Neutral Citation Number: [2024] EWHC 291 (Ch)

Case No: PT-2022-001020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/2/2024

Before:

MASTER CLARK

- -

Between:

CHAIM SAUL GROSSKOPF	**Claimant**
- and -	
(1) YECHIEL GROSSKOPF **(2) JACOB MOSHE GROSSKOPF** **(as trustees of the M Grosskopf 1974 Settlement Trust)**	**Defendants**

- -
- -

Fenner Moeran KC and **Simon Atkinson** (instructed by **Yugin & Partners**) for the **Claimant**
Elizabeth Weaver (instructed by **Fladgate LLP**) for the **Defendants**

Hearing date: 27 November 2023

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10am on 16 February 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

.....

Master Clark:

1. This is my judgment on the defendants' application dated 24 January 2023 seeking:
   (1) a stay of the claim pursuant to section 9 of the Arbitration Act 1996 ("the 1996 Act"); alternatively
   (2) to strike out the claim as an abuse of process.

Parties and the claim

2. The claimant, Chaim Grosskopf, and the defendants, Yechiel Grosskopf and Jacob ("Moshe") Grosskopf, are (together with 4 others) children of Myer Grosskopf and Malka Grosskopf. Without intending any disrespect, I refer to the members of the Grosskopf family by their first names.

3. All the children are the beneficiaries of a trust established by a Deed of Settlement dated 22 March 1974 ("**the Trust Deed**") between Myer (as settlor) and Malka and Abraham Perelman (as original trustees): the M Grosskopf 1974 Settlement Trust ("**the Trust**"). The claimant sues as a beneficiary. Yechiel and Moshe, are, and are sued as, trustees of the Trust.

4. The claim seeks the appointment of a judicial trustee in place of the defendants.

5. The basis of the claim is, in summary, that the defendants have engaged in conduct which:
   (1) appears to have been in breach of their duties as trustees;
   (2) may be dishonest;
   so that their conduct needs to be investigated independently.

6. The primary complaints, for which the claimant says he has reasonable grounds, are that the defendants have:
   (1) procured the disposal of assets at an undervalue to parties connected with them, to the prejudice of the transferor companies, and thus ultimately to the prejudice of the Trust;
   (2) both approved of, and failed to disclose the existence of, lending from companies ultimately owned by the Trust to connected parties on terms disadvantageous, or potentially disadvantageous, to the lending company and thus ultimately prejudicial to the Trust; and
   (3) been remunerating themselves excessively in their capacity as directors of companies ultimately owned by the Trust to the prejudice of the income beneficiaries of the Trust (who have themselves received very low distributions in recent years relative to the remuneration paid to the defendants).

7. The defendants have not of course filed any evidence in response to the claim. However, they deny that they have acted dishonestly or improperly as alleged by the claimant, and deny that it is necessary or appropriate for a judicial trustee to be appointed.

Background

8. The factual context in which the application is made is as follows.

Trust Deed

9. The beneficiaries of the Trust are defined by clause 1(b) of the Trust Deed as:
   (1) any widow of the settlor;
   (2) the children and remoter issue of the settlor;
   (3) their spouses;
   (4) two named charities, and other charitable institutions as may be specified by the trustees.

   The class of beneficiaries is therefore not closed.

10. The 4 other children of Myer and Malka are:
   (1) Chaya Klagsbald;
   (2) Pinchas Grosskopf;
   (3) Sprince Leichtag; and
   (4) Hannah Pinter.

11. There are approximately 62 existing grandchildren of Myer. It is unclear how many great-grandchildren of Myer there are; the claimant suggests there may be a few hundred.

12. The Trust is a discretionary trust, with the trustees holding the Trust Fund and income on trust for such of the beneficiaries as they might in their discretion appoint, revocably or irrevocably: clause 3. The trustees have a power to appoint capital: clause 5. Various trusts in default are created by clauses 6 and 7.

13. The power to appoint new trustees is currently vested in Malka: clause 19 of the Trust Deed.

Deed of appointment

14. By a deed of appointment dated 21 March 1985 the income of the Trust was irrevocably appointed to Myer's 7 children in equal shares absolutely, with the capital to be held subject to the rights of the children to the income. All 7 children therefore have absolute vested interests in the income of the Trust, which is no longer held on a discretionary basis.

Trust Fund

15. The Trust Fund comprises shareholdings in various English companies and a single property in London. Trust accounts for y/e 5 April 2019 show shareholdings in the following companies: Greenquest Limited; Probex Limited; Lanturn Limited and Atlas Estates Limited. Rivergrove Limited is a wholly-owned subsidiary of Greenquest. The defendants are, and have been since 23 May 2006 and 1 April 2010 respectively, directors of Rivergrove.

Initial request for information

16. Following Myer's death on 15 November 2016, the claimant sought information by way of accounts of the Trust.

The Ikul

17. On 28th April 2017, on the claimant's application, the Beth Din of the Union of Orthodox Hebrew Congregations (UOHC) issued an Ikul (a without notice interim injunction by way of a freezing order) to the defendants, on the basis of a claim for full disclosure of all matters concerning Myer's estate. The defendants did not accept the jurisdiction of the UOHC Beth Din.

Arbitration agreement

18. On 14 June 2017, the parties entered into an arbitration agreement ("**the arbitration agreement**") before the Beth Din of the Federation of Synagogues ("**the Tribunal**"). This provided so far as relevant:

> "WHEREAS a **dispute or difference** has arisen and still exists between the above parties in regards to a claim **about full disclosure of the estate/assets of the late R'Myer Grosskopf**
>
> AND WHEREAS it is the desire of the parties to refer such dispute or difference for final determination …
>
> NOW THEREFORE the parties agree as follows:
>
> 1. The parties hereby agree to refer to the arbitration and final decision of the Beth Din of the Federation of Synagogues. London, the tribunal consisting of Dayanim, Dayan Y. Y. Lichtenstein, Dayan Y. D. Hool and Dayan Posen
>
> **any and all disputes and differences between them regarding the above issue and any other issue arising in connection with this** for determination by way of Din Torah according to the rules of procedure commonly employed in arbitrations before the Beth Din … and according to principles of halachah and/or general principles of equity customarily employed in arbitration by the Beth Din and/or English law where applicable as decided by the Beth Din.
> …

6. The parties hereby agree that should either party, after the preliminary hearing has been heard inter partes, subsequently fail without good cause to attend any subsequent hearing, the Beth Din may determine the matter ex parte.

7. The Beth Din will usually provide a detailed Award explaining the reasons for the Award, if requested, but reserves the right to issue a brief Award which defines the decision of the Beth Din without giving detailed reasons for the decision."

(emphasis added)

19. The Tribunal has issued 4 interim awards:
    (1) interim award dated 15 June 2017;
    (2) second interim award dated 30 October 2017;
    (3) third interim award dated 25 January 2018;
    (4) fourth interim award dated 6 April 2021.

First interim award

20. The first interim award of 15 June 2017 required, amongst other things, the defendants to:
    (1) request from Malka a copy of Myer's will;
    (2) prepare and provide to the claimant's nominated representative a report reflecting the current situation of Myer's estate;
    (3) provide future updates at quarterly intervals;
    (4) inform the claimant of any disposal or transfer of property.

    It also discharged the Ikul, except for assets in Israel; however, the claimant subsequently accepted that the defendants have no control over assets in Israel connected with Myer.

21. On 7 July 2017 the defendants provided to Rabbi Halpern, the claimant's nominated representative, accounts of all the companies relating to the Trust, a spreadsheet showing a breakdown of a number of units, property locations and a further breakdown of the armchair valuations in the accounts. They also provided advice received from their accountants, Cohen Arnold, as to the feasibility options of splitting the Trust and a draft Estate Summary prepared for probate.

22. The claimant was dissatisfied with the accounts provided by the defendants. On 7 September 2017 (17:25), Rabbi Halpern sent the following email to Rabbi Lewis, the registrar of the Tribunal:

> "I am sending you an email received from Mr Eliot Feingold the accountant for R'Chaim Grosskopf, which is self explanatory.

> His criticism and comments regarding the response received from R'Yechiel and R'Moshe are very clear. He is not at all happy with the information so far provided and you will see he is recommending that there be an independent financial investigation.
> Please take this letter as a formal request to Beth Din to order that an independent investigation into the affairs of the trust be commenced as soon as possible."

23. This was followed by an email at 17:28 attaching an email dated 6 September 2017 from Mr Feingold to Rabbi Halpern. In it, Mr Feingold made a number of criticisms of the accounts provided by the defendants, and raised queries including as to why the net income distribution to each beneficiary was only about £15,000 when the Trust's assets were at least and might exceed £16 million. It continued:

> "To clarify this fundamental query, it is obviously necessary for an independent financial investigation to be carried out into the affairs of the trust, which will also determine whether the trustees/directors are primarily focusing on the beneficiaries best interests, or are engaged in 'empire building' or furthering their personal interests."

24. The claimant in his first witness statement states that the first email of 7 September 2017 was sent in error (its heading contains "DRAFT"), and that the correct email was sent 3 minutes later without the second and third paragraphs. He says he spoke to Rabbi Lewis a few days later, and asked him to ignore the draft email. He also exhibits an email dated 25 April 2018 from Rabbi Halpern to him saying that the email was sent in error. As to this:
    (1) there is in evidence no email from Rabbi Halpern to Rabbi Lewis withdrawing the 7 September email;
    (2) the 7 September email was in evidence before Master Price on 12 July 2018 (and referred to in his judgment of 6 November 2018), without the claimant suggesting that it had been sent in error;
    (3) the first occasion on which the claimant suggested the email was sent in error was in his witness statement dated 23 May 2023 in opposition to this application.

    However, most importantly, Mr Feingold's email clearly asks for an independent investigation to be carried out; and it is clear, in my judgment, that this is what the claimant was asking for by these emails, whether or not the first one was sent in error.

25. On 11 September 2017, the claimant's lawyer (Murray Yugin) sent him an email setting out that the defendants had failed to provide him with full financial information concerning the affairs of the various companies either owned by or in which the Trust had an interest. This must have been forwarded to Rabbi Lewis, who forwarded it to the defendants, with the following:

> "In regard to the email below from Mr Yugin, the Beis Din would like a formal reply.
> If your legal advisers disagree with Mr Yugin's legal analysis, the Beis Din will appoint an independent legal adviser, at the expense of both parties,
> and after consideration of this independent opinion, will rule on these issues."

26. It would appear that the defendants did disagree, because both sides then made submissions to the Tribunal as to the entitlement of a beneficiary of a trust to more detailed financial information concerning the assets and expenses of the trust.

Second interim award

27. The second interim award made on 30 October 2017 recited that:

> "The Beis Din requested that the Respondents submit to the Claimant an accounting of the trust that they are managing in their capacity as trustees.
>
> The accounting provided apparently indicates that the costs of management of companies owned by the trust are very high relative to the annual distribution made from the trust to the beneficiaries.
>
> The Claimant has requested that the trustees be instructed to provide a full and transparent accounting of the assets held by the trust, including companies held in trust, and the associated income and expenditure of the trust and the corporate bodies held by it."

28. The award ordered the defendants, amongst other things, to disclose the Trust Deed and provide:
    (1) a full accounting (within 30 days) of the assets owned by the Trust and/or under management, including income and expenditure for the last three years until the present day of the Trust and the corporate bodies held by it.
    (2) (within 30 days) a clear plan for the management of the Trust going forward, that indicated what the defendants intended doing with the ongoing management and possible eventual winding up of the Trust.

29. On 6 December 2017, Rabbi Lewis wrote to the claimant setting out that it had come to his (Rabbi Lewis') attention that he (the claimant) had made applications to the Beth Din of the Union of Orthodox Hebrew Congregations (UOHC) on the basis that the current proceedings at the Federation Beis Din concerned only a claim for disclosure, and not any other claims that the parties might have against each other regarding Myer's estate. He attached a further arbitration agreement "clearly committing authority to the Federation Beis Din regarding all issues arising from the estate", and asked the claimant to sign it. The claimant did not sign the further agreement.

30. On 12 January 2018, Rabbi Lewis wrote asking the parties to attend a second hearing in the arbitration proceedings on 22 January 2018. The claimant replied:

> "My claim in the Beis Din was for disclosure. That has now been dealt with by the second interim award. The role of the Beis Din in my claim is therefore complete and dealt with … . There is therefore no need for any further hearing."

Third interim award

31. The further hearing took place on 22 January 2018. The claimant did not attend. The outcome of the hearing was the third interim award dated 25 January 2018, which:
    (1) noted that the Tribunal was entitled under the arbitration agreement to hold the hearing in the presence of one side alone;
    (2) recited that reports of all the assets, as well as income and expenditure had been made available to the claimant, but that a breakdown of the management costs had not been provided;
    (3) concluded that there was no necessity for further information to be provided by the defendants;
    (4) ordered the claimant to provide accounts in respect of a matzos business in Israel.

The first claim

32. On 14 March 2018, the claimant issued a claim (PT-2018-000198: "the first claim") seeking:
    (1) an inquiry into the property held by the Trust;
    (2) an account of property subject to the trusts of the Trust possessed and received by the defendants or any of them;
    (3) an account of rents, profits, dividends, interest and income received by the defendants of the property for the time being subject to the Trust;
    (4) other relief as set out in the claim form and particulars of claim dated 28 March 2023.

33. The particulars of claim alleged breaches of trust by the defendants:
    (1) failing, despite requests, to make trust accounts available;
    (2) failing to provide details of the income of the Trust;
    (3) lending Trust money to their personal company Heanor Limited;
    (4) taking substantial salaries from trust assets;
    (5) removing the existing tenant from the Trust's property, 47 Craven Walk, London E5 and depriving the Trust of the rental income of that property;
    (6) wrongfully using trust assets to commence substantial works to the property.

Master Price's decision on the defendants' stay application

34. The defendants applied on 24 April 2018 for a stay of the first claim, on the grounds that the matters raised were the subject of the arbitration proceedings, under the arbitration

agreement and/or a further agreement made by conduct and evidenced by the email correspondence in September 2017. That application was heard by Master Price on 12 July 2018, who gave a written judgment on 6 November 2018, holding that the first claim was within the scope of the arbitration agreement. He did not however grant a stay (having expressed concerns as to certain procedural aspects of the arbitration proceedings); but adjourned the application. On 1 May 2019, the defendants' appeal against Master Price's order was compromised by a consent order staying the first claim.

Continuation of the arbitration

35. In January 2019, the claimant submitted to the Tribunal Details of Claim, in which the relief sought was identical to that sought in the first claim. The defendants submitted a Response to the Details of Claim. A further hearing took place on 29 January 2019, attended by the parties and their legal representatives, at which submissions were made about the scope of the arbitration agreement and the Tribunal's jurisdiction, as well as the claimant's complaints about the defendants' conduct and the administration of the Trust.

36. On 24 May 2019, the claimant's solicitors wrote to the Tribunal asking it to make orders in relation to the defendants' conduct and the management of the Trust, including requiring them to stop taking remuneration until the final resolution of the matter. By asking the Tribunal to regulate the defendants' behaviour in the management of the Trust, the claimant was, in my judgment, accepting that the Tribunal's jurisdiction and the scope of the arbitration agreement extended to all issues concerning the administrative management of the Trust.

37. There was a further hearing in November 2020, with both sides present.

Fourth interim award

38. In the fourth interim award issued on 6 April 2021, the Tribunal held that all issues arising in connection to the Trust and the estate were to be determined by it. It expressly addressed issues of disclosure, the sale of 47 Craven Walk, the defendants' remuneration and a transaction involving a company called FABH Limited, about which the claimant complains in this claim. The Tribunal commented (at [85]) that no evidence of impropriety had emerged from the extensive disclosure before it. The claimant was directed to submit further documentation on two outstanding issues. He has not done so.

Status of the arbitration

39. The arbitration has not yet concluded. The Registrar of the Tribunal has confirmed in its email dated 9 January 2023 and letter dated 14 February that the arbitration is ongoing;

and that the claimant is free to raise further claims in regard to the administration of the Trust or to ask the Tribunal to hear new evidence or reconsider points.

Claim

40. This claim was issued on 5 December 2022 under Part 8. It is supported by the claimant's 1st affirmation dated 5 December 2022 and 2nd affirmation dated 23 May 2023.

Procedural background

41. The application notice was issued on 24 January 2023, supported by Moshe's 1st witness statement of the same date, and 2nd witness statement dated 1 June 2023, in reply to the claimant's witness statement dated 23 May 2023.

42. On 14 November 2023, the claimant filed a 3rd affirmation dated 14 November 2023. Insofar as this was filed in the claim, it was out of time, and, in any event, my directions order dated 30 May 2023 provided that the application should be heard in advance of any further step in the claim. Insofar as it was sought to be relied upon in relation to the application, it was out of time and no application for permission to extend time has been issued. Furthermore, it raised matters and put forward material which the defendants had not had an opportunity to consider. Ultimately, the claimant accepted that it should be excluded except insofar as it exhibited documents already disclosed in the arbitration:
    (1) the Trust's financial statements;
    (2) the claimant's Details of Claim dated January 2019 in the arbitration proceedings;
    (3) the defendants' undated Response to those Details of Claim.

Legal principles

Stay

43. Section 9 of the Arbitration Act 1996 provides, so far as relevant:

> "**Stay of legal proceedings.**
> (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) **in respect of a matter which under the agreement is to be referred to arbitration** may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
> …
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."
> (emphasis added)

44. The approach that the court should take in deciding whether proceedings should be stayed under section 9 is the subject of the recent Supreme Court decision in *Republic of*

Mozambique v Privinvest Shipbuilding SAL (Holding) [2023] UKSC 32, [2023] Bus. L.R. 1359:

(1) English law adopts a pro arbitration approach which forms part of the context in which it must interpret section 9: [47];

(2) This may involve a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved: [46];

(3) Section 9 involves a two-stage process:

  (i) to identify the matters in respect of which the proceedings are brought, and

  (ii) to ascertain whether those matters fall within the scope of the arbitration agreement on its true construction: [48];

(4) A matter is not the same as a cause of action. The court must ascertain the substance of the dispute or disputes. That involves looking at the pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means: [35] and [73];

(5) A matter is a substantial issue that is legally relevant to a claim or a defence or foreseeable defence in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute: [75];

(6) The exercise involves a judicial evaluation of the substance and relevance of the matter, and the application of common sense: [77];

(7) This involves evaluating whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which the stay is sought: [77];

(8) The scope of the arbitration agreement is a question of its true construction. [99].

Appointment of a judicial trustee

45. Section 1(1) of the Judicial Trustees Act 1896 provides:

> "Where application is made to the court by or on behalf of …a beneficiary, the court may in its discretion appoint a person (in this Act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as a sole trustee, and if sufficient cause is shown, in place of all or any existing trustees."

46. A judicial trustee will therefore only be appointed in place of the existing trustees if the applicant establishes a case justifying the appointment. The court will not normally appoint a judicial trustee unless it is established that there is some breakdown in the administration of the trust or some ground of complaint against the existing trustees: see Lewin on Trusts (20th ed) para 18-002.

Issues in the application

47. In this context, the issues in the application are:

(1) What are the matters in issue in the claim?

(2) Has the court and/or the Tribunal already decided that the matters in issue in this claim are within the scope of the arbitration agreement?

(3) If not, are the matters in issue in this claim within the relevant scope of the arbitration agreement?

(4) If the answer to question (3) is yes, whether the fact that the claimant seeks a specific remedy which the Tribunal cannot grant has the effect of making the matters the subject of the claim inarbitrable.

Matters in issue in the claim

48. The matters in issue in the claim are summarised in general terms in paragraph 6 above. The specific complaints made by the claimant are that:

(1) 47 Craven Walk, London N16 6BS was sold by Lanturn Limited (wholly owned by the Trust) at an undervalue to Moshe's daughter;

(2) Rivergrove Limited (wholly owned by the Trust) made a loan to Sorg Limited (not owned by the Trust) on a non-commercial (unsecured) basis, which loan was written off when Sorg went into liquidation;

(3) Across the 6 year period from 2014 to 2019, the defendants and their spouses have received payments totalling £1,666,160 by way of directors' remuneration, spousal wages and distributions from the Trust. The remaining 5 income beneficiaries have received payments totalling £452,900 across the same period.

49. The claimant relies on these complaints to justify the need for a full financial investigation into the affairs of the Trust.

Whether the court and/or the Tribunal has already decided that the matters in issue in the claim are within the scope of the arbitration agreement

Master Price's decision as to the scope of the Tribunal's jurisdiction

50. Master Price's reasoning and decision as to the scope of the Tribunal's jurisdiction is at [21] of his judgment:

> "The Agreement refers to full disclosure of the Estate and assets of the late Myer Grosskopf, but the Agreement goes on to refer to all disputes and differences regarding this issue and any other issue arising in connection with this, and it is the case that the parties have proceeded on the basis that the Federation Beth Din would have wide-ranging jurisdiction given in particular the terms of the second interim award, which directed a full accounting. In my view this necessarily involves in substance the relief which is sought in this claim."

51. He also expressly accepted (at [22]) the defendants' submission as to the scope of the arbitration agreement, which were at paras 34 to 37 of their skeleton argument:

"34. There is an arbitration agreement between the parties for arbitration by the Federation Beth Din of all issues relating to accounting and disclosure in connection with the Trust.

a. The Arbitration Agreement is not limited to disclosure of information or trust documents but extends to "disclosure of assets" and any other issue relating to that question. Applying a broad purposive construction, that is clearly wide enough to cover a claim for an account of Trust assets in the hands of the Defendants and income received as requested in the Claim.

b. It is clear that the Federation Beth Din and the parties understood the width of the arbitration agreement given the terms of the Interim Awards.

c. Even if the terms of the Arbitration Agreement were limited to disclosure in a narrower sense, the parties subsequently agreed in September 2017 (as evidenced by the emails referred to above) that the Federation Beth Din should decide whether a full financial investigation of the Trust is needed.

35. Given the position of the Federation Beth Din that the issues in the Claim should be referred to it, there is no ground for alleging that the Arbitration Agreement is null and void, inoperative or incapable of being performed.

36. The Claim asks for an inquiry into and account of the property of the Trust and the dealings with it. In other words, an investigation into the financial affairs of the Trust.

37. It is therefore clear that the Claim is "in respect of" matters which have been referred to arbitration."

52. The emails referred to at 34 c of the defendants' submissions are set out at paragraphs 22 and 23 above.

53. The matters in this claim are complaints about the administration of the Trust. Indeed, they are relied upon as justifying a full financial investigation of the Trust. Master Price held that the scope of the parties' agreement extended to deciding whether a full financial investigation of the Trust was needed. In my judgment therefore, Master Price has already decided that the matters in this claim fall within the scope of matters which the parties have agreed should be dealt with by the Tribunal.

The Tribunal's decision as to the scope of its jurisdiction

54. The Tribunal expressly addressed the scope of its jurisdiction in the 4th interim award at [37] to [47]. They agreed with Master Price's analysis and decision. In particular, they

agreed that the parties had intended throughout to have all issues regarding the Trust and the estate, and not just requests for disclosure, to be arbitrated by the tribunal.

Conclusion

55. The claimant is bound by Master Price's determination as to the scope of the Tribunal's jurisdiction. The parties also agreed that issue estoppel applies to issues determined in arbitration proceedings: see *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm) at [22] [23]; *Fidelitas Shipping Ltd v V/O Exportchleb* [1966] QB 630. It follows that the claimant is estopped from alleging that the matters in this claim fall outside the jurisdiction of the Tribunal. It is accordingly unnecessary to determine issue (3), though if required to do so, I would also respectfully adopt Master Price's reasoning.

Whether the fact that the claimant seeks a specific remedy which the Tribunal cannot grant makes the matters the subject of the claim inarbitrable

56. The claimant submitted that the claim was incapable of arbitration because the power to appoint a Judicial Trustee is exercisable only by the court, and not by the Tribunal.

57. He relied upon *Lewin* at §49-005:

> "An arbitrator will lack the powers conferred on the court by statute, such as the power to remove a trustee or to appoint a new one and similarly lacks the court's jurisdiction to give directions to trustees… Nonetheless, an arbitrator will frequently be able to make orders having a comparable effect; an arbitrator could give effect to a claim for removal, for example, by ordering the trustee to resign, to appoint a new trustee and to convey the trust property to that person. If arbitration requires the consent of the beneficiaries, it is only if all those concerned in the question to be determined are of full age and capacity that there can be an effective decision. In other cases there can generally be no effective decision in view of the lack of contractual capacity of some of the beneficiaries."

58. In the particular circumstances of this case, there were, he submitted, practical considerations which prevented arbitration from being an effective remedy for the claimant. First, he relied upon the fact that others beyond the parties to this claim have vested interests similar to the claimant's; and there is a class of discretionary beneficiaries including numerous living grandchildren, minors, unborns and charities, who are entitled to be considered for capital appointments. An arbitration could not accommodate representations from all of these other parties, some of whom are legally incapable of agreeing to submit to arbitration.

59. Secondly, he submitted that the possible alternative route suggested in *Lewin* would not work in the present case; the trustees cannot be ordered to appoint new trustees, as that power is vested in Malka.

60. Thirdly, he relied upon the fact that the High Court has a supervisory jurisdiction over trusts and trustees to ensure that trusts are properly administered; and that CPR Part 64 is a procedural manifestation of this jurisdiction: persons interested in a trust can approach the Court for directions that trustees do or not do something. The claimant, as a beneficiary of the Trust, is entitled, he said, to come to this Court and ask it to enquire into the conduct of the defendants as trustees; and the statutory power to appoint a Judicial Trustee is part of the arsenal of measures available to the Court in discharging its supervisory jurisdiction.

61. As to this, the starting point is that the basis of the claim is the complaints against the existing trustees and a breakdown in the administration of the Trust. There is no reason in principle why the questions of whether those complaints are made out, whether there has been a breakdown in the administration of the Trust, and whether there are sufficient grounds for appointing a judicial trustee could not be resolved by arbitration. There is no statutory prohibition or policy rule against trust disputes being resolved out of court, including as to whether a complaint made against a trustee is made out, and justifies them standing down.

62. There is, similarly, no overriding statutory scheme for the regulation of private trusts or trustees of private trusts. The court has a supervisory jurisdiction, but this has to be invoked, and is not exercised on the court's own initiative. Unless and until it is invoked, private trusts are left to operate outside court. Trustees are frequently appointed and replaced outside court. Where a beneficiary makes a complaint against a trustee (or applies for removal), this may be compromised, without any reference to the court, by the trustee agreeing to step down. If that happens, then the complaint is never considered by the court. Some of the beneficiaries may not even become involved in the dispute.

63. It is, as the defendants' counsel submitted, not much of a further step to envisage the trustee and beneficiary agreeing that the trustee will step down if the grounds of complaint are made out before the Tribunal. That course might be taken to preserve the privacy of the trust and its affairs. Such an arrangement would not have a prejudicial impact on the other beneficiaries. Their rights as beneficiaries are not affected by a change of trustee. They retain their rights to invoke the supervisory jurisdiction of the court, if necessary. The risk of inconsistent findings were another beneficiary to go to court is only a risk for the trustee, not the beneficiaries. That might be a practical reason

why a trustee would not agree to arbitration. It is not, in my judgment, a principled reason for concluding that such a dispute is not arbitrable.

64. As to the appointment of a new trustee, beneficiaries have no general right to control the exercise of a power of appointment of new trustees (although a failure to inform or consult them might in some circumstances provide a basis for setting aside the appointment): see *Lewin* para 15-055.

65. Thus, the Tribunal could make an order with similar effect to that sought in this claim: it could direct the defendants to stand down; and to seek the appointment of new trustees by Malka; and, if she failed to do so, an application to the court under s.41(1) of the Trustee Act 1925, or indeed for a judicial trustee, could be made.

66. I therefore reject the claimant's submission that the fact that the other beneficiaries are not parties to the arbitration agreement means that the Tribunal cannot decide whether the defendants should step down.

67. I turn therefore to the more general submission that the fact that the claim seeks relief which cannot be granted by the Tribunal means that the claim is inarbitrable.

68. There is no English authority directly on this point.

69. However, in *Rhinehart v Welker* [2012] NSWCA 95, the New South Wales Court of Appeal expressed the view[1] that an agreement to submit a dispute about the removal of a trustee to arbitration was not contrary to public policy. At [170], Bathurst CJ (with whom McColl JA agreed) said:

> "the fact that an arbitrator cannot grant all the relief a court is empowered to grant does not mean the dispute is incapable of arbitration."

70. A similar approach is taken by common-law jurisdictions to the analogous situation of whether the relationship between shareholders has broken down in the context of an application for a winding up petition. In such cases, matters in dispute can be resolved by arbitration notwithstanding that only a court can make a winding up order. That approach was confirmed by the recent Privy Council case of *FamilyMart China Holding Co Ltd v Ting Chaun (Cayman Islands) Holding Corporation* [2023] UKPC 33. At [33], Lord Hodge said:

[1] strictly, obiter, because the decision was that the dispute did not fall within the scope of the arbitration agreement

> "Matters, such as whether one party has breached its obligations under a shareholders' agreement or **whether equitable rights arising out of a relationship between the parties have been flouted**, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order."
> (emphasis added)

71. There is, in my judgment, no material difference where the relationship between the parties is one of beneficiary and trustee.

72. The fact that the claim seeks relief which the Tribunal cannot grant does not, in my judgment, make the dispute inarbitrable since:
    (1) the grounds on which the appointment is sought are clearly suitable for resolution by arbitration; and
    (2) in such an arbitration, the Tribunal would have the power to make a direction as to the defendants' position which could, if necessary, be enforced outside the arbitration.

73. In addition, the fact that a claimant is seeking a remedy in legal proceedings that is not available in the arbitration does not justify refusing a stay under section 9. The non-availability of the remedy is simply a consequence of the fact that the parties agreed to resolve their disputes by arbitration under a different system of law with different procedures and remedies: *Société Commerciale de Reassurance v Eras (International)* [1992] 1 Ll Rep 570 at 611. The facts of that decision were complex; but for present purposes the relevant fact is that the parties had entered into an arbitration agreement governed by Illinois law. The consequence of this was that rights of contribution under the Civil Liability (Contribution) Act 1978 which were available in a claim brought in England were not available in the arbitration. Rejecting the argument that this justified refusal of a stay, Mustill LJ said:

> "Accordingly it seems to us plain that if the action is stayed for the purposes of arbitration the rights of contribution under the Act of 1978 which would exist if the action were to proceed in the High Court will be extinguished. This striking fact does not however lead to the conclusion that the stay should be refused. Clarksons have addressed no detailed argument as to the mechanism by which this conclusion is to be reached, and we ourselves cannot devise one. Section 1 of the Arbitration Act 1975 requires the court to grant a stay, unless there is no dispute between the parties, or the arbitration agreement is "null and void, inoperative or incapable of being performed." These words do not apply here. Nothing has gone wrong with the arbitration agreement. All that has happened is that the parties have discovered that the remedies available to the arbitrator are in one respect more narrow than those which, but for the agreement, could have

been awarded by the English court. We can see no ground here for refusing a stay.

At first sight this result appears harsh, but the impression is misleading. It is not a question of Clarksons being deprived of a right by the grant of a stay. On the contrary, the parties have agreed that all their rights shall be fixed in Illinois according to the procedures (and by implication the substantive law) in force in that state. If the stay is refused the consequence will be that by acting in breach of their agreement, in pursuing their claim against Howdens in the English court, Clarksons have obtained for themselves the possibility of a right and remedy which they would not have possessed if they had acted as their agreement required. In the face of this we can see nothing unjust in holding Clarksons to their agreement, in accordance with the spirit of the Act of 1975 and the New York Convention on which it is based."

Conclusion

74. In my judgment, therefore, the fact that the Tribunal cannot appoint a trustee does not render inarbitrable the disputes raised in this claim, namely whether there has been misconduct by the defendants sufficient to justify an independent investigation, or whether the administration of the Trust has broken down. Indeed, as noted above, many of these disputes have in fact been determined by the Tribunal. The claimant is not satisfied with those determinations, and seeks to relitigate the disputes in this claim. In my judgment, the arbitration agreement is operative, and he is not entitled to do so. In these circumstances, it is unnecessary to decide whether the claim should be struck out as an abuse of process.