



Bond v Equiom Trust (Guernsey) Limited

Royal Court
4th June 2018

JUDGMENT
24/2018

Seeking relief pursuant to section 53 of the Trusts (Guernsey) Law, 2007

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between

MARIA BOND

Applicant

-and-

EQUIOM TRUST (GUERNSEY) LIMITED

Respondent

Hearing date: 25th May 2018

Judgment handed down: 4th June 2018

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Applicant:

Advocate M G Ferbrache

Counsel for the Defendants:

Advocate J M Wessels

Cases, Texts & Legislation referred to:

The Trusts (Guernsey) Law, 2007

The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011

The Cyprus Contracts Law

The Indian Contract Act

Jones v Pacaya Rubber and Produce Co. Ltd [1911] 1 KB 455

IRC v Silverts Limited [1951] 1 Ch 521

Saunders v Vautier (1841) Cr & Ph 240

Lewin on Trusts (19th ed.)

Clarence House Ltd v National Westminster Bank plc [2010] 1 WLR 1216

Don King Productions Inc v Warren [2000] Ch 291

Snell's Equity (33rd ed.)

Law Debenture Trust Corporation v Elektrim Finance NV [2006] EWHC 1305 (Ch)

Introduction

1. By an Application dated 11 May 2018, Maria Bond, the Applicant, seeks relief pursuant to section 53 of the Trusts (Guernsey) Law, 2007, and/or by virtue of the inherent jurisdiction of this Court, against the Respondent, Equiom Trust (Guernsey) Limited. The evidence in support of the Application comprises a First Affidavit of Robert Breckon, sworn on 11 May 2018, and a Second Affidavit of Mr Breckon, sworn on 23 May 2018. Various other documents have also been adduced on behalf of the Applicant, including inter partes correspondence. The Respondent opposes the granting of the relief sought and relies on three Affidavits sworn by Marcel Cariou, who is a Legal Director of the Respondent. The first two of his Affidavits were sworn on 23 May 2018, with his Third Affidavit being sworn on 25 May 2018.
2. The hearing of the Application took place on the morning of 25 May 2018 as part of the business of the Interlocutory Court. At its conclusion, I indicated that I would reserve judgment to enable me to consider in more detail the submissions that had been made by Advocate Mark Ferbrache and Advocate Wessels on behalf of the Applicant and Respondent respectively and to digest the materials that had been produced following the first hearing the previous Friday when directions had been given. This judgment sets out my reasons for granting the Application.

Facts

3. There is no dispute about the sequence of events that led to the Application and which largely derives from the contemporaneous documentation.
4. Under a loan agreement dated 21 June 2012, AV Capricorn International Limited (“AVCIL”) lent US\$6 million to Carnmor Group Limited (“Carnmor”). This agreement, which in its original form is included within the exhibit to Mr Breckon’s First Affidavit, is governed by the law of Guernsey and has apparently been amended and/or restated from time to time. It was a requirement (see clause 2.3) that the loan be used solely “*to permit the Borrower to repay certain existing debts, for the purchase of a property in Moscow and for the development of the business of the borrower*”. In 2012, both companies were registered in Guernsey. There was also a Guernsey law security interest agreement to be put in place in respect of 150 shares in Carnmor. That agreement would be entered into by Christopher Bond, who I understand is the husband of the Applicant, Virtus Trust Limited and AV Holdings Limited (as nominee for AVCIL). Elsewhere in the materials before the Court, there is reference to this security interest agreement having been executed on 7 August 2012.
5. When Carnmor proposed to migrate to Cyprus, a different arrangement to afford security for the loan was needed. A Deed of Pledge of Shares in Carnmor was executed on 26 April 2016 by the Applicant (as Pledgor), the Respondent (in its former name, Virtus Trust Limited, as Nominee) and AVCIL (as Pledgee). This Pledge relates to 38 of the 1,000 issued shares in Carnmor, of which the Applicant was, and still is, the sole beneficial owner. By clause 26.1, the Pledge is expressed to be governed by and construed in accordance with the laws of the Republic of Cyprus.
6. The Respondent made a Declaration of Trust of those 38 shares in favour of the Applicant dated 22 June 2016, by which the Respondent undertook and agreed “*not to transfer deal with or dispose of the Shares save as the Owner may from time to time direct and further to give full effect to the trust hereby declared.*” It is common ground that this is a bare trust.
7. By a letter dated 28 March 2017, the Respondent provided to the Applicant a copy of its Standard Terms and Conditions. By clause 4.1, either party has the right to terminate the engagement for services by giving three months’ notice in writing. Clause 4.6 provides:

“Termination of the engagement for Services shall not prejudice any rights of the parties in respect of any rights, liabilities or obligations arising under the engagement prior to the termination. In the event of a notice of termination being served by either party on the other, the Client shall be obliged, within three months’ [sic] of the service of the notice, to arrange for the transfer of the administration of any Entity from the Company to a new administrator. Upon the supply by the Client to the Company of the details of the new administrator the Company shall, provided that the Client shall have paid all fees and disbursements due to the Company to date (together with interest if applicable) be obliged to procure the transfer of the administration of the Entity to the new administrator. In the event that such information concerning the new administrator is not given by the Client to the Company or in the event that the Client does not pay its fees in full, the Company shall be entitled to procure the winding up, liquidation or dissolution of any Entity, and the costs of so doing shall be a debt due by the Client to the Company payable on demand on a full indemnity basis. Where termination by the Company is immediate the Client or Protector shall take immediate steps to transfer administration to a new administrator but in any event within 3 months of the notice of termination.”

The term “Entity” is defined, “where the context so admits”, to mean “any one or more of a trust, the estate of a deceased person, a limited or unlimited company (public or private or limited liability partnership), a partnership (limited or general), a foundation or any other entity recognised as such according to the law of the jurisdiction in which it is established”.

8. From a letter dated 2 November 2017 from the Applicant’s Cypriot lawyers to the Respondent, it appears that AVCIL took steps to enforce under the Pledge in respect of the non-payment of the loan by Carnmor in August 2017. I have also seen an e-mail dated 14 November 2017 to Advocate Cariou from Stavros Pavlou, the Applicant’s Cypriot lawyer, commenting on the consequences of there having apparently been no execution of the documents to be delivered to the Pledgee in accordance with the Pledge. That e-mail also indicates that Advocate Cariou had acknowledged that no backdated documents would be created.
9. Also in November 2017, the Applicant commenced proceedings before the District Court of Limassol arguing that the Pledge is invalid and produces no legal effect on the basis highlighted in the letter sent earlier that month. She obtained an interim injunction preventing enforcement of the Pledge. A copy of that interim injunction has been served on the Respondent. The Respondent has applied to the Limassol Court to set aside that injunction. It has also applied to strike out the Applicant’s substantive claim on the basis of want of prosecution. Directions hearings in these matters are to be held in June 2018.
10. On 8 March 2018, Mr Pavlou sent a letter by e-mail to the Respondent. That letter contained a demand that the Respondent immediately transfer the shares held by it to the Applicant and that she be registered as the shareholder thereof. It noted that the Respondent is a bare trustee and that there was no reason to refuse to comply with the direction. Numbered paragraph 5 of that letter states:

“In the event that you are concerned about the existence of the invalid pledge in favour of AV Capricorn over a small portion of our client’s shares, we would like to draw your attention to the fact that the pledger is our client and there would therefore be no impediment in transferring the entire shareholder into her name, even if the pledge was not obviously invalid as we have already established.”

The Respondent wrote directly to the Applicant on 23 March 2018, referring to an earlier reply to the Applicant’s Cypriot lawyers in which the Respondent had indicated its

willingness to comply with the direction to transfer the shares “*subject to payment of [its] outstanding fees and subject to compliance with the two pledge agreements.*” That letter further gave three months’ notice of termination in accordance with the Respondent’s terms of business and requested the Applicant to “*identify another fiduciary services provider*” to enable it to “*start the hand over process*”. There has been no explanation about the reference to complying with “*the two pledge agreements*”, although the exhibit to Mr Breckon’s First Affidavit contains a copy of a Deed of Pledge of Shares in Carnmor between the Respondent, as trustee of the AAV Trust, and Lemman Management Limited which was made on 5 April 2017.

11. On 4 April 2018, Advocate Cariou sent an e-mail to Maxim Chernavin. I was told that Mr Chernavin is a lawyer who assists the Vdovin family, which has the beneficial interest through a trust, of which the Respondent is also the trustee and AVCIL forms a wholly owned part thereof, in respect of half of the issued shares in Carnmor. That e-mail states:

“By way of notice, Equiom Trust (Guernsey) (previously Virtus Trust) has been asked to transfer the shares it holds in Carnmor Group as nominee for Maria Bond into the name of Maria Bond. As those shares are subject to the terms of the pledge in favour of AV Capricorn (the Pledge), the consent of AV Capricorn is required. We would propose to make such transfer by the end of the week. As you know, the terms of the Pledge are such that the primary obligations are on Maria Bond and Virtus is only party as nominee. We do not think that transferring those shares to Mrs Bond and removing Virtus from its obligations under the Pledge will affect the validity of the Pledge.”

On 16 April 2018, Advocate Cariou confirmed that the Respondent had received payment of the fees owed to it by the Applicant and asked her to confirm whether she had identified an alternative corporate services provider in Guernsey.

12. The Applicant’s request to transfer to her the shares in Carnmor that were subject to the 2016 Declaration of Trust was repeated on her behalf by Advocate Ferbrache at a meeting he had with Advocate Cariou on 3 May 2018. Accordingly, on 8 May 2018, Advocate Cariou sent an e-mail to Derval Walsh, who I was told is a solicitor with Mishcon de Reya also advising the Vdovin family, which states:

“We have had further requests from Maria Bond’s advisers to transfer the shares in Carnmor Group that we hold for her on bare trust into the name of Maria Bond.

We would like to propose that the share pledge in favour of AV Capricorn (AVCIL) be amended and restated to reflect the removal of Virtus Trust (now Equiom Trust (Guernsey) Limited). If the terms were identical to the existing pledge agreement (but without any reference to Virtus or a nominee arrangement), there would not be any diminution of the security given to AVCIL, indeed AVCIL would be able to enforce directly against Maria Bond without necessarily enforcing against the nominee.

As the arrangement is a bare trust, we are contractually obliged to transfer the shares to Maria Bond when she requests. Further, as a matter of trust law – the rule in Saunders v Vautier – we are obliged to hand over the assets when the sole beneficiary calls for those. As a Guernsey trustee, we are subject to regulation and, in particular, the Code of Practice for Trust Service Providers requires us to act in the beneficiary’s best interests. We are, therefore, compelled to transfer the pledged shares to Maria Bond and would like to find a solution. I should be grateful if you

would consider whether you could recommend an amended and restated pledge agreement to AVCIL.”

13. On 11 May 2018, Advocate Cariou sent an e-mail to Advocate Ferbrache, referring to the entry into the Pledge in 2016 and continuing:

“That said, and as noted, [the Respondent] would like to comply with your client’s instructions to transfer the relevant shares into her name. In order to effect the transfer of the 38 shares into the sole name of Maria Bond, we would propose that, subject to Cyprus law advice confirming that the status quo between the Pledgee and the Pledgor would be preserved, the Pledge be amended and restated in identical terms but as a bi-partite agreement between Maria Bond and AV Capricorn International Limited, without ETGL as nominee.”

14. Further correspondence ensued, especially on 15 and 16 May 2018, now involving Advocates on behalf of the Respondent. Advocate Ferbrache set out the Applicant’s case, in terms that were repeated in his submissions at the hearing, and Advocate Barrett in reply highlighted that the Pledge is what is preventing compliance with the Applicant’s request for the transfer of the shares in Carnmor and that the injunction obtained by the Applicant in the Cyprus proceedings held the ring for the time being. The Applicant was invited to withdraw her Application. In his response on 16 May 2018, Advocate Ferbrache rehearsed the history of the matter and indicated on behalf of the Applicant that, if the Respondent agreed to transfer the shares into her name forthwith *“she will give an undertaking to the Pledgee, AVCIL, not to dispose or charge the shares providing [sic] determination of the proceedings in Cyprus or further order of the Court in Cyprus. This is expressly without prejudice to her position that the Pledge agreement was invalid and she maintains all rights as advanced on her behalf in the Cypriot proceedings.”* By way of a further letter by e-mail sent by Advocate Ferbrache to Advocate Wessels on 24 May 2018, that undertaking was mentioned again, albeit noting that the offer had not been accepted, and the letter added:

“In the alternative, we are instructed to request that Equiom transfers the 38 shares to Page Trustees Limited, a Cyprus company owned by Maria’s Cypriot lawyers Patrikos Pavlou & Associates LLC who will hold her shares as Maria’s bare trustee with an obligation to hold the same until the matter of the Cypriot proceedings concerning the Pledge are resolved.”

The parties’ submissions

15. On behalf of the Applicant, Advocate Ferbrache advances the simple case that the bare trust of the 38 shares has been terminated and so section 53 of the 2007 Law entitles the Applicant to be afforded the relief she claims. He points out that the Applicant is of full age and not under any legal disability and that the Respondent is the nominee, or “dummy” for her, as the true owner of the shares, capable of putting an end to the trust and directing the trustee to hand over the trust property. Further, the Respondent has terminated the trust and, in accordance with its own terms and conditions, eg, clause 4.6, now has to procure the transfer of the shares to the person the Applicant identifies as the new administrator. The fact that she has identified herself rather than a different corporate services provider is immaterial. This is entirely consistent with the tenor of the correspondence of Advocate Cariou.
16. On behalf of the Respondent, Advocate Wessels submits that it is essential first to have regard to the terms of the Pledge, which is the commercial arrangement governing the nominee arrangement represented by the declaration of trust of the Respondent in favour of the Applicant. The Pledge is designed to secure the loan from AVCIL to Carnmor, which has not been repaid, and so limits the right of the beneficiary of the trust of the shares to call for their

return. If calling for their return would put the Respondent in breach of its obligations under the Pledge, this provides an exception to the rule in *Saunders v Vautier*. Just because the trust is coming to an end does not mean that the trust property must be returned, because there are frequent instances where a trust is terminated but the trustee retains the trust property for good reason.

17. The clauses of the Pledge to which Advocate Wessels drew particular attention include:

“3.1 *As security for the Secured Obligations, the Pledgor hereby pledges and charges to the Pledgee with first priority all the shares and pledges the Share Certificate representing the Shares provided that unless and until enforcement of the security constituted by this Deed is commenced by the Pledgee hereunder no title to the Shares shall be transferred to the Pledgee and the Pledgor shall be entitled to remain the owner of the Shares and shall retain as beneficial owner all rights attaching to the Shares, including rights to dividends and voting and the Nominee shall be entitled to remain the registered owner of the Shares. ...*

6. *The Pledgor hereby represents and warrants to the Pledgee as at the date hereof and as a continuing warranty during the subsistence of this Deed that:- ...*

(e) *As at the date hereof the Nominee is the registered owner of the Shares and the lawful holder of the Share Certificate and the Pledgor is the Beneficial Owner of the Shares. ...*

The Nominee hereby represents and warrants to the Pledgor and the Pledgee as at the date hereof and as a continuing warranty during the subsistence of this Deed:- ...

(b) *To create, perfect, preserve or protect the Security Interest created or intended to be created by this Deed, including, without limitation, the control of, or title to, any part of the Shares. ...*

9.1 *The Nominee further covenants and undertakes to the Pledgee the intent that the same shall be continuing covenants and undertakings until the Pledgee's Security Interest in this Deed is wholly discharged and it shall treat the Pledgee as the party entitled to exercise all rights and benefits in respect of its contract rights and, without limitation, the Nominee further acknowledges: ...*

(c) *That it holds and will hold all titles or possessions of this Deed held in connection with the contract rights arising from the Nominee Agreement to the order only of the Pledgee for its benefit;*

Provided that, for the avoidance of doubt, nothing in this Deed and this Clause 9 shall operate so as to novate the Pledgor's obligations under and in respect of the above contract rights and the Pledgor alone shall remain liable to the Nominee in respect of all obligations and liabilities arising under or in respect of the above contract rights.

10.1 *For as long as this Deed or any part of it is registered in the name of the Pledgor or the Nominee each of the Pledgor and the Nominee undertake that:*

- (a) *They shall, and shall procure that the Nominee will, comply with all obligations and conditions assumed by, and imposed on the Pledgor in respect of this Deed or any relevant part.*

Advocate Wessels argues that these clauses from the Pledge demonstrate that, during the subsistence of the Pledge, which is ongoing pending any determination by the Limassol court, there are obligations on the parties to this Application to maintain the Respondent as the registered owner of the 38 shares in Carnmor.

18. Advocate Ferbrache dealt with this issue by referring to the absence of any expert evidence dealing with the position in Cypriot law. Because the Pledge is governed by the law of Cyprus, he submitted that the Respondent had failed to establish an appropriate evidential base to be able to make this argument. In response, Advocate Wessels points out that the approach to be taken as set out in a document from the Respondent's Cypriot lawyer is to follow English law principles.

Expert evidence

19. The material before me relating to the law of Cyprus is not exactly in the form that would be usual. Given the way in which the Application had been dealt with comparatively quickly, I decided to be pragmatic and waive any requirements for formal applications and permissions pursuant to the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011. The simplest solution was to regard a letter dated 23 May 2018 prepared by Mr Pavlou, which was exhibited to Mr Breckon's Second Affidavit, and the two documents prepared by Elias Neocleous & Co LLC, which were exhibited to Advocate Cariou's Second and Third Affidavits, as containing the expert evidence both parties wished to adduce. The authors of the respective materials had indicated that they understood their documents might be relied on before this Court.
20. Mr Pavlou's letter addresses two issues: the nature of the Pledge and the proceedings before the Limassol court. He explains that *"Under Cyprus law, a pledge is an actual or constructive delivery of movables or documents of title to the lender as security for payment of a debt"* and refers to section 130 of the Cyprus Contracts Law. He further refers to the way in which the Cypriot courts have regard to a work on the Indian Contract Act because of similarities between the two measures, from which it follows that *"for a pledge to be completed, there has to be an actual or constructive delivery of the pledged property."* He then refers to clause 4 of the Pledge, under which the Respondent agreed to deliver some documents to AVCIL, before adding *"From our handling of the case and communications with the representatives of the counter-parties, it is our understanding that such documents were never executed by Virtus Trust Limited and they were never delivered to the Pledgee. ... Since delivery, whether actual or constructive, of the pledged goods has not been effected the Pledge Agreement is not complete and valid under Cyprus Law and, if that were the only problem, could only be completed once delivery of the said documents is effected."* After commenting on the non-compliance with the required formalities for executing the Pledge, which form the basis of the Applicant's proceedings before the Limassol court, he adds: *"We are of the opinion that after the order of the Court in the Cyprus proceedings referred to below no action can be taken to comply with the requirements of the law regarding the lack of deliverables."* Mr Pavlou describes the proceedings instituted by the Applicant in the Limassol court and explains that *"During the period that the Interim Order is in force, none of the Defendants may proceed with exercising any contractual rights deriving from the Pledge Agreement, including of course, taking steps towards the execution of any deliverables that*

should have been executed and were not or the enforcement of the Pledge Agreement and the transfer of the pledged shares in the name of” AVCIL.

21. Mr Pavlou also refers to some other proceedings in Cyprus in which Equiom Trust (Guernsey) Limited is engaged, in its capacity as trustee of the AAV Trust, against Carnmor and Leman Management Nominees Limited. In that action, the stance being taken by Equiom Trust (Guernsey) Limited refers to the alleged non-compliance with the same provision of the Cyprus Contract Law on which the Applicant in the proceedings with which I am dealing raises in her own proceedings before the Limassol court. Mr Pavlou suggests that “*If Equiom argues before the Guernsey Court that the Share Pledge Agreement may be valid or enforceable then this would be in direct contradiction to their position promoted in the Action with no 708/2018.*” By reference to what he had written to the Respondent on 8 March 2018, as previously quoted, Mr Pavlou commented:

“Self-evidently, the merging of the legal and beneficial ownership of the 38 shares in Maria Bond would make no difference under Cypriot Law and it would certainly not per se put the Pledgee in a worse position than their present position. This is because, Maria Bond is included as a party to the Pledge Agreement and therefore if the Pledge was valid, then the Pledgee would be able to enforce its rights directly against the Pledgor rather than it being necessary to involve Equiom as Nominee.”

22. The document exhibited to Advocate Cariou's Second Affidavit similarly describes the steps taken in the proceedings before the Limassol court. The Respondent's lawyers explain that:

“It should be noted that the proceedings in Guernsey were filed by MB despite the fact that the application to reopen the injunction proceedings in Cyprus is still pending, and despite the fact that, as it stands, the Cyprus injunctions provide MB with sufficient comfort and protection. Further, the issue as to whether the Pledge is unenforceable will not be definitively determined until the trial of the Cyprus action. At a general level, Cypriot law as to the interpretation of commercial contracts is broadly similar to the position under English law.”

This first letter continues to offer an opinion that there will be a potential breach of clause 8.1(e) of the Pledge in the event that the Applicant were to vote the shares that are the subject of the Pledge at an extraordinary general meeting of Carnmor that has been called for 6 June 2018 without first having sought written consent from AVCIL.

23. The document exhibited to Advocate Cariou's Third Affidavit comments on Mr Pavlou's letter dated 23 May 2018. It deals first with the way in which an interlocutory injunction maintains the status quo until the substantive hearing or until further notice, referring to *Jones v Pacaya Rubber and Produce Co. Ltd* [1911] 1 KB 455. On this basis, Elias Neocleous & Co LLC take issue with the comment of Mr Pavlou that “*During the period that the Interim Order is in force, none of the Defendants may proceed with exercising any contractual rights deriving from the Pledge Agreement*”, commenting that the injunction “*merely prohibits the enforcement of the pledge over the 38 shares and is purported to preserve the status quo until the Cyprus court delivers its ruling on the substance of the claim.*” The letter also implicitly criticises the Applicant from bringing her Application without having informed the Limassol court.

Discussion

24. Section 53 of the 2007 Law deals with the termination of trusts. The section provides:

“(1) On the termination of a trust the trust property shall, subject to subsection (2), be distributed by the trustees within a reasonable time in accordance with the terms of the trust to the persons entitled thereto.

(2) The trustees may however require that they be provided with reasonable security for liabilities (existing, future, contingent or otherwise) before so distributing the trust property.

(3) Without prejudice to the powers of the Royal Court under subsection (4), and notwithstanding the terms of the trust, where all the beneficiaries are in existence and have been ascertained, and none is a minor or a person under a legal disability, they may require the trustees to terminate the trust and distribute the trust property among them.

(4) The Royal Court, on the application of any person mentioned in section 69(2), may –

(a) direct the trustees to distribute, or not to distribute, the trust property, or

(b) make such other order in respect of the termination of the trust and the distribution of the trust property as it thinks fit.”

It is clear that the Applicant, as a beneficiary of the trust, has standing to bring the Application pursuant to section 53(4). There is also no issue that she is not a minor or a person under a legal disability. Accordingly, pursuant to section 53(3), she is able to require the termination of the trust and the distribution of the trust property as she directs. By reference to the language used in *IRC v Silverts Limited* [1951] 1 Ch 521, 530, to which Advocate Ferbrache refers, “where the registered shareholder is a bare trustee in the sense of being a mere name or “dummy” for the true owner”, although the result in that case does not directly assist the Applicant, there is a strong argument that the nominee arrangement can be collapsed at the direction of the beneficial owner of the shares held on such a simple, or bare, trust.

25. The rule taken from the case of *Saunders v Vautier* (1841) Cr & Ph 240 (and which can be regarded as codified by section 53(3)) is summarised as follows at para. 24-009 of *Lewin on Trusts* (19th ed.):

“If there is only one beneficiary, or if there are several beneficiaries all of full age and capacity and of one mind, the specific execution of the trust may be stayed and the special trust will acquire the character of a bare or simple trust; for through whatever channel the settlor may have intended his bounty to flow, the beneficiaries, as the persons ultimately to be benefited, are in equity and from the creation of the trust, and before the trustees have acted in the execution of the trust, the absolute beneficial proprietors.”

At para. 24-011, the commentary continues by explaining that “The principle of *Saunders v Vautier* is not a rule of construction but depends on the proposition that the beneficiaries are collectively the beneficial proprietors of the fund. It may therefore be invoked even though it will defeat the known intentions of the settlor or testator.” There then follows the passage (in para. 24-012) on which Advocate Wessels relies:

“Beneficiaries who invoke the principle will convert the trust into a bare or simple trust of the property called for. But they are not entitled to require the trustee to act

in breach of obligations to third parties, as by calling for an assignment of a lease in breach of covenant against assignment. Nor can they override the rights of the trustee, so they will be unable to demand a full distribution if the trustee is entitled to retain any or all of the trust fund to satisfy his entitlement to an indemnity.”

The assignment of lease case cited in support of the proposition is Clarence House Ltd v National Westminster Bank plc [2010] 1 WLR 1216. At the end of that paragraph, the work also states that “*The mere possibility that events may occur in the future giving rise to a claim to an indemnity is not a reason for refusing to distribute.*”

26. Further guidance is offered in para. 24-023 of *Lewin*:

“Where the subject-matter of the trust is not assignable, as in the case of a non-assignable contract, it is not open to the beneficiary or beneficiaries to require the trustee to wind up the trust by assigning the contract to them. Similarly, they may be unable to require the trustee to transfer shares in a private company to them if the articles of association make a transfer subject to the directors' consent and the consent is not forthcoming.”

The authority cited for the first of those propositions is Don King Productions Inc v Warren [2000] Ch 291.

27. Before turning to these two cases on which Advocate Wessels relies, I will first mention para. 29-030 of *Snell's Equity* (33rd ed.), which also deals generally with the rule in Saunders v Vautier. The final part of that paragraph deals with principles largely deriving from Commonwealth cases and states:

“In principle, the rule in Saunders v Vautier may apply as much to trusts in a commercial setting as to traditional family trusts. But it should not be applied where it would undermine the fundamental commercial purpose of the transaction in which the trust device has been used. For example, the rule would not entitle the beneficiaries of a pension trust to wind up the scheme and require the trustees to pay out the scheme assets, if that would circumvent any statutory rules regulating the winding up of the scheme and frustrate the employer's purpose in providing periodic benefits during the members' retirement. But it would not necessarily prevent an entire class of bondholders from terminating the trust on which the bonds were held and requiring payment of the bonds directly to themselves.”

The only English case cited in this passage is Law Debenture Trust Corporation v Elektrim Finance NV [2006] EWHC 1305 (Ch), which relates to the final sentence.

28. Advocate Wessels invites me to look more widely at the way the nominee arrangement in respect of the 38 shares arose. The Pledge is the foundation on which this trust was built. There are express promises in the Pledge that continue to bind the parties and they cannot be ignored by the Applicant. This is, therefore, an example of one of those rare situations in which the rule in Saunders v Vautier should not be applied and the relief sought by the Applicant rejected.

29. I share some of the concerns expressed by Advocate Ferbrache about the state of the expert evidence. It strikes me that neither of the Cypriot lawyers has thought expressly about how to assist this Court to reach a conclusion about the law of Cyprus. Instead, both have descended into argument, as if they were, as they are in Limassol, protagonists articulating their respective clients' cases. Neither appears to have been asked to address expressly the

questions that would be of most assistance in determining whether or not the Pledge should be regarded as overriding the terms of the declaration of trust in respect of the 38 shares in Carnmor. The best that can be said for the evidence adduced on behalf of the Respondent is that Elias Neocleous & Co LLC explain that “*At a general level, Cypriot law as to the interpretation of commercial contracts is broadly similar to the position under English law.*” Advocate Wessels relies on that very general statement as the basis to submit that the approach this Court should take to the Pledge is to construe it in the same way as it would a similar document subject to Guernsey law, thereby enabling me to conclude that it would be commercially unintuitive for the Applicant to be entitled to call unilaterally for the termination of the nominee arrangement whilst the repayment of the loan is outstanding. Against that, Mr Pavlou highlights that the Cyprus Contracts Law bears similarities to the Indian Contract Act with the consequence that the Cypriot courts take guidance from commentaries about the law as it stands in India. In those circumstances, I could conclude that the expert evidence does not lead me to conduct an exercise by reference to what the commercial position would be in Guernsey law because neither Cypriot lawyer has offered that outcome in their respective opinions. As a result, the Respondent would not have laid an adequate expert evidential basis for the submissions made by Advocate Wessels. However, I am not persuaded that that would be an appropriate way to resolve this Application because I indicated at the hearing that I would be pragmatic about the state of the expert evidence. Whether the route to considering the Pledge is from Cyprus to English law and then to Guernsey law, or to Indian law and then to Guernsey law, possibly passing through English law, it seems to me that each system of law enjoys a similar common law basis when it comes to construing contracts and so it would be artificial to disregard the submissions of Advocate Wessels on this basis.

30. I am conscious that there are extant proceedings in Cyprus that will determine whether the arguments of the Applicant that the Pledge is invalid will be resolved. It is not my function in determining this Application to decide whether I agree or disagree with the position taken by the Applicant, or the Respondent, in those proceedings. However, in the context of an Application under section 53 of the 2007 Law and, in particular, the opposition to it from the Respondent, I do not think I can entirely ignore what I have been told about the Pledge because I take the view that it has an impact on how to construe the document as a whole, which is the approach that I believe I have to take applying normal Guernsey law principles of contractual interpretation.
31. There is, however, a further difficulty with elements of that approach because I have gleaned certain information about what has happened in Cyprus from Mr Pavlou’s letter dated 23 May 2018, when there is no direct evidence of some of these matters. For example, he refers to the other proceedings in which Equiom Trust (Guernsey) Limited is engaged and in which the company is taking the contrary position to the stance it is arguing in the proceedings commenced by the Applicant. Although it is permissible for a person to take two contrary positions in different actions, at least until a court has decided whether one of the positions being taken is tenable, it inevitably infects the view I take as to the strength of the Respondent’s reliance on the terms of the Pledge in the present Application. Mr Pavlou also indicates that the Respondent did not comply with its obligations under the Pledge in respect of the deliverables. When coupled with the reference in Mr Pavlou’s e-mail of 14 November 2017 referring to Advocate Cariou’s acknowledgement that no backdated documents would be created, which Advocate Cariou has not stated in evidence is contrary to what it must be inferred he told Mr Pavlou, I am minded to find that the Respondent has not complied with its obligations under the Pledge and that this may well be a further reason for not treating the Pledge as the overriding document.
32. Although little was said at the hearing about the interim, or interlocutory, injunction that the Applicant has obtained from the Limassol court, it has featured in the commentary given by

the Cypriot lawyers and its existence lends further support to the position of the Applicant that AVCIL is currently unable to insist upon either of the parties before this Court taking any positive step in respect of the Pledge. I appreciate that it is designed to maintain the *status quo* until determination of the substantive challenge to the validity of the Pledge, but I consider I have to resolve the Application before me in the light of the current situation of the parties.

33. Accordingly, I find myself balancing two competing obligations on the part of the Respondent. As acknowledged by Advocate Cariou in his correspondence with others before the Application was made, the Respondent is obliged in its relationship with the Applicant to accede to her request upon the termination of the trust to transfer the 38 shares into her name. However, as Advocate Wessels submits, to do so potentially puts it in breach of the terms of the Pledge, with the result that it could face action from AVCIL. For the reasons that follow, I find that the balance lies in favour of requiring the Respondent to give effect to its obligations to the Applicant, even if that leaves it potentially exposed to action by AVCIL. In other words, the certainty of the position vis-à-vis the Applicant is stronger and so outweighs the possibilities of what might follow were AVCIL to take action against the Respondent at some future point.
34. Section 53 of the 2007 Law is predicated on there being a termination of a trust. I am in no doubt that the trust of the 38 shares has been terminated. The original request for the transfer of the shares made by the Applicant's Cypriot lawyers on 8 March 2018 amounts to an intention on the part of a beneficiary of an accepted bare trust to end the nominee arrangement that had been entered into with the Respondent. Further, when the Respondent wrote on 23 March 2018 giving three months' notice of the termination of its agreement to provide services to the Applicant, conditional upon certain events, it amounted to confirmation (if such confirmation were needed) that there was a mutual intention to bring about the termination of the trust. Moreover, I am satisfied that the conditions imposed by the Respondent have been met by the Applicant, in that the outstanding fees payable to the Respondent were settled and the Applicant has identified an alternative "administrator" as required by clause 4.6 of the Respondent's terms and conditions to which the trust and its property, which is really the "Entity" for these purposes, is to be transferred. Accordingly, I am satisfied that there is a positive obligation on the Respondent to act and *prima facie* there is no impediment to the steps required by section 53 being taken now to give effect to the obligations under which the Respondent has held this trust property for the benefit of the Applicant. I regard it as significant that the Respondent chose to give notice of its termination of its services agreement with the Applicant in the knowledge that she had already indicated her wish to terminate the trust. Had the Respondent wished to raise the type of opposition it now raises to the Applicant's direction as to the mechanics of the transfer of the trust property, that was the time at which to do so. Instead, its actions confirmed that there was, in the Respondent's mind, no impediment to giving effect to the Applicant's wishes.
35. In the face of this termination of the trust, the highest that the Respondent's case is put, in my opinion, is that there should be no order under section 53(4) directing the trustees to distribute the trust property as directed by the sole beneficiary because it will involve the Respondent acting in breach of its obligations to a third party, AVCIL, and that this also runs contrary to the underlying commercial basis for the nominee arrangement. I regard this as amounting to a submission that the Court's discretion should be exercised against granting the Application.
36. Turning first to *Clarence House Ltd v National Westminster Bank plc* (*supra*), the passage to which Advocate Wessels referred is in para. 45:

"A bare trustee, or a trustee who is being directed to deal with a lease at the direction of those entitled under the rule in Saunders v Vautier, cannot be compelled to act in a

way which would put him in breach of his obligations to the landlord under that lease.”

It is apparent that this is no more than a comment made *obiter* by Ward LJ because he continues (at para. 47):

“It was with some hesitation that the judge reached the conclusion that there was no breach of the prohibition in the lease against declaring any trust of the property or the lease. I am satisfied there is no trust. I recognise that virtual assignments are strange new beasts in the forest; that one must circle around them suspiciously and cautiously; but the moment one gets close and has a good sniff, the overwhelming smell is of contract, not trust. Although the judge would not have expressed himself in such an inelegant way, so lacking jurisprudential precision, this was the central finding on this point and he was correct in that conclusion.”

Further, the reason given by Ward LJ for making the comment he did in para. 45, to which I have just referred, was:

“There are parallels in that context with the qualified trusteeship which arises on the sale of land, where the vendor is sometimes said to become a trustee for the purchaser as from the date of the contract (with the property correspondingly being at the purchaser’s risk). The trusteeship in the case of vendor and purchaser depends on the availability of specific performance: Howard v Miller [1915] AC 318, 326. Specific performance would not be granted of the assignment of a lease in the face of opposition from the landlord if that would result in a breach of covenant and a risk of forfeiture.”

37. As soon as the reasoning for reaching a conclusion in another jurisdiction is said to rest on parallels with specific performance, it presents problems in Guernsey, where it remains an open question as to whether specific performance is available. However, even if that issue is overlooked, and I concentrate solely on the terms of the Pledge, I have noted the final sentence of para. 24-012 in *Lewin* about the possibility of an event occurring in the future giving rise to a claim to an indemnity not being a reason to refuse to distribute. I take the view that the argument that distributing the trust property as directed by the Applicant will put the Respondent in breach of its obligations to AVCIL is more theoretical than real. As Advocate Cariou pointed out on behalf of the Respondent when proposing to Mr Walsh the collapsing of the structure under the Pledge so that the Respondent would drop out as nominee and AVCIL would be enabled to enforce directly against the Applicant, there would be benefits to all parties in such an outcome and it would arguably leave AVCIL in no worse position. That is also the opinion of Mr Pavlou and the Respondent’s Cypriot lawyers, in reviewing Mr Pavlou’s letter of 23 May 2018, have not joined issue with that assertion. Accordingly, I think I can properly regard this as being the position in Cyprus. In those circumstances, to the extent that there were any action taken by AVCIL, I also envisage a response that suggests that AVCIL had unreasonably withheld its consent to what was being proposed. Although I must be cautious and avoid offering any view that might be regarded as purporting to resolve matters with which the court in Limassol is seized, I find it odd that the Respondent relies on the Pledge as the reason why this Court should not grant the Application when it also appears to accept that there are doubts about the validity of a document executed in similar circumstances, albeit between different parties. There is also the issue as to whether there has already been non-compliance with the basic requirements assumed by the parties under the Pledge. The combination of these factors leads me to conclude that, rather than the Respondent inevitably being put in breach of its obligations under the Pledge, the position is considerably less clear than that, from which I reach the position that the final sentence of

para. 24-012 of *Lewin* applies rather than the position set out *obiter* in the *Clarence House* case. In other words, I reject the submission made by Advocate Wessels.

38. The Respondent's case is not, in my view, assisted by reference to the passage in *Don King Productions Inc v Warren* (*supra*) to which Advocate Wessels has referred. The passage appears on page 321 and is the fourth reason given by Lightman J, on which there was no comment when the matter went to the English Court of Appeal, for rejecting the contention that a contract containing a provision prohibiting assignment could not be held on a trust, in that case between two boxing promoters:

“The rule in Saunders v Vautier (1841) Cr. & Ph. 240 (which enables the sole beneficiary or beneficiaries to give directions to the trustee) only applies if the beneficiary is entitled to wind up the trust and require the trustee to assign to him the subject matter of the trust. If the trust cannot be determined because the trustee has under the contract held as a trust asset outstanding obligations and has no power to transfer the trust asset to the beneficiary or to his order, the rule does not apply: see In re Brockbank [1948] Ch. 206. Accordingly in a case where the subject matter of the trust is a non-assignable contract and there are outstanding obligations to be performed by the trustee, the beneficiary under the trust cannot interfere.”

Assuming for a moment that this principle should be applied as part of Guernsey law, it is apparent that the factual position in the present case is different. The Pledge is not the trust asset under consideration. The trust involves the 38 shares in Carnmor. There has been no suggestion that there is anything in the constitutional documents of Carnmor preventing what the Applicant has directed from taking effect. Unlike in the *Don King* case, the subject matter of the trust can be dealt with in accordance with the usual principles and it would only be if a separate tripartite contract, to which the trustee and beneficiary are parties, overrode the trusts position that there should be any different outcome. For all the reasons I have given, I do not consider that the Pledge should be allowed to displace what would otherwise be the usual application of the rule. In particular, I do not regard the position as being that the application of the rule, effectively section 53(3) of the 2007 Law, would undermine the fundamental commercial purpose of the transaction.

39. Indeed, taking a wider view of the commercial objectives of the parties, the underlying feature of the Pledge is that a different form of security was required in respect of the loan made by AVCIL when Carnmor was to migrate from Guernsey to Cyprus. For whatever reason, and no one has offered any evidence about this, the parties chose to interpose the Respondent as a nominee. If the nominee is removed from this equation, there will still, as I understand the position, be the same security provided to AVCIL. That appears to be the opinion of Mr Pavlou in respect of which no different expert evidence has been adduced on behalf of the Respondent. If AVCIL were to take steps to seek repayment of the loan by Carnmor and then be forced to rely on this security, it should be in no worse position in obtaining repayment of the loan than if the Respondent remains in place as the nominee. Accordingly, in a situation where I have some reason to doubt whether the strict terms of the tripartite Pledge could even be relied upon, I am not persuaded that the Pledge should be capable of being used to thwart the relief the Applicant seeks pursuant to section 53 of the 2007 Law. Further, I regard this section as the clear starting point for deciding the outcome of this Application. Having concluded that the trust relationship between the Applicant and Respondent has been terminated by both parties indicating their wish to end the relationship, there is a reasonable time permitted in which to distribute the trust property, being the 38 shares, as directed by the beneficiary. To the extent that reasonable security is required to be provided to the Respondent under subsection (2), the proposal set out in Advocate Ferbrache's letter dated 24 May 2018 seems to me to preserve the position in a manner that should be to the satisfaction of the Respondent. Although the use of “*may*” in section 53(4) demonstrates that the relief

sought by the Application is discretionary, I am satisfied that there is no good reason to regard the Pledge as operating as a barrier to granting the relief sought. Indeed, I am satisfied that the equitable outcome as between the parties is to make an order that, upon the termination of the trust, the Respondent distribute the 38 shares in Carnmor.

Conclusion

40. For the reasons I have given, the Application will be granted. In particular, I find that the trust dated 22 June 2016 between the Respondent, as trustee, and the Applicant, as sole beneficiary, has terminated and that, in accordance with section 53(4) of the 2007 Law, the trust property, being the 38 shares in Carnmor, is to be distributed. Whether that should be directly to the Applicant or to Page Trustees Limited for that company to hold on bare trust for the Applicant until the proceedings in Cyprus are resolved is an issue on which I invite further submissions. I will also now invite submissions on the appropriate order as to costs.