reservations which the Board must

entertain about his reliability as a witness. His evidence was that the vesting of those shareholdings in Gany was part and parcel of an agreed plan between him and MAR to transfer beneficial ownership to him, and this the judge roundly rejected, for good reason. The assertion by Asif that there was a plan to transfer beneficial ownership of the three companies to him (eventually by giving him the bearer share in Gany) was of course self-serving. But his evidence that the shareholdings in the three companies were vested in Gany, viewed separately, was not self-serving. On the contrary, it constituted a necessary plank in any case, hostile to his, that the shares in the three companies were property of the Trust. Nor was his evidence of the vesting of those shares itself a matter of challenge, although of course his case that there was an agreement that he should become beneficial owner of them was vigorously, and successfully, disputed at trial. There is documentary corroboration of the vesting of ECL BVI's shares in Gany, and no evidence to place in the scales against Asif's evidence that this was true in relation to the shareholdings in each of the three companies. Accordingly the Board considers that the vesting of those shares in Gany before the end of 1994 should be regarded as proved to the requisite standard.

41.
The next question is whether this vesting occurred while Gany was a trustee of the Trust. It was submitted for the appellants that no finding or inference could be made to the effect that either Schweizer or Cedilla were vested in Gany after it became trustee of the Trust in November 1993. There was a three-year period following the incorporation of Schweizer and an eight-month period following the incorporation of Cedilla before Gany became trustee. Either or both of them might have been vested in Gany before it became trustee. This is of course possible, but the Board's view is that the vesting of the shares of those two companies in Gany probably occurred after it became trustee in November 1993. Even if not, it occurred at a time when MAR planned that Gany should take over as trustee from MISA. Their incorporation and the transfer of their shares to Gany was all part and parcel of an exercise by MAR to re-locate part of his business interests, in terms of corporate ownership, in the British Virgin Islands, which began with the incorporation of Gany in November 1989. That uncertainty as to timing does not, in the Board's view, significantly detract from the other factors which point towards determining this issue by considering the three companies together.

42.
What then are the possible alternative conclusions about MAR's intention with regard to the beneficial ownership of those shares once vested in Gany? There are really only three possibilities. The first is that MAR intended Gany to hold the shares beneficially. The second is that he intended the shares to be held by Gany as trustee on the terms of the Trust. The third is that he intended to retain beneficial ownership of the shares himself.

43.
A beneficial transfer to Gany was, of course, stage one of Asif's two-stage case about a plan to transfer beneficial ownership to him, rejected by the judge. No other evidence was adduced as to why MAR should have intended to make the three companies (all registered in the British Virgin Islands) wholly owned subsidiaries of another British Virgin Islands company. The only evidence about MAR's use of Gany, apart from the vesting of the shareholding in the three companies, was that he wished it to be trustee of the Trust, and he caused to be vested the much more important shareholding of ECL HK in Gany as trustee, only two days before the vesting of the shares in ECL BVI. It is material to note, in that context, that no evidence was produced to the court that Gany ever prepared or kept company accounts, which it might have been expected to do if it beneficially owned assets of its own rather than held them purely as trustee.

44.
The second alternative, namely vesting in Gany on the terms of the Trust is, in the Board's view, plainly the most likely common-sense deduction, just as it was in In re Curteis' Trusts. MAR had (or contemplated) a relationship with Gany as settlor and trustee of the Trust when the shares were vested in Gany. There is clear evidence, summarised above that MAR intended Gany to hold the important shareholding in ECL HK on the terms of the Trust. There is no sensible reason why he should have entertained a different intention in relation to the shares of the three companies. It is, in this context, nothing to the point that there is clear documentary evidence in relation to the shares of ECL HK, but no similar evidence in relation to the shares in the three companies. Prior to vesting in Gany, the bulk of the shares in ECL HK were held by a third-party entity, not controlled by MAR, to which MAR needed to give clear and specific instructions. He had no such need in relation to the three companies' shares, since he both owned and controlled those companies himself.

45.
The third possibility, namely that MAR intended to retain beneficial ownership of the shares in the three companies notwithstanding their vesting in Gany may be said to derive some support from the judge's observation, at para 66 of his judgment that:

"I think that MAR retained beneficial ownership, or ultimate beneficial ownership of his businesses, down to the date of his death."

The judge was there dealing with Asif's case that MAR agreed to give him all his business interests in the early 1990s and the judge drew support for his observation from the fact that MAR retained beneficial ownership of his stake in a Malaysian joint venture, and did not transfer it, beneficially or otherwise to Asif. But the judge's observation was also based upon his conclusion that it was "highly unlikely" that MAR had transferred any of his business assets other than ECL HK to any of the successive trustees of the Trust. Finally, he read MAR's declaration of 1 July 1994 as reinforcing his conclusion.

46.
The Board has considered carefully whether it should depart from that conclusion of the judge, and has decided that it should, for the following reasons. First, it is undermined by the mistake, already identified, constituted by the judge's incorrect conclusion that there was no evidence of a gratuitous vesting of the shares in any of the three companies in Gany, while it was a trustee. It was not, as the judge thought, "highly unlikely" that MAR had transferred any of them to a trustee of the Trust.

47.
Secondly, the judge's reliance on evidence about the ownership of MAR's Malaysian interests appears to have been misplaced, because it was not part of Asif's case that MAR had intended to give them to him. They were vested in MAF. Thirdly, the Board takes a different view of the inferences to be drawn from MAR's 1 July 1994 declaration. Far from supporting a conclusion that, by the beginning of 1995, MAR had retained beneficial ownership of all his business interests, it rather suggests, in the Board's view, that MAR had indeed divested himself of some, at least, of those interests in favour of the children, and divestment by transferring them to his existing family settlement in which the children were named beneficiaries, seems a natural and probable way of doing so.

48.
In conclusion therefore, there is sufficient evidence from the facts about MAR's conduct, in particular during the period 1989-1995, to lead to an inference that, when transferring or otherwise vesting the

shares in the three companies in Gany he intended to do so upon the basis that Gany was to hold the shares as an accretion to the property of the Trust.

The 1998 Appointment

49.
An independent ground for Gany's and Asif's defence of the proceedings was that, whatever may have been the property of the Trust on MAR's death, it was all appointed out to Asif by Gany by means of the 1998 Appointment. The respondents challenged this at trial, seeking a declaration that the 1998 Appointment was void or liable to be set aside on a number of grounds, including sham, and a challenge to the validity of the board meeting of Gany at which the Appointment had been resolved to be made. Those grounds were rejected by the judge, and are not live issues before the Board.

50.
But the main ground for challenging the 1998 Appointment was that it had been executed by Gany under a misconception on the part of the directors who resolved upon it as to what then constituted the property of the Trust. The case advanced was that the relevant directors thought that there existed no Trust property of any significant value, so that the 1998 Appointment was nothing more than a tidying up exercise, conferring no benefit of substance upon Asif, or depriving the other beneficiaries of anything of value.

51.
The judge rejected this ground of challenge as well, upon the basis that that perception of Gany's directors was correct. He found that the only property of the Trust by 1998 was the shares in ECL HK, but that there was no evidence that those shares were of any significant value.

52.
The Court of Appeal reversed the judge's decision on the issues of misconception, on two grounds. The first was that even if the only property of the Trust in 1998 consisted of the shareholding in ECL HK, that company had, according to its accounts, beneficially owned assets valued at US$357,891.24, so that the shares in ECL HK were of significant value. Secondly, flowing from its conclusion about the first issue, Gany as trustee had (through its directors) acted under a misconception in failing to appreciate that the Trust property also included the shareholdings in the three companies.

53.
Before the Board, the appellants challenged this conclusion of the Court of Appeal on the main ground that it was an impermissible interference with the judge's unimpeachable findings of fact. More specifically the appellants submitted that there was nothing to show that the directors had, in 1998, been unaware of the item in ECL HK's audited accounts or that, whatever its cost, it had any significant value by 1998. Secondly, of course, the appellants submitted that the Court of Appeal had been wrong to conclude that the Trust property included the three companies. Even if it did however, there was nothing to show that, by 1998, the shareholding in the three companies was worth anything of significance.

54.
There is no dispute about the applicable legal principles. Although the Court of Appeal based its analysis on In re Hastings-Bass deceased [1975] Ch 25, it is common ground that for the purposes of the law of the British Virgin Islands, they are now to be found in the judgment of the Supreme Court in Pitt v Holt [2013] 2 AC 108. It is unnecessary to set out those principles in full. The following points are sufficient for present purposes. First, the court's discretion to set aside a disposition in exercise of

the trustee's powers on the basis of misconception depends upon it being shown that the relevant misconception amounted to, or came about as the result of, a breach of fiduciary duty. Secondly, if that condition is satisfied, the court has a flexible discretion whether to set aside the challenged disposition, in the exercise of which the question whether, if properly informed, the trustees (or reasonable trustees) would or might have acted differently will be relevant, but not decisive. The appellants did not base the main thrust of their appeal on a submission that the Court of Appeal had made errors of law in addressing this issue.

55.
The Board's conclusion that the appellants fail on the first issue, relating to the beneficial ownership of the three companies, necessarily means that Gany's directors, Asif and Banu and Mr Salim, acted under a misconception about the extent of the trust property in believing, as they said they did, that it was limited to the shareholding in ECL HK. Mr Jonathan Crow QC for the appellants sensibly conceded that this would be so, if the Board reached the conclusion which it has reached upon the first issue.

56.
The extent to which the directors laboured under a misconception about the value of the ECL HK shares when making the 1998 Appointment is less straightforward. There is some force in the appellants' submission that the Court of Appeal was over-simplistic in its departure from the judge's findings of fact, in assuming that, because the directors' evidence was that they regarded the Trust as having property of no significant value, they were necessarily unaware of the entry in ECL HK's audited accounts attributing a value of US$357,000 odd to those shares. It was pointed out by reference to the transcripts of the trial that, contrary to the Court of Appeal's assumption, the judge had been aware of those accounts. It was submitted that, if so, he may have concluded either that the attributed value (based on a historical cost convention) was unreliable, or that the directors could properly regard that sum as insignificant in the context of dealing with what had been MAR's business assets amounting to many millions of dollars.

57.
If the matter had rested upon issues as to the value of the shares in ECL HK, the Board might have regarded the appeal on this issue as finely balanced. But the inclusion within the ambit of the directors' misconception of the shares in the three companies is, in the Board's view, amply sufficient to swing this issue against the appellants. Mr Crow valiantly submitted that it made no difference because the shareholdings in the three companies had not been shown to be of significant value in themselves. There was, he said, no evidence that the three companies were, in 1998, more than mere shells. But the absence of evidence about the assets of the three companies cannot, in the Board's view, be of assistance to the appellants. On the basis that the three companies were part of the Trust's property at all material times, Gany was duty-bound to inform itself about the nature and value of their assets, and cannot fairly shield itself under the cloak of a submission that no evidence was deployed to demonstrate valuable assets. Following his father's death, Asif had plainly been in the driving seat so far as the affairs of Gany and the Trust were concerned and, in particular, having regard to what he now describes as repeated deceptions of his siblings about the nature and extent of the Trust assets over many years, can be in no better position than Gany.

58.
The Board is in no doubt that the failure by Gany's directors in 1998 to appreciate that the shareholdings in the three companies formed part of the Trust's property amounted to a serious breach of fiduciary duty on the part of Gany, sufficient to trigger the court's discretionary power to set

aside the 1998 Appointment. It was submitted for the appellants that, nonetheless, the “would not/might not” causation test was not satisfied, and that no useful purpose would be achieved by setting aside the 1998 Appointment, which would otherwise simply cause an injustice to Asif. The Board disagrees. For the reasons already given, it does not lie in the appellants’ mouths to make this submission. It was submitted that the Court of Appeal’s use of the word “void” rather than voidable in para 101 of the judgment of Blenman JA revealed a misconception that the court had no discretion in the matter. The Board is satisfied that this was no more than a judicial slip of the tongue. Read as a whole the Court of Appeal’s reasoning, and the terms of its March 2016 Order, sufficiently demonstrate that it was aware that it was exercising a discretionary power. The Board has not heard anything in the appellants’ submissions which would cause it to doubt that the discretion was correctly exercised in the circumstances and, in particular, having regard to the Court of Appeal’s conclusion on the first issue, with which the Board agrees.

Asif’s Liability to Account

59.
The Court of Appeal, reversing the judge, ordered Asif to account for any assets he received as a result of the 1998 Appointment. The claim for an account had originally been made, in the pleadings, on the basis of knowing receipt but, in opening, also on the basis of knowing assistance. Both the judge and the Court of Appeal rejected those grounds, in particular because there was no allegation, let alone finding, of dishonesty against Asif. Ms Sue Prevezer QC for Asif submitted on appeal that there was therefore no basis upon which the Court of Appeal could make an order for an account against Asif.

60.
The Board disagrees. Asif was not a bona fide purchaser of the property which he received by virtue of the 1998 Appointment. On the contrary, he was a volunteer. Nonetheless, until set aside, the 1998 Appointment conferred upon him both legal and beneficial ownership of the assets transferred. But the effect of the setting aside of the 1998 Appointment is to re-vest the beneficial ownership of the assets transferred in the beneficiaries of the Trust. If Asif still holds property transferred in 1998, he must return it to the trustee of the Trust. If not, he must give an account of what he has done with it.

61.
The main submission made for Asif on this issue was that the Court of Appeal had somehow imposed upon Asif the liability of a constructive trustee, under a remedial (and therefore illegitimate) constructive trust. In the Board’s view the Court of Appeal’s order that Asif account did no such thing. It imposed no personal financial liability on him, and it is no part of the respondents’ submissions that it did. In particular, it imposed upon him no personal liability to compensate the Trust or its beneficiaries in respect of property received pursuant to the 1998 Appointment of which Asif disposed before it was set aside.

62.
For those reasons the Board’s opinion is that the Court of Appeal’s order that Asif account in respect of property received under the 1998 Appointment was correctly made.

Costs

63.
There remains a narrow issue of construction, relating to the costs order made by the Court of Appeal in its March 2016 Order. The essential background is that the judge, by para 2 of his Order made after

trial on 13 June 2014 ordered the claimants (ie the respondents to this appeal) to pay Gany's costs of the action and, by para 3, ordered the claimants to pay Asif's costs of the action. The Court of Appeal's March 2016 Order provided, so far as is relevant to this issue:-

"1. The appeal is allowed…

6. Gany Holdings (PTC) SA shall pay Zorin Sachak Khan's costs both in this Court and in the court below to be agreed within 21 days, failing which, costs to be assessed by a commercial court judge."

64.
An issue arose between the parties whether the Court of Appeal thereby set aside the judge's costs order in favour of Asif. Following a short further hearing before a differently constituted Court of Appeal on 20 July 2016, in which (among other things) that issue was argued, the Court of Appeal ordered, at para 5, as follows:

"On the Construction Issue, the effect of the March 2016 Order is that the entirety of the Order made at first instance by Mr Justice Bannister is set aside."

The effect of this further order was that the judge's costs order in favour of Asif was itself treated as having been set aside by the Court of Appeal's March 2016 Order. Asif appealed the further order of the Court of Appeal, submitting that it had got the construction of the March 2016 Order wrong.

65.
This is a very short point of construction, which requires the Court of Appeal's March 2016 Order to be interpreted as a whole, and in the light of its conclusions on the appeal.

66.
The Board's opinion is that, on this last issue, the respondents are again correct. Their appeal to the Court of Appeal clearly and expressly included an appeal against the costs order against them in favour of Asif made by the trial judge. Paragraph 1 of the Court of Appeal's March 2016 Order allowed their appeal in full. It follows, despite the brevity of the language used, that the appeal against the costs order against Asif was allowed.

67.
It is not to be inferred from the fact that, in exercising its own costs jurisdiction, the Court of Appeal only ordered Gany, rather than Asif, to pay the respondents' costs, that it thereby left the judge's costs order in favour of Asif in place. It follows that, at the hearing on 20 July 2016, the differently constituted Court of Appeal construed the March 2016 Order correctly.

68.
For all the above reasons the Board will humbly advise Her Majesty that this appeal should be dismissed.