

Application pursuant to Rule 54 of the Royal Court Civil Rules 2007 and/or the inherent jurisdiction of the Court that judgment be given, the Defendants having failed to comply with an Unless Order and as a consequence their respective defences having been struck out.

**[2022]GRC078**

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**Between:** **NINA NAUSTDAL** **Plaintiff**

**-and-**

**(1) TKC CORPORATE SERVICES NV**  
**(2) SEBASTIAAN RIJCKAERT**  
**(3) NEW DAWN INVESTMENTS LIMITED** **Defendants**

**Judgment handed down: 23 December 2022**

**Before: Jessica E Roland, Deputy Bailiff**

**Counsel for the Plaintiff: Advocate A Lyne**  
**Counsel for Second Defendant: Advocate R Cowling**  
**The First and Third Defendants did not appear.**

**Cases, texts & legislation referred to:**

The Royal Court Civil Rules, 2007  
The Trusts (Guernsey) Law 2007  
Human Rights (Bailiwick of Guernsey) Law 2000  
Lewin on Trusts (20<sup>th</sup> Edition)

Re Westbury Property Fund Limited [2005–06 GLR 176]  
Rothschild Trust Guernsey Limited and Adamantios (Diamantis) Pateras and Katigko-Kalliopi  
15/2011  
Credit Suisse v Haggiag 47/2015  
John Frances Merrien and The Registrar of La Chambre De Discipline and Advocate X, (11<sup>th</sup> July  
2022)

Financial Services Authority v Rourke [2001] EWHC 704 (ch)  
Marcan Shipping (London) Limited v Kefalas [2007] EWCA Civ 463  
Fattal & Others v Walbrook Trustees (Jersey) Limited & Others [2010] EWHC 2767 (Ch)  
Goldcrest Distribution Limited v McCole & Others [2016] EWHC 1571 (Ch)  
Ward v Saville [2018] EWHC 995 (Comm)  
Montlake Qiaif Platform Icav v Tiber Capital LLP [2021] EWHC 202 (Comm)  
Aramco Trading Fujairah FZE v Gulf Petrochem FZC [2022] EWHC 288 (COMM)

## Introduction

1. This is an application (the “Application”) by the Plaintiff pursuant to Rule 54 of the Royal Court Civil Rules 2007 (“RCCR”) and/or the inherent jurisdiction of the Court that judgment be given in the form of the relief set out in the Application the First and Second Defendants having failed to comply with Unless Order dated the 5 August 2022 (the “Unless Order”) and as a consequence their respective defences having been struck out.
2. The Second Defendant opposes the Application says that he has materially complied with the Unless Order and therefore the defences are not struck out.

## Procedural History

3. On 19 April 2021 the Plaintiff obtained leave to serve an application dated 1 April 2021, seeking declaratory and other relief on the First and Second Defendants. When it was returned substantively to the Court in June, the First Defendant was represented by Walkers and the Second and Third Defendants were represented by Babbé.
4. Following a hearing before Lieutenant Bailiff Marshall, the Plaintiff was ordered to table a Cause in the proceedings in place of the application which she did on 20 August 2021. A Consent Order was lodged, placing the matter inscrite and giving the élection de domicile of 12-14 New Street for the First Defendant and La Vielle Cour for the Second and Third Respondent. Defences were filed by the three Defendants on 17 September 2021.
5. A case management conference set down on 1 October 2021 was dealt with by a consent order setting out directions for the progress of the matter.
6. The Plaintiff filed a réplique on 29 October 2021.
7. On 20 January 2022, the First Defendant filed its list of documents and disclosure statement and on 21 January 2022, the Plaintiff, Second Defendant and Third Defendant filed their lists of documents and disclosure statements.
8. In February 2022, the Plaintiff instructed Ogier in place of Collas Crill. On 11 February 2022, various directions were made by the Court dealing with a possible amendment to the Cause and consequential directions.
9. On 16 March 2022, Babbé informed the Court that they had ceased acting for the Second and Third Defendants. On 22 March 2022, Walkers informed the Court that they had ceased acting for the First Defendant. The élections de domicile were not amended and remained as set out above until the Second Respondent changed his on 17 August 2022. The Third Defendant notified the Court on 20 October 2022 that its élection de domicile was no longer at Walkers’ address.
10. On 23 March 2022, the Plaintiff filed an application for leave to amend the Cause to be heard on 25 March 2022. None of the Defendants appeared at Interlocutory Court on 25 March 2022, however prior to the hearing the Second Defendant emailed the Court asking for a 14 day adjournment. An adjournment was granted and directions were made in relation to the application for leave to amend the Cause, requiring the Defendants to advise whether or not they were going to oppose the amendments.
11. On 22 April 2022, the Plaintiff presented her application for leave to amend her Cause. The First and Second Defendants did not appear and were not represented. The Third Defendant appeared by video link represented by Mr Brenner who was the appointed liquidator. He indicated that the Third Defendant was now neutral in relation to the proceedings. The Court

granted leave for the Plaintiff to amend her Cause. The Defendants were given until 20 May 2022 to serve and file amended defences and there were other consequential directions. The Plaintiff's costs incidental to the application were ordered to be paid jointly and severally on a recoverable basis. The matter was listed for a Case Management Conference on Friday 10 June 2022.

12. The Defendants have not at any point amended their defences to reflect the amended Cause despite the additional claims contained therein.
13. On 10 June 2022 the Second Defendant appeared by TEAMS and the First and Third Defendant were unrepresented and did not appear. The Plaintiff sought various orders including that the First and Second Defendant disclose and provide documents. At that hearing, the Second Defendant asked for the CMC to be adjourned for 14 days. This was granted with the CMC being adjourned until 24 June 2022.
14. On 24 June 2022, none of the Defendants were represented or appeared in person. At that hearing various Orders (the "Orders") were made in an Act of Court of the same date including:
  - (1) Subject to paragraph 2 below, the First and Second Defendants were to disclose and provide copies of the documents listed in the Schedule that was annexed to the Act of Court ("the Schedule") by no later than 4 pm on Friday 1<sup>st</sup> July 2022.
  - (2) In the event that the First and/or Second Defendants were not able to produce any of the documents listed in the Schedule for the reason that they do not exist, or are no longer in their possession or control, they were to confirm that fact by filing an affidavit by no later than 4 pm on Friday 1<sup>st</sup> July 2022, specifying what document or documents cannot be produced and stating the reason why the particular document or category of documents cannot be produced.
  - (3) The parties were to provide standard disclosure of all documents relevant to the additional claims made in the Plaintiff's amended Cause and exchange disclosure lists by no later than 4 pm on Friday 1<sup>st</sup> July 2022 and there were thereafter consequential directions leading up to trial, including the request for availability dates so the matter could be set down for a Judge sitting with Jurats.
15. It was also ordered that the Plaintiff's costs were to be paid by the First and Second Defendants jointly and severally on the indemnity basis.
16. On 1 July 2022, the Plaintiff served her disclosure statement and additional list of documents upon the three Defendants. On the same date the Second Defendant served a list of the documents identical to that served on the 21 January 2022 i.e. before the Cause was amended. The First and Third Defendants did not file any additional documentation.
17. On 4 July 2022, the Plaintiff made the first application for an unless order that was set down for a hearing on 22 July 2022. On 22 July 2022, the Second Defendant appeared via TEAMS and the First and Third Defendant were unrepresented and did not appear. The Second Defendant confirmed in Court that he would disclose the documentation sought in the Orders. He also confirmed that he would pay the outstanding costs orders amounting to £29,000. The Second Defendant informed the Court that he was reinstructing Babbé and Mourant Ozannes and that Walkers would be instructed to represent the First Defendant by the middle of the following week.
18. In a brief ex tempore judgment I did not make an unless order applied for but ordered that the First and Second Defendants were required to comply with the Orders by 4 August 2022. If the First and Second Defendant did not comply with the Orders then if the Plaintiff wished to

pursue an unless order this could be dealt with on 5 August. I made it clear to the Second Defendant that the consequences of not complying with an unless order would be that the defences of the First and Second Defendant would be struck out without further order and that in turn was likely to lead to an application for judgment against the First and Second Defendant. If the Plaintiff wished to pursue an unless order, then the Defendants had to be formally served with that application. I also made clear that if the First and Second Defendants did not comply with the Orders that I had made, I could see very little reason why I would not make an unless order if the Plaintiff applied for one because considerable indulgence had been given to the First and Second Defendants during the course of this matter despite their failure to comply with the Orders. I made it clear, however, that I had not yet made a decision on whether I would grant an unless order if the Plaintiff applied for one.

19. The First and Second Defendant failed to comply with the Orders by 4 August 2022. On 5 August 2022, the Plaintiff applied to attach an unless order with a 7 day requirement for compliance with the terms of the Orders. None of the Defendants were present or represented. At the hearing on 5 August 2022, Advocate Thibeault of Walkers and Advocate Cowling of AFR attended Court but were not formally instructed by the First and/or Second Defendants at that time. I made the Unless Order with compliance required within 7 days of 5 August 2022.
20. The First Defendant did not file any documentation or an affidavit but on 11 August 2022 the Plaintiff received a letter by email from the First Defendant stating that they were not going to file anything further. On 12 August, the Second Defendant filed two affidavits, The first affidavit (the “First Affidavit”) states the Second Defendant did not have “*the requested documents and therefore are unable to produce the said document*”. The second affidavit (the “Second Affidavit”) says that due to AFR “*not being released by Babbé*” the Second Defendant had been unable to comply with the Unless Order from the 5 August 2022 and that he requested a 7 day extension.
21. On 15 August 2021 the Plaintiff applied for judgment against the First and Second Defendants. The Application was served on all three Defendants at their respective *élection de domiciles*. The matter was listed for a hearing on 16 September 2022 and then a further hearing on the 27 September 2022.
22. The Second Defendant filed a third affidavit on 21 September 2022 (the “Third Affidavit”).

## **The Law**

23. Rule 53 of the RCCR says as follows:

- (1) *Where a party has failed to comply with any of these Rules, or any court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an unless order as defined in paragraph (6).*
- (2) *An application under paragraph (1) may be made without notice but must be accompanied by –*
  - (a) *evidence on affidavit, or otherwise to the satisfaction of the Court, which –*
    - (i) *identifies the rule or order which has not been complied with,*
    - (ii) *states the nature of the breach, and*
    - (iii) *certifies that the other party is in default, and*

- (b) *a draft order.*
- (3) *The Court may –*
  - (a) *grant the application,*
  - (b) *seek the views of the other parties, or*
  - (c) *direct that a date be fixed for the purpose of considering the application.*
- (4) *Where a date is fixed pursuant to paragraph (3)(c), the applicant must give not less than 7 days' notice of the date, time and place of such application to all other parties.*
- (5) *Where an unless order is made, the party in default shall be ordered to pay the costs of the application*
- (6) *In this Rule, an unless order is an order which identifies a breach, requires the party in default to remedy that breach within a specified period and specifies the consequences of failure to do so.*

24. Rule 54 says:

- (1) *This Rule applies where the Court makes an order which includes a term that the pleading of a party be struck out if that party does not comply with the order.*
- (2) *Where an order has been made striking out the whole of a party's pleading, any other party may apply for judgment with costs to be entered in his favour.*
- (3) *A party may apply for judgment under this Rule by filing a request for judgment, which request must -*
  - (a) *state that the order of the Court has not been complied with, and*
  - (b) *certify that, in consequence, the right to enter judgment has arisen.*
- (4) *Where the party applying for judgment is the plaintiff and the claim is for -*
  - (a) *a specified sum of money,*
  - (b) *an amount of money to be decided by the Court,*
  - (c) *delivery of goods, where the claim gives the defendant the alternative of paying their value, or*
  - (d) *any combination of these remedies,*

*judgment shall be in accordance with the terms of the particulars of the claim together with any interest and costs after giving credit for any payment that may have been made.*
- (5) *Where the party applying for judgment is the plaintiff and the claim is for some other remedy, the judgment shall be such as the Court considers to be appropriate.*

## **Striking out of the Defences**

### **Brief submissions**

25. Both parties accepted that if I find that there has been compliance with the Unless Order then the matter will continue to trial, however if there has been non-compliance then the next step is for the Court to consider the Plaintiff's application for judgment under Rule 54. The submissions of the Plaintiff were that neither the First Defendant nor Second Defendant had complied with the Unless Order and therefore the strike out of their defences has taken effect. In the absence of Guernsey authority on this point, the Plaintiff says the Guernsey Court should look to *Marcan Shipping (London) Limited v Kefalas [2007] EWCA Civ 463* for guidance. The Court of Appeal in that case made clear that the sanction embodied in an unless order took effect without the need for any further order if the party for whom it was addressed failed to comply with it in any material respect. It also identified a number of principles:
- (1) That once the prescribed time has expired the Judge has no jurisdiction to extend the time because the action has ceased to exist.
  - (2) The fact that in the event of default the order operated without further intervention of the court means that the order needs to be precise in its terms to ensure that the party to whom it was directed should be in no doubt about what he needed to do to avoid the action being dismissed.
  - (3) Unless the party in default has applied for relief or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise.
  - (4) If it is thought that the court should not have made an order in those terms in the first place, the right course is to challenge it on appeal.
26. The Second Defendant's First Affidavit states that the Second Defendant did not have any of the documents. The Second Defendant's Second Affidavit referred to seeking an extension to comply with the Unless Order although no application was made nor has this been pursued since. Once AFR were formally instructed by the Second Defendant on or around the 16 August 2022, the position taken by the Second Defendant's Advocate is that there has been material compliance and to the extent that there has not been that this was due the Second Defendant being a litigant in person without a proper understanding of the obligations of disclosure. The Plaintiff says that neither the First nor the Second Affidavit complies with the Unless Order which sets out clearly what the obligations of the First and the Second Defendants were in order to comply with the Unless Order. No application has been made under Rule 57 of the RCCR which provides for relief from any sanction imposed for a failure to comply with any rule. Therefore the defences of both the First and Second Defendants have been struck out. The Third Affidavit to the extent it attempts to rectify the non-compliance is too late. Further even if the Court does not agree that the Second Defendant's defences are not struck out, the Plaintiff says she can proceed with her Application on the basis that the First Defendant's defences have been struck out given it cannot be in question that the First Respondent has not complied with the Unless Order.
27. The Second Defendant argues that there has been material compliance with the Unless Order by the filing of the First Affidavit. The questions raised by the Plaintiff in correspondence after the First Affidavit was filed indicates an expectation of a response from the Second Defendant rather than non-compliance with the Unless Order. In the Third Affidavit of the Second Defendant says that he was without legal representation at the time of the Unless Order and he considered the word "have" to mean physically in his possession. Nevertheless he includes within the exhibit further documents. In his submissions Advocate Cowling argued that the Second Defendant had attempted to comply with the Unless Order but was not legally represented at the time. The Third Affidavit shows that he is doing his best to comply and engage with the process having now instructed AFR. The Third Affidavit further states that

there has been compliance or sufficient compliance with the Unless Order by the Second Defendant and the defences have not been struck out.

## Discussion

28. The consequence of non-compliance with the Unless Order is very serious for the First and Second Defendants because failure will mean that the defences of these parties will have been struck out at midnight on 12 August 2022. It is for this reason that careful consideration is given before the Unless Order is made. The Second Defendant has not made an application for relief from sanction under Rule 57 but rather argues that he did in fact comply to a material extent with the Unless Order. The Second Defendant did not appeal the making of the Unless Order and its terms are clear and unambiguous. There is no question that the Application and the subsequent Unless Order were properly served. Therefore the remaining issue is whether what the Second Defendant did complies with the Unless Order.
29. The Unless Order was made in the context of a second disclosure process in this litigation as a consequence of the amendments to the Cause adding in new causes of action. The first round of disclosure happened in January 2022. On 21 January 2022, when he was legally represented, the Second Defendant filed a list of documents and disclosure statement which is signed by him where he sets out in accordance with the standard declarations, various certifications and confirmations. This included the following information:
- “(1) *I certify that I have been advised of and understand the duty to disclose documents and that such duty includes informing the court and other parties if any further document required to be disclosed, comes into my possession or control or at any time before the conclusion of the action.*
- (3) *I confirm that reasonable and proportionate searches to locate relevant disclosure documents have been made and documents which I consider to be relevant have been disclosed in accordance with my ongoing duty of disclosure.*
- (4) *I confirm that I have in my control documents relating to the matters in question in this action enumerated etc.*
- (5) *I object to producing the documents enumerated in schedule 1 part 2 on the grounds that .....*
- (6) *I have had but now not have in my control, the documents relating in the matters in question in this action and enumerated in schedule 2 hereto.*
- (7) *The documents in the said schedule 2 were either last in my possession on the dates of each thereof when they were sent by ordinary post to the addresses and where their whereabouts are now unknown or have never been in my possession.*
- (8) *I certify to the best of my knowledge and belief that I have complied with my duty of disclosure by providing in the form of the list of documents contained in schedule 1 and schedule 2 to this disclosure statement, a complete list of all relevant documents that are or have been in my possession or control.”*
30. In his Third Affidavit the Second Defendant says at the time he swore the First Affidavit, he thought “have” meant physically in his possession. Whilst the Second Defendant was not legally represented at the time he filed his First Affidavit, the Second Defendant had the advantage of having gone through this process before whilst he was legally represented and

certified that he had complied with the duty of disclosure. I consider I am entitled to conclude that he understood what that duty was when he signed this certificate. Nor does his lack of legal representation take into account that in the hearing on 22 July 2022 he said he had the documents and on a number of occasions assured the Court that he could comply with the Orders. He knew of the consequences of non-compliance as not only is this clear on the face of the Unless Order but it was explained to him in Court.

31. The obligations which had to be complied with within the time period by the First and Second Defendant were to disclose and provide copies of the documents that were listed in the Schedule annexed to the Unless Order. In the event that the First and/or Second Defendant were not able to produce any of the documents listed in the Schedule for the reason that they did not exist, or were no longer in their possession or control, they were to confirm that fact by filing an affidavit specifying what document or documents cannot be produced and stating the reason why the particular document or category of documents cannot be produced. They were then obliged to provide standard disclosure of all documents relevant to the additional claims made in the Plaintiff's amended Cause.
32. In considering the degree of latitude that that the Court should give to those who represent themselves the judgment of the Bailiff in the matter of John Frances Merrien and The Registrar of La Chambre De Discipline and Advocate X, handed down on 11<sup>th</sup> July 2022 is apposite:

“13. *The Court will give a degree of latitude to those who represent themselves. However, there have been many statements in other jurisdictions, which are equally applicable, here, that this does not equate to applying differing standards when rules need to be complied with. I will refer to just one example of where these principles have been set out, which is para. 18 in Lord Sumption's judgment in Barton v Wright Hassall LLP [2018] 1 WLR 1119:*

*‘Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: R (Hysaj) v Secretary of State for the Home Department [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); Nata Lee Ltd v Abid [2014] EWCA Civ 1652. At best, it may affect the issue “at the margin”, as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR rule 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater*

*indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take.'*

14. *In the context of the present case, the false steps that the Plaintiff has taken, when time has been running against him, cannot, in my judgment, simply be overlooked because he is a litigant in person. To the extent that something is marginal, then there might be scope to afford a litigant in person that degree of latitude to which I have referred but, if the time taken to get something done accurately is inordinate, then this will inevitably have an impact on whether the Court can permit it to pass uncritically. Fairness has to be accorded to everyone before the Court, whether they are represented or not and there would otherwise be a risk of a self-represented party being perceived to get away with conducting proceedings that would not be acceptable were an Advocate acting, which in turn has an adverse impact on other parties to those proceedings. Accordingly, where something has happened before commencing proceedings that would, or should, not have occurred if the party were represented, this is a type of procedural matter that has to be considered in the same way as if the party had instructed an Advocate."*

33. The Second Defendant's non-compliance in this case is not something marginal. It is significant. To the extent it is relevant, his Third Affidavit which although after the date of the required compliance with the Unless Order is an attempt to show his willingness to comply with the Unless Order, still fails to comply with the orders sought. In relation to the Schedule of documents it is incomplete and only deals with some of the 15 categories of documents listed by the Plaintiff in the Schedule and does not deal with the standard disclosure obligation at all nor does it explain how he now apparently has the documents. In any event this was served after the 12 August and after the Second Defendant had not undertaken what was required of him in the clearly expressed Unless Order. The correspondence with the Plaintiff after he filed the First Affidavit is a red herring in terms of somehow extending the time for compliance with the Unless Order as it requires an application to the Court for relief from sanction including the time for compliance (see Rule 56 of the RCCR) (as Ogier made clear in correspondence).

34. The Unless Order is clear in its terms about what was required of the First and Second Defendants. The Second Defendant's breach of the Unless Order was serious and he failed to materially comply with the Unless Order. The First Defendant has failed to comply with the Unless Order at all. As the sanction prescribed by the Unless Order takes effect automatically as a result of the failure to comply with its terms in a material respect, then the First and Second Defendants' defences have been struck out. In those circumstances in accordance with the terms of the Unless Order, the defences of the First and Second Defendant were struck out at midnight on 12 August.

## **Application for Judgment**

### **Brief Procedural History**

35. On 15 August 2022 the Plaintiff made an Application for judgment against the First and Second Defendants on the basis of the defences having been struck out. This was listed by agreement on 16 September 2022. In support of this Application the Plaintiff filed her third affidavit dated 8 September 2022 and a skeleton argument with authorities. At that hearing the Plaintiff was ready to proceed against the Second Defendant and said in any event regardless of the position

of the Second Defendant she could proceed on the basis of the First Defendant's defences being struck out. The Second Defendant submitted that he was not ready to proceed and that given the nature of the Application asked for time for the Second Defendant to file an affidavit in response to the evidence filed by the Plaintiff (but also dealing with any issues raised in correspondence by the Plaintiff's Counsel) and to respond to the skeleton argument (if necessary) which had been filed by the Plaintiff in support of her Application. The Second Defendant was granted further time due to the serious consequences of the Application and the fact that declaratory relief was being sought. The Second Defendant also argued that because there was declaratory relief being sought that it should be before the Jurats in order to consider the issues properly. The best place to deal with this he said was at the trial listed in December 2022. He said that as the damages claim was not being dealt with, it would be part heard in any event so this was further reason for the matter to go to trial. I directed that the hearing of the Application did not require Jurats and made the following directions:

- (1) That the Second Defendant shall file and serve all evidence and submissions which he wished to rely on in response to the Application by 4.00 pm on 21 September 2022.
- (2) That the Plaintiff shall file and serve any supplementary evidence submissions on the Application by 4.00 pm on 23 September 2022 and the hearing was listed for 9.30 am on 27 September 2022.
- (3) I also required that the Plaintiff to serve a notification on the First Defendant in respect of the said hearing of 27 September 2022.

36. Both parties filed skeleton arguments and affidavit evidence and supplemented this with oral submissions at the hearing on the 27 September 2022.

### **Brief Submissions**

37. Neither party is aware of any relevant Guernsey or Jersey cases on the granting of judgments under Rule 54 in circumstances where declaratory relief is sought. The Plaintiff says that the wording of Rule 54 of the Royal Court Civil Rules, gives the Court a wide and specific discretion in relation to causes seeking declaratory relief which is not set out in the English Civil Procedure Rules.

38. The Plaintiff also relies on the English case of *Ward v Saville* [2018] EWHC 995 (Comm) and in particular at paragraph 57 where Butcher J notes "that Courts have traditionally been cautious about granting declarations of right on admissions or default of the pleadings. However, the Courts have been prepared to grant declarations where not to do so would deny a claimant the fullest justice to which he or she is entitled". In that particular case without a declaration the claimants could not pursue the proprietary relief they were seeking and therefore in order to do the claimants the fullest justice to which they were on their unopposed case entitled, the judge found there was no good reason for not proceeding to make the declaration as sought. She also considers that the case of *Goldcrest Distribution Limited v McCole & Others* [2016] EWHC 1571 (Ch) ("Goldcrest") at paragraph 43 contains guidance which the Royal Court should apply:

*"Whatever the experiences of the past, in the modern legal system, where the rules in the High Court should not be interpreted differently in the QBD and in this division, and the overriding objective (CPR rule 1.1) of doing justice at proportionate cost is to observed everywhere, it would not be right to hold that declarations can never be given on default judgments. In my judgment the better rule is that declarations should not be given without argument inter partes, save in the clearest cases."*

39. The Plaintiff argues that the Court's primary consideration in exercising its discretion regarding appropriate declaratory relief is the necessity to ensure justice in a particular case. She says it

would be invidious and wrong to allow the First and Second Defendants' non-participation in these proceedings to prevent the making of the declarations which the Plaintiff requires. She says the Court must take into account the First Defendant's lack of engagement in the proceedings since February 2022 and the correspondence which indicates that it does not intend to participate as it has "*nothing further to add to the conversation*". Thus waiting for a full trial is not going to benefit the Plaintiff. On 5 September 2022, the Plaintiff received a letter from SBA Advocate, lawyers in Curaçao, representing the First Defendant enclosing a copy of proceedings apparently brought by the First Defendant in Curaçao against the Plaintiff and the Second Defendant (the "Curaçao Proceedings"). In the claim form it is stated (at paragraph 2.1) that the Second Defendant paid the First Defendant for its work as trustee of the Trust from May to September 2019. It also says at paragraph 3.4 that the First Defendant received an undertaking from the Second Defendant that he would pay the costs of the First Defendant and that he would indemnify the First Defendant against claims from third parties. Based on that commitment, the First Defendant accepted the appointment as trustee of the Trust. The Plaintiff says that this must throw doubt on the Third Affidavit of the Second Defendant where he says that he did not have any communication with the First Defendant and this is not contained in the First or Second Defendant's defences nor has either the First or the Second Defendant provided disclosure of these arrangements. Further the Plaintiff says that it should deeply trouble the Court that in circumstances where the Cause alleges that the First Defendant and the Second Defendant conspired together to defraud the beneficiaries of the Trust, that the First Defendant now claims in the Curaçao court proceedings that: (a) the Second Defendant (a third party to the Trust) paid the First Defendant for its services as trustee including the service of transferring the Trust's primary asset to the Second Defendant for no consideration; and (b) the Second Defendant undertook to indemnify the First Defendant against its costs and any claims from third parties.

40. Further in relation to the Second Defendant, although he is currently engaged with the proceedings having instructed AFR, the Court should not ignore his previous broken commitments to engage, his failure to comply with the Unless Order and his failure to pay the costs orders which have been ordered to be paid forthwith. The Plaintiff submits that the Court cannot take any comfort at all that it will be possible to have a fair and fully argued inter partes trial in this matter.
41. The Second Defendant also relies on *Goldcrest (ibid)*, but he emphasises the final sentence of the quotation at paragraph 38 above where Master Mathews says:

*"it would not be right to hold that declarations can never be given on default judgments. In my judgment, the better rule is that declarations should not be given without argument inter partes, save in the clearest cases."*

42. He also refers the Court to the English case of *Aramco Trading Fujairah FZE v Gulf Petrochem FZC* [2022] EWHC 288 (COMM) which sets out the following applicable principles:

- (1) *A court will normally not grant a declaration by consent or without a trial following a judgment in default – see Patten v Burke Publishing Ltd [1991] 1 WLR 527 per Millet J (as he then was) at 543(a) – (b); New Brunswick Railway Co Ltd v British and French Trust Co Ltd [1939] AC 1 per Lord Maughan LC at 22; and Wallersteiner v Moir [1974] 1 WLR 991 per Buckley LJ at 1021;*
- (2) *Where judgment in default is entered and it is necessary to make clear on what basis relief has been granted, that should generally be done by recitals at the head of the order rather than by formal declarations – see Wallersteiner v Moir (ibid) per Buckley LJ at 1029;*
- (3) *The practice of not granting declarations is not a rule of jurisdiction but is a rule of practice only and will not be followed if the claimant cannot obtain the fullest justice to which he is entitled without such a declaration – see Patten v Burke Publishing Ltd (ibid) at 544(b);*

(4) *Amongst the discretionary factors that may be taken into account in deciding whether or not to grant declarations other than following a trial, there are included:*

(a) *The effect of an order on foreign third parties who cannot be expected to understand the reluctance of an English court to grant a declaration but include a statement of the basis on which a judgment has been given – see Patten v Burke Publishing Ltd (ibid.) at 544(f); and*

(b) *The fact, if it be the fact, that the declarations sought cannot affect the rights of third parties – see Patten v Burke Publishing Ltd (ibid) at 544(g).”*

43. The Second Defendant says this is a case where the declarations sought are numerous and involve complex and complicated factual issues which are disputed. Some of the declarations involve third parties and therefore should not be made (see Aramco Trading at (4) (b) above). The declarations sought include an order that the resolution which placed the Third Defendant into liquidation is set aside. There is no evidence before the court as to what would happen if this declaration was made. It is understood that the Third Defendant is insolvent. There is therefore the risk that the company could be placed into compulsory liquidation by one of its creditors. It is also unclear what steps have been taken by the liquidator of NDIL to date. Evidence of what has been, including whether any assets have been liquidated, creditors paid, or fees incurred, should be placed before the court for due consideration.
44. He also says that there is no evidence before the Court that FFP (the trustee the Plaintiff says she and Mr El-Khoury appointed in May 2022) is still capable and willing to take on the Trust. These matters should not be granted by way of summary relief but must be investigated thoroughly by the Court.
45. The declarations sought are not limited to Guernsey as they involve a Monegasque resident (the Second Defendant), a Curacao company (the First Defendant) and a Cayman Islands company (FFP). The Second Defendant says that there will need to be expert evidence as to foreign law as to the effect of any Guernsey declaratory relief in those jurisdictions, including any matters relating to enforcement.
46. The Second Defendant says there should be an undertaking given by the Plaintiff for damages should FFP or any other party suffer any loss as a result of the declarations being made by the Court.
47. Advocate Cowling further argues that the Application should not be granted due to procedural unfairness. He says that it is a fundamental feature of the Guernsey Civil Justice system that the Second Defendant should be given the opportunity to put forward argument as to why judgment should not be given. The Second Defendant says that he has not been given the opportunity to serve evidence in response to the affidavit that the Plaintiff was directed to file on 23 September 2022 nor can the Second Defendant cross examine the Plaintiff on her witness evidence. He says that it appears that the Court is only seeking one side of the story. The Second Defendant says that this is prima facie unfair and contrary to Article 6 of the ECHR (right to a fair trial) and Rule 1(1) of the RCCR (the overriding objective that cases be dealt with justly). Only seeking evidence from one party means that it is impossible for the Royal Court to determine whether the underlying facts are clearly made out.

## Discussion

48. If there has been procedural unfairness as alleged by the Second Defendant then the Application for judgment should not be granted on any of the individual declarations sought by the Plaintiff. If I do not consider that there has been procedural unfairness, I shall go on to consider the relief sought.

49. After the Application for judgment was made by the Plaintiff in August and following correspondence between the Greffe and the parties, the matter was set down for a half day hearing on 16 September 2022 in anticipation of the Court considering and determining at that hearing whether the Second Defendant has complied with the Unless Order of 5 August 2022 as contended for by AFR and the Application. As I have set out above, on 16 September 2022, when Advocate Cowling appeared for the Second Defendant, I allowed the matter to be adjourned and ordered the Second Defendant to file and serve all evidence and submissions in response to the Application by 4.00 pm on 21 September 2022. The documentation which had been filed by the Plaintiff in anticipation of the hearing on 16 September 2022 included the Plaintiff's Third Affidavit dated 8 September 2022. This was made in support of her request for judgment and was received by the Second Defendant on 9 September 2022. The Plaintiff's Third Affidavit confirms that her amended Cause dated 22 April 2022 and the documents referred to therein as true and correct save for amending the ages of her children. She also exhibits the documentation upon which she relies in support of her claim and her Application for judgment.
50. The Second Defendant had the opportunity to respond to this (and had the opportunity at the hearing on the 16 September 2022) but focused his evidence on his non-disclosure. There was no restriction upon him putting in evidence on the substantive claim indeed the hearing on the 16 September 2022 which had been originally listed to deal with the matter, did not deal with the Application primarily to enable the Second Defendant to file any evidence and submissions that he wished to rely on. In passing I should also make it clear that there was no limitation on the Second Defendant filing submissions on the Unless Order either (as asserted in the Second Defendant's written submissions) although in any event Advocate Cowling made oral submissions at the hearing on the 27 September 2022. Also, there was no complaint made during the hearing on 16 September 2022 that the directions I was putting in place were unfair. The fourth affidavit which the Plaintiff filed at my direction (the "Fourth Affidavit") provides a narrative to her claim in affidavit form but is duplicative of her Cause (which she had already confirmed on oath was true) and does not introduce any substantive new evidence on the claims that had not already been provided to the Defendants in the Plaintiff's Third Affidavit. The Fourth Affidavit was also her opportunity to be responsive to any material filed by the Second Defendant and provide the Court with any updates. The Second Defendant in complaining that he has not had the opportunity to put forward his side of the story did not point to any matter in the Fourth Affidavit to which he was unable to respond. This is unsurprising given the nature of the Fourth Affidavit. I am therefore confident that the Second Defendant had an opportunity to put his side of the story. Importantly not only did the Second Defendant file submissions and an affidavit, but Advocate Cowling ably augmented the written submissions during the hearing on 27 September 2022 which was a date set for the resumed hearing at the convenience of both parties.
51. Advocate Cowling also argues that to grant judgment for the Plaintiff would be unfair and contrary to Schedule 1 Article 6 of the Human Rights (Bailiwick of Guernsey) Law 2000, and the overriding objective found in Rule 1(1) of the Royal Court Civil Rules. I consider these arguments to be misplaced. As I have set out above the Second Defendant had the opportunity to fully argue his position in written and oral submissions in adversarial proceedings at the hearing on the 27 September 2022 where he was professionally represented. Further this hearing was adjourned from 16 September 2022 in order for him to file evidence and/or a skeleton argument in relation to the Application and the evidence filed in support. This was a form of summary procedure due to the First and Second Defendant's failure to comply with the Unless Order. Article 6 does not guarantee the right to cross-examine and in these circumstances the Second Defendant is not entitled to cross-examine the Plaintiff. In response to a similar argument on cross examination put forward by the defendant in *Financial Services Authority v Rourke* [2001] EWHC 704 (ch), Neuberger J stated simply:

*“So far as the right to examine witnesses is concerned, that cannot be an absolute right in civil proceedings, or else any summary procedure would be doomed.”*

52. The Application must be put in the context of all the previous opportunities that the Second Defendant has been given in relation to breaches of this Court’s orders. The overriding objective does not mean that regardless of the conduct of the Second Defendant that declaratory relief cannot be granted on a summary basis. As I have set out above, the First and Second Defendants have had ample opportunity to engage properly with this litigation and multiple opportunities to comply with the Court orders but did not do so. Adhering to court times is a fundamental requirement of any litigant, whether represented or not and whether they are the Plaintiff or the Defendant. The overriding objective of the RCCR is to decide cases justly and at proportionate cost. This applies to the treatment of all the litigants to an action. The Second Defendant knew the consequences of failure to comply with the Unless Order made on the 5 August 2022 and therefore, in all the circumstances, the consideration of the Application is proportionate and not in breach of the Second Defendant’s Article 6 rights to a fair trial.
53. Therefore having considered all the arguments put forward by the Second Defendant on the basis of procedural unfairness I do not consider that any of them are made out and therefore it is necessary for me to consider whether I should order the relief sought.
54. Neither the Plaintiff nor the Second Defendant referred to the Guernsey cases on declaratory relief which must be the right starting point in considering whether or not I should in principle consider this relief. In *Re Westbury Property Fund Limited* [[2005–06 GLR 176] LB Hancox considered whether he should give unopposed declaratory relief and found that this relief was available in this jurisdiction. Relying on the comments made by Neuberger, J in *Financial Services Authority v Rourke* (*ibid*), he said *“the court should not grant declarations merely because the right, facts or principles, as the case may be, have been established and one party asks for a declaration. It must be satisfied that, in all the circumstances, it is appropriate to make the order in question.”*. Sir Richard Collas as Deputy Bailiff was willing to grant substantive declaratory relief confirming amongst other declarations the validity of a trust and that the trustee was validly appointed in the absence of the defendants in the matter of *Rothschild Trust Guernsey Limited and Adamantios (Diamantis) Pateras and Katigko-Kalliopi* 15/2011. In *Credit Suisse v Haggiag* 47/2015 Lieutenant Bailiff Marshall said at paragraph 119:
- 119. The jurisdiction of this court to grant declarations is inherent and undoubted. Its scope follows English practice: see Re Westbury Property Fund Ltd [2005-06] GLR 176 (Royal Court). A declaration can be, and usually is, a declaration of right, but it can be a declaration of fact. Indeed, any finding of fact which a court makes as a necessary foundation for its ultimate conclusion in a case has the status of a judicial declaration of fact in the form of res judicata on that issue, even if it is not embodied in a formal declaration of the court.*
- 120. However, the granting of any declaration is a matter of discretion. The court will therefore grant a declaration only if satisfied that it is appropriate to do so, and only if also satisfied that the terms of the declaration which it is asked to make are appropriate. It will not therefore make a declaration which is imprecise, unclear or overly wide. Nor will it make one on a purely hypothetical or academic matter. Nor, in my judgment, will it make a declaration which could serve no useful purpose. Since the claim for a declaration will, or should, include an indication, express or at least implied, of the purpose for which it is required, the court will wish to consider this and what form of declaration is appropriate for that purpose. It is unlikely to think it appropriate to grant a declaration in a vacuum. It will also be careful to ensure that any declaration which it does make is framed in words which are apt to define, and if necessary limit, its scope.*

55. Neuberger J in *Financial Services Authority v Rourke* (*ibid*) in a case where the Plaintiff was seeking declaratory relief on summary judgment identified four issues that the Court should take into account: (i) justice to the claimant; (ii) justice to the defendant; (iii) whether the declaration would serve any useful purpose; and (iv) whether there were any other special reasons why the court should or should not grant the declaration. Further he confirmed that as between the parties to a claim the court can grant a declaration as to their rights or as to the existence of the facts or as to a principle of law. Therefore although the Second Defendant has sought to argue that it would not be appropriate for the court to exercise its discretion against the First Defendant or the Second Defendant due to their being a Curacao company and Monegasque resident respectively, the First and Second Defendants are parties to this action and moreover in their defences neither defendant nor indeed the Third Defendant argue that the declarations sought in the Cause and which are now reflected in the Application contain arguments as to the jurisdiction of this court to make them. Therefore I do not consider that this will prevent a declaration being made if it is appropriate for me to exercise my discretion to do so.
56. The Second Defendant also raises the fact that FFP is a Cayman Islands company however contrary to the submissions of the Second Defendant there is evidence before the Court that FFP are willing and able to act as trustee to the Trust and I have been assured by Counsel for the Plaintiff that they have been kept apprised of the ongoing litigation (as have SG Hambros the lender of the First Loan and holder of the first charge over the Property as defined below). Attached to the Fourth Affidavit is an email from Tia Healy of FFP stating unequivocally “*I can confirm that we are still willing to act and for the court to make the orders sought*” therefore although it is right that I must proceed with caution in relation to third party rights, there does not appear to be a reason not to make an order which will effect FFP if it is in the terms of which FFP have been made aware.
57. Simon Salzedo QC sitting as a deputy High Court judge in *Montlake QIAIF Platform ICAV v Tiber Capital LLP* [2021] EWHC 202 (*Comm*) having considered the modern authorities on declaratory relief set out some useful high-level statements about the modern approach to declarations in these circumstances:
- (1) *First, the jurisdiction to grant declarations which arises under the Senior Courts Act 1981 section 19 is not fettered by the statute nor any longer by immutable bare on its exercise in particular situations*
  - (2) *Secondly, the court will only make a declaration which it judges to be correct.*
  - (3) *Thirdly, as with any discretionary relief, the Court will grant a declaration only where it is satisfied that some proper purpose will be served by granting that relief and by doing so in preference to or in addition to such other relief as may be available.*
  - (4) *Fourthly, the exercise of this discretion must keep in mind that a declaration for the court purports to bind all the world in respect of the matter declared. That is a strong and perhaps dangerous step to take without adversarial argument or if a party obviously affected is not before the court or if there is risk that other person not before the court wish to heard upon it. For these reasons, the authorities command caution on a court considering granting declaratory relief which is not opposed or in default of pleadings and which will affect parties not identified or not joined to the proceedings.*
58. With these principles in mind it is necessary for me to be satisfied on the evidence whether it is appropriate to exercise my discretion to grant each of the declarations sought. The only remedies sought by the Plaintiff are the declaratory relief and orders contained in her Cause as she is not currently seeking relief for the claim for damages. She argues that the availability of justice to her will be curtailed if the declarations are not granted and the impact goes directly to her home and that of her children.

## The Factual Background

59. The Plaintiff lives in London, although is a Norwegian national. She has three children with her partner, Mr El-Khoury. They live at 13 Smith Street, Chelsea, SW3 4EE (“the Property”). The Plaintiff and Mr El-Khoury met in 2005, separated in 2011, but have since reconciled.
60. Mr El-Khoury was the Settlor of the New Dawn Trust (the “Trust”) settled on the 20 February 2012 as set out in a Trust Deed of that date (the “Trust Deed”). This is a Guernsey Trust with the original trustees being SG Hambros Trust Company (Channel Islands) Limited (the “Original Trustee”). The beneficiaries of the Trust are the Plaintiff and her three children (the “Minor Beneficiaries”). The Settlor transferred his share in New Dawn Investments Limited (“NDIL”) which is the Third Defendant to the Trustees. NDIL is incorporated in Guernsey and it owns the Property and granted a licence for the Plaintiff and the Minor Beneficiaries to live in the Property.
61. As acknowledged in the Trust Deed, NDIL was indebted to S G Hambros in respect of an on demand loan facility with a maximum amount of £3,080,000. (the “First Loan”) The first charge over the Property secures the First Loan. The Second Loan is to NDIL from Mr EL-Khoury in the sum of £1,493,120.17 dated 20 February 2012 (the “Second Loan”). This is also secured against the Property by way of a second legal charge.
62. It is recorded in the Trust Deed that the Settlor’s overriding intention in making this settlement is “*to provide accommodation for the beneficiaries at all times during the Trust period*”. The Trust period is defined at clause 1.1 (z) as the period from and including the date of settlement until whichever of the following dates shall first occur, namely:
- (i) *the day on which the youngest of the beneficiaries then living, reaches the age of 25;*
  - (ii) *the day on which shall expire the maximum period for the duration of the Settlement permitted by the Proper Law from time to time;*
  - (iii) *such day (if any) as the Trustee may, with the written consent of the Settlor and [the Plaintiff] jointly during their lifetime or the survivor of them, during the Trust Period at its discretion, appoint by irrevocable Deed*

*PROVIDED ALWAYS that:*

- (iv) *if the Proper Law does not prescribe a maximum period then the Trust Period shall continue until the date specified under paragraph (i);*
  - (v) *the power under paragraph (iii) of this sub clause may be exercised any number of times and may extend or shorten the Trust Period;*
63. At clause 5.3 of the Settlement Deed it says:

*“Until the youngest Final Beneficiary reaches the age of 25 the Trustee shall permit the Final Beneficiaries and [the Plaintiff] to reside in the Residence. IT IS FURTHER PROVIDED THAT:*

- (a) *During the Settlor’s lifetime no sale of the Residence shall occur without the Settlor’s prior written consent, such consent not to be unreasonably withheld;*
- (b) *During [the Plaintiff’s] lifetime and so long as [the Plaintiff] occupies the Residence as her main home no sale of the Residence shall occur without [the Plaintiff’s] prior written consent, such consent not to be unreasonably withheld....”*

64. At clause 13, “Power of Appointment of New or Additional Trustees” it says:

*13.1 The persons specified in Schedule 6 in order of priority may by irrevocable Deed appoint one or more other persons wheresoever resident but subject to any exclusions or provisions specified in Schedule 6 to be a trustee of this Settlement in place of a person ceasing to be Trustee in any of the following circumstances:  
...”*

65. Schedule 6 of the Trust Deed sets out that the following persons in the following order of priority shall have the power to appoint and remove trustees:

*“(1) the Settlor and [the Plaintiff] jointly during their joint lifetimes or the survivor of them and;  
(2) any more, one or more persons as a Settlor and [the Plaintiff] shall jointly appoint in writing.”*

66. On or around January 2019, Mr El-Khouri informed the Plaintiff that he had had discussions in relation to financial issues that the family was having with the Second Defendant. As a consequence of these discussions, a general memorandum (the “General Memorandum”) was drawn up between the Plaintiff, Mr El-Khouri, the Second Defendant and a company connected to the Second Defendant called Rijck BV dated 8<sup>th</sup> March 2019.

67. The Plaintiff accepts that she signed the General Memorandum and accompanying documents although she says she did so in the absence of legal advice. The Plaintiff, in her affidavit sets out the reasons why she signed those documents including threats that if she did not do so she would lose her home. Broadly, the arrangements contained in the General Memorandum and accompanying documents were that the Second Defendant would transfer £100,000 to Mr El-Khouri and would employ Mr El-Khouri through one of his companies and pay to him a monthly salary of £20,000 for sixty months. This arrangement was said to be effective 14 days after the full transfer of the shares in NDIL to Rijck BV, a company controlled by the Second Defendant. There were further terms in the General Memorandum including a right for the Plaintiff to live in and occupy the Property limited to a maximum period of 60 months and subject to any sale of the Property on normal commercial terms, also that upon sale of the Property the Plaintiff would be entitled to a 35% share of the net proceeds of the sale. The General Memorandum does not recognise any entitlement of the Minor Beneficiaries to a share of the net proceeds of sale. The Plaintiff’s evidence is that the Second Defendant did not pay any of the monies or financial assistance set out under the General Memorandum.

68. A document dated 8 March 2019 records the Plaintiff and Mr El-Khouri’s agreement to “register the charge related to the assignment of the loan” to NDIL to the Second Defendant or Rijck BV (“the Second Charge Assignment”). This agreement is stated as being “effective 14 days after the date of the full transfer of all shares in New Dawn Investments Limited to Riick [sic] BV”. There is also an undated share transfer agreement between the Plaintiff and Rijck BV (“the Share Transfer Agreement”) signed by the Plaintiff purportedly on behalf of herself and the Minor Beneficiaries as “the registered and...beneficial owners of all shares in New Dawn Investments Limited”.

69. The General Memorandum appears to anticipate that the shares in NDIL would be distributed by the Trust to the Plaintiff and in turn, the Plaintiff would transfer ownership to the Second Defendant or one of his companies, who would thereafter close down the Trust. It also records that Mr El-Khouri has requested that the Original Trustee terminate the Trust and distribute the Trust Fund to the Plaintiff and the minor beneficiaries. The Original Trustee had already refused to consent to the assignment of the benefit of the Second Loan and Second Charge to Matracon NV, a Belgian company associated with the Second Defendant and of which Rijck

BV is a subsidiary, as it required confirmation that this action was in the best interest of the beneficiaries

70. Following the signing of the General Memorandum, the Original Trustee was asked to distribute the NDIL share to the Plaintiff but refused to do so as it did not consider it to be in the interests of the beneficiaries.
71. On 7 May 2019, Mr El-Khoury and the Plaintiff signed a notice removing the Original Trustees on 30 days' notice and appointed the First Defendant as replacement trustee. In accordance with the notice the Original Trustee retired and transferred the trust. According to the First Defendant the DORA was dated 26 July 2019.
72. In accordance with the General Memorandum it appears that it was a condition precedent that the Plaintiff was to obtain legal title to the NDIL share. The Plaintiff says that she has not obtained title to the share during the relevant period.
73. On 29 July 2019 Bow Trustees, a Guernsey based company offering corporate services became the directors of NDIL replacing those provided by the Original Trustee.
74. A draft Deed of Termination was produced on behalf of the Second Defendant which:
  - a. at Recital (A) acknowledged that the Trust Period had not expired;
  - b. relied on the General Memorandum as the instrument through which the Plaintiff had agreed to the termination of the Trust and the transfer of the NDIL share to the Second Defendant (Recital (D));
  - c. stated that the Second Defendant was a loan creditor of Mr El-Khoury who has become a loan creditor of NDIL on the basis of a purported deed of assignment of a loan dated 13 December 2018.
  - d. contended that "[a]s a consequence of the events described above, the Trust is left with no tangible assets but with continued administration and other expenses. [The Second Defendant] has agreed to cover the outstanding administration costs of the Trust in return for the transfer of the Shares and the termination of the Trust" (Recital (F)).
  - e. acknowledged that the Trust Deed requires the consent of the Plaintiff and Mr El-Khoury in order for the Trust to be terminated in accordance with Clause 1(z)(iii) (or at all, the relevant provision of the Trust Deed being Clause 1.1(z)(iii)).
  - f. In its operative provisions recorded the Plaintiff and Mr El-Khoury as consenting to the First Defendant's proposed exercise of the trustee's power pursuant to Clause 1.1(z)(iii) to terminate the Trust.
75. The draft Deed of Termination was signed by Mr de Bruijn who is the Managing Director of the First Defendant ("Mr de Bruijn"). The draft Deed of Termination was provided to the Plaintiff and Mr El Khoury on 21 August 2019 but they refused to sign it. On 1 September 2019 the First Defendant, acting in its capacity as trustee of the Trust, assigned a loan of £635,198.28 owed to the First Defendant by NDIL ("the TKC loan") to the Second Defendant for £1 ("the TKC loan assignment").
76. On 11 September 2019 Mr Theuns (an associate of the Second Defendant) emailed Mr de Bruijn and the Second Defendant, copying the English lawyer for the Second Defendant, informing them that the Plaintiff and Mr El-Khoury refused to sign the draft Deed of Termination and

referring to the Trust being empty. On 12 September 2019, NDIL served the Plaintiff with a Notice to Quit the Property for alleged breaches of the licence ("the September notice").

77. On 21 October 2019 the Second Defendant applied to the Land Registry to have the Second Charge against the Property registered in his name. He executed a TR4 form dated 18 October 2019 on behalf of himself as transferee as well as on behalf of Mr El-Khoury as transferor, purportedly pursuant to a power of attorney in his favour. The Land Registry sent a requisition requesting an ID1 form for Mr El-Khoury on 25 November 2019.
78. On 13 January 2020 Mr Theuns contacted Andrew Myers of Stephenson Harwood LLP, who were acting on behalf of the Second Defendant to inform him that (i) Mr Theuns was increasingly concerned that the Second Defendant was creating documents and that (ii) not all of the documents that had been provided were authentic. As the Second Defendant failed to provide the Land Registry with the requested ID1 form for Mr El-Khoury and the Land Registry cancelled the application on 17 January 2020.
79. On 6 February 2020 the Second Defendant made another application to the Land Registry in an attempt to obtain ownership of the Second Charge. The Second Defendant relied on a power of attorney (of which the Plaintiff doubts the authenticity) in support of this application and a purported deed of assignment of the loan to the Second Defendant. The Land Registry requested the Second Defendant provide a copy of the alleged deed of assignment as well as a completed ID1 form for Mr El-Khoury. When the Second Defendant failed to provide either document to the Land Registry this application was also cancelled by the Land Registry on 10 August 2020.
80. On 29 April 2020 the Plaintiff and Mr El-Khoury executed a notice to the First Defendant to effect its removal as trustee of the Trust and appointing FFP (Cayman) Limited ("FFP") as the new trustee of the Trust ("the 29 April Notice"). The 29 April Notice was delivered to the First Defendant on 30 April 2020 and purported to remove them as trustee from 30 May 2020 in accordance with Clause 14.1 of the Trust Deed.
81. Mr de Bruijn's first response was to question the authenticity of Mr El-Khoury's signature which was confirmed as authentic by Advocate Havard of Collas Crill.
82. Tia Healy on behalf of FFP contacted the First Defendant on 12 May 2020 requesting the transfer of the Trust files and records. Five days later, on 19 May 2020, the First Defendant responded referring to a '*misunderstanding*' as the Trust had been terminated on 4 September 2019 "*based on the wishes expressed by the settlor and the agreement reached on March 8, 2019*" ("the 19 May email"). Attached to the 19 May email was a copy of the General Memorandum, a statement by the First Defendant dated 1 November 2019 ("the TKC Statement") and a document titled "Timeline New Dawn Trust/New Dawn Investments" dated 28 October 2019 ("the TKC Timeline"). The TKC Statement relied on the General Memorandum and stated that it had been agreed to transfer the NDIL share to the Second Defendant, or to Rijck BV, a company controlled by him, that the transfer "*of the one share in the capital of NDI has taken place on August 19 2019 and the board of directors has resolved on August 20, 2019 to issue share certificate number 4 to Mr. Sebastiaan Rijckaer*". The TKC Statement then purported to confirm and state that "*the Trust has been terminated and dissolved effective September 4, 2019*".
83. I note in passing that a further copy of the TKC Timeline (which the Plaintiff exhibited to her fourth affidavit having received it from the First Defendant attached to proceedings commenced by it in Curaçao ("Curaçao Proceedings")) is different from the first version from paragraph 39 (around August 2019) and does not for example refer to the draft Deed of Termination. It is the position of the Plaintiff that due to the time period covered and the manner in which the TKC Timeline is drafted, this document is in whole or in part drafted by the Second Defendant.

84. The TKC Timeline makes references to events prior to the appointment of the First Defendant, including a reference in paragraph 10 to the Plaintiff asking, "*me to come to London and discuss further*"; at paragraphs 23-24 "*After more weeks the trustees inform Nina and us that they will not transfer the share and dissolve the trust, as it is not in the benefit of the beneficiaries of the trust...Konrad Friedlaender stops his mission when we ask to attack the trustees*". The TKC Timeline further states, inter alia, that: on 1 October 2018 Mr El-Khoury signed an acknowledgement of debt promising to pay the Second Defendant US\$3,200,000 ("the alleged acknowledgement of debt"); on 13 December 2018 Mr El-Khoury (i) assigned the £1,493,120.17 loan he provided to NDIL to the Second Defendant as security on the existing debt of US\$3,200,000 and (ii) signed an irrevocable power of attorney to the Second Defendant in order to transfer the Second Charge to Mr Rijckaert; that after the 8 March 2019 meeting at which the March 2019 documents were signed, the Original Trustees informed the Plaintiff "*and us that they will not transfer the share and dissolve the trust, as it is not in the benefit of the beneficiaries of the trust*"; and that the First Defendant was appointed as trustee of the Trust in place of the Original Trustees as "*This seems the only way to get the trust dissolved*".
85. The TKC timeline states that on 22 August 2019 "*WB [Mr de Bruijn] oversees hat [sic] the Trust is illiquid, no money coming in since long time, debt are mounting and he learns that [the Second Defendant] is willing to pick up the outstanding debts, including a huge debt of the Settler [sic] of the trust to him of USD 3,200,000, this debt is only covered with the transfer of the second charge of GBP 1,493,120.17. In order to formalize the new mortgage and solve the growing financial backlog WB decides to transfer the share of NDI to [the Second Defendant], as requested by [the Plaintiff] and JEK earlier.*"
86. The first version of the TKC Timeline acknowledges that the Plaintiff and Mr El-Khoury refused to sign the Deed of Termination and then at the end of the TKC timeline it states that "*The trust is empty, taking into account a considerable increasing amount of outstanding debts, ongoing costs and the current market value, there are no proceeds expected for distribution in the case of a sale of the property.*"
87. The Plaintiff says that the 19 May email to FFP, which was copied to Collas Crill was the first notice that she had received from the First Defendant that the NDIL share had been transferred to the Second Defendant some 9 months earlier. In the absence of any communication from or consultation with the First Defendant about its intention to transfer the NDIL share to the Second Defendant at the relevant time, or about the First Defendant's subsequent purported termination of the Trust without the Plaintiff's consent, the Plaintiff requested from the First Defendant the documents relating to:
- i. The minutes of the meeting at which it was resolved to transfer the NDIL share to Mr Rijckaert;
  - ii. The trustee resolution (and any supporting documentation in that resolution) in relation to the transfer of the NDIL share to Mr Rijckaert;
  - iii. The minutes of the trustee meeting at which it was (purportedly) resolved to terminate the Trust; and
  - iv. The trustee resolution relating to the termination of the Trust.
88. These were not provided nor have they been forthcoming in disclosure save for a written resolution dated 20 August 2019 of the Directors of the Company issuing share certificate number 4 to the Second Defendant replacing share certificate number 3 which it resolved to cancel. The disclosure list from the First Defendant also refers to one dated 13 September 2019 where the Directors record a resolution in relation to the assignment of the TKC Loan (although the Court has not seen this).
89. On 1 September 2019 TKC, acting in its capacity as trustee of the Trust, purported to assign the TKC Loan of £635,198.28 owed to TKC by NDIL to Mr Rijckaert for £1 ("the TKC loan

assignment”). There is a reference in the TKC Timeline as set out in paragraph 80 above to a debt which is said to have been owed by Mr El Khouri to the Second Defendant but no reference to money owed by NDIL to the First Defendant. There is no reference to the TKC Loan in the TKC Statement.

90. On 1 April 2021 the Plaintiff applied to the Royal Court for declaratory relief to protect the Trust ("the proceedings"). The Second Defendant was served with the proceedings on 13 April 2021. Thereafter the Second Defendant directed the NDIL board to circulate a shareholders' resolution to place NDIL into liquidation. The Second Defendant signed that resolution ("the NDIL liquidation resolution") and, on 21 April 2021, NDIL was placed into voluntary liquidation and Mr Jeffrey Brenner of B&C Associates ("Mr Brenner") was appointed as liquidator.
91. The Third Defendant has been neutral as to the outcome of these proceedings since April 2022. On 20 October 2022 the Third Defendant resigned.

### **Conclusions and Relief sought**

92. In considering the relief sought I have considered very carefully and cautiously for each declaration, the principles that are set out above in exercising my discretion to grant declaratory relief. I have taken into account all the evidence before me as well as the submissions on behalf of the Plaintiff and the Second Defendant.
93. Paragraph 1 of the Application seeks a declaration that the Trust has not been terminated by any action taken by the First Defendant, the Second Defendant or at all and is extant. At paragraph 66.2(e)(ii) of the Cause the Plaintiff pleads that the First Defendant has purported to terminate the Trust despite the fact that there was no appointment by irrevocable deed as required by Clause 1.1(z)(iii) of the Trust Deed. The wording of Clause 1.1 (z). of the Trust Deed requires two conditions must be met for the Trust to have been validly terminated: (i) An irrevocable deed in writing executed by the trustee of the Trust; and (ii) The prior written consent of Mr El-Khouri and the Plaintiff jointly having been given to the termination of the Trust.
94. Whilst both defences have been struck out, nevertheless, for these purposes I will take the pleadings into account as well as the other evidence before me in considering whether to make the declaration sought. The defences of the First Defendant refer to the Trust being terminated by the First Defendant by a deed of termination on 4 September 2019. No deed has been disclosed by any of the Defendants which was one of the documents referred to in the Schedule to the Unless Order. It is not included in either the First Defendant's or the Second Defendant's Lists of documents dated 20 and 21 January 2022 respectively. The First Defendant says it has no further documentation and the Second Defendant has said that he does not have a copy of the Deed. The TKC Statement does not refer to a deed but rather that "*the termination and dissolution of the Trust was effective 14 (fourteen) days after the date of the transfer of the one share of the capital of New Dawn Investments to [the Second Defendant].*" The pleadings of the First Defendant in the Curaçao Proceedings do not refer to a deed being executed only that 14 days after the transfer of the share to the Second Defendant, the Trust was "dissolved". The 11 September 2019 email from Mr Theuns is not consistent with the Trust having been dissolved on 4 September 2019 as it makes no reference to dissolution but refers to the refusal to sign the Deed of Termination by the Plaintiff and Mr El Khouri. The TKC Statement refers to the consent from the Plaintiff and Mr El Khouri being contained in the General Memorandum and from "NV" on 23 August 2019. There is no reference to contact with the Plaintiff on 23 August 2019 in either version of the TKC Timeline. In the first version there is a reference to the refusal of the Plaintiff and Mr El-Khouri to sign the Deed of Termination and "*no more contact possible with [Mr El-Khouri] and [the Plaintiff].*" The Second Defendant pleads in his defences, at paragraphs 10, 43 and 44 that the Trust was terminated by the First Defendant on

4 September 2019 by a Deed of Termination of that date. The Second Defendant in his Third Affidavit says that he was not involved in the termination of the trust and therefore does not have the documentation in his possession. In a letter dated 5 September 2022 from the lawyers for the First Defendant, it states that “*whether the Trust is or is not in existence is up to the Guernsey Court to decide. [The First Defendant] needs no part in the proceedings for the Court to be able to reach a decision on that.*” The Plaintiff says that the reference to consent being given by her on 23 August is absolutely false. She says at no stage did the First Defendant communicate with her about this. The Plaintiff says there is no deed. The only deed she was aware of was the one she and Mr El-Khoury refused to sign.

95. Taking into account the evidence before me I have concluded that no such Deed exists. Therefore in the absence of an irrevocable deed executed by the First Defendant as required by the Trust Deed, there are grounds for me to make a declaration that the Trust has not been terminated. For the avoidance of doubt I also find that the terms of the General Memorandum were not sufficient to amount to the written consent of the Plaintiff and Mr El Khoury to terminate the Trust in the circumstances of this case or at all. There is no evidence that the Plaintiff on her behalf or on behalf of the Minor Beneficiaries consented to the termination on 23 August 2019. Rather the First Defendant knew from the email correspondence (and acknowledged in the TKC timeline) that the Plaintiff was refusing to execute the Deed of Termination. In order to consider whether I should make the declaratory relief as sought under Paragraph 1, it is necessary for me to also consider the facts relied on for the relief sought under Paragraph 3 of the Application.

96. Paragraph 3 seeks a declaration that the purported transfer of the share in NDIL to the Second Defendant was made in breach of trust. This reflects the pleading at paragraphs 64 and 65 of the Amended Cause, where the Plaintiff says that the First Defendant assigned a loan and transferred the share in NDIL to the Second Defendant at his direction and for his benefit and that this was in breach of trust. Again whilst the First and Second Defendants’ defences have been struck out, nevertheless, for these purposes I will take the pleadings into account along with the First Defendant evidence before me. First it is not disputed that the transfer took place i.e. the Trustee transferred the share in NDIL to the Second Defendant who was a stranger to the Trust (although the date is not consistent in the documentation of the First Defendant). At paragraph 40.3 of its defences, the First Defendant states that: “... *the NDL share was carried out pursuant to the wishes of the Beneficiaries*” however, the First Defendant has not disclosed any document evidencing any contact with the Beneficiaries. Neither of the TKC Timelines includes at the time of the transfer of the share, any reference to the Beneficiaries nor consideration of what was in their interests. At point 36 of both of the TKC Timelines it says the following:

“22-08-2019 WB oversees hat [sic] the Trust is liquid, no money coming in since long time, debts are mounting and he learns that SR is willing to pick up the outstanding debts, including a huge debt of the Settlor of the Trust to him of USD3,200,000, this debt is only covered with the transfer of the second charge of DPP1,493,120.17 in order to formalise the mortgage and resolve the growing financial backlog WB decides to transfer the share of NDI to SR as requested by NN and JEK earlier.”

97. The “*earlier*” reference appears to be a reference to the General Memorandum to which the First Defendant was not a party. Further, there does not appear to have been at the time or indeed at all, any consultation with the Plaintiff nor any consideration by the First Defendant to the interests of the Minor Beneficiaries who live in the Property and for whom along with the Plaintiff the Trust had been settled, the purpose of which being “*to provide accommodation for the beneficiaries at all times during the Trust period*”. The evidence is not only did the First Defendant fail to consult the Beneficiaries they did not even inform them of the actions they had purported to take. The Plaintiff’s evidence is the first she knew about it was the reference to the “*empty trust*” when FFP contacted the First Defendant. The First Defendant

does not appear to have given any consideration to the fact that neither Mr El-Khoury nor the Plaintiff were able to sign away the Minor Beneficiaries' rights in the Trust, or their rights to any distribution from the Trust, on their behalf.

98. It also appears from the documentation filed by the First Defendant in the Curaçao Proceedings, that the Second Defendant paid the First Defendant's professional fees for carrying out Trust services including the purported transfer of the Trust's primary asset to him. It also says that the Second Defendant undertook to indemnify the First Defendant for any costs or liabilities to third parties associated with the trusteeship, including any liabilities incurred, as a result of transferring the Trust's primary asset to himself.
99. Attached to the Curaçao Proceedings is a document referred to as the 'Sale and Transfer of Registered Shares' which purports to transfer for £1, the share in the capital of NDIL. This is signed as being effective on 20 June 2019. However according to the TKC Timeline the DORA between the Original Trustees and the First Defendant did not take place until 26 July 2019. There is a further document also purporting to be the sale and transfer of registered shares on 19 August 2019 which states that it replaces the agreement dated 20 June 2019 due to the "capacity" of the Seller and selling the share in NDIL to the Second Defendant for £1. The Curaçao Proceedings refer to it happening on 19 August 2019. I note that a written resolution dated 20 August 2019 refers to the agreement incorrectly recording the company statutory seat and registered offices are Hambros House, St Julian's Avenue rather than 1<sup>st</sup> Floor, 3 College Street, St Peter Port. Although the date of the sale and transfer of the Registered Share Agreement is not noted on that document, it is the 20 June 2019 sale and transfer of registered shares which has the incorrect address on it. The NDIL share register records the transfer from Hanom II Ltd to the First Defendant's corporate services company (TKC Corporate Services N.V) on 2 August 2019 and then transferred from TKC Corporate Services N.V to the Second Defendant on 21 August 2019.
100. It is a term of the Trust Deed at clause 10 that "*the Trustee shall exercise (or refrain from exercising) the trust powers and discretions vested in it as the Trustee shall think fit for the benefit of all or any one or more of the Beneficiaries and for the advantage of one at the expense of the another or for the benefit of any one or more of them without being obliged to consider the other or others*". This has been referred to as the principal of "*single-minded loyalty*"<sup>1</sup> of the fiduciary. The test of whether an exercise is for the benefit of the beneficiaries is an objective test (see *Lewin on Trusts (20<sup>th</sup> Edition)* at paragraph 30-047). The First Defendant was obliged to exercise its functions with utmost good faith and to act *en bon pere de famille* (Section 22 of The Trusts (Guernsey) Law 2007). As a trustee with fiduciary duties the First Defendant was under an obligation to exercise its power for a proper purpose. If a trustee exercises its power for a purpose or with an intention beyond the scope of or not justified by the instrument creating a power this is a fraud on a power and such an exercise is void (see *Lewin* 30-067). The Amended Cause pleads that the transfer of the share in NDIL to the Second Defendant in breach of trust was committed in fraudulent bad faith or dishonestly.
101. In *Fattal & Others v Walbrook Trustees (Jersey) Limited & Others [2010] EWHC 2767 (Ch)* at paragraph 81, in order to show dishonesty in the case of a professional trustee it is necessary to show:
- “(i) A deliberate breach of trust;
  - (ii) Committed by a professional trustee:
    - (a) Who knows that the deliberate breach is contrary to the interests of the beneficiaries; or

<sup>1</sup> See *Bristol and West Building Society v Mothew [1998] Ch 1 page 18*

- (b) *Who is recklessly indifferent whether the deliberate breach is contrary to their interests or not; or*
- (c) *Whose belief that the deliberate breach is not contrary to the interests of the beneficiaries is so unreasonable that, by any objective standard, no reasonable professional trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries.”*

102. TKC admits it was a professional trustee aware of its duties including its duty to perform its obligations honestly and in good faith for the benefit of the Beneficiaries and it was aware of the terms of the Trust and that it was an express provision of the Trust Deed that *“the overriding intention in making this Settlement is to provide accommodation for the Beneficiaries [the Plaintiff and the Minor Beneficiaries] at all times during the Trust Period and the Settlor and the Original Trustee intend that the Settlement shall be construed accordingly”*.

103. Applying the test from *Fattal v Walbrook*, even on the case set out in the defences of the First Defendant, which of course are now struck out, the exercise of the transfer of the NDIL share to the Second Defendant, cannot be properly regarded as being for the benefit of the Beneficiaries intended to be benefited. It does not appear that the First Defendant turned its mind at all to independent consideration of the exercise of its powers but have merely acted on the prompting of others i.e. the Second Defendant who is a stranger to the Trust. Unlike the Original Trustee in its consideration of requests made to it, the First Defendant does not appear to have applied its mind at all to the exercise of discretion entrusted to it. On the First Defendant’s own case there do not appear to be any Trustee Resolutions or minutes or contemporaneous file notes made prior to the exercise of this discretion recording that it deliberated the matter of the transfer at all. The First Defendant did not inform, let alone consult, the Beneficiaries of its intention to transfer the asset out of the Trust. To the extent that the General Memorandum is relevant to the exercise of the First Defendant’s power (given it was not a party), there does not appear to have been any verification or checking that the Beneficiaries received any of the monies or financial assistance set out in the General Memorandum. The First Defendant does not appear to have considered the fact that the General Memorandum presumes circumstances where the Plaintiff would transfer the share not the Trustee. The General Memorandum (and the Second Charge Assignment) provides it was not to be effective until the full transfer of the NDIL share to Rijck BV, by the Plaintiff acting as registered and beneficial owner of the NDIL share, which did not happen. Further the evidence before the Court is that the conditions of the General Memorandum had not been fulfilled including that the Second Defendant had not paid any of the monies or financial assistance nor did the Second Defendant plead in his defences that he had paid any consideration. The First Defendant does not appear to have considered at all the position of the Minor Beneficiaries who were not capable of expressing their wishes or authorising a conflict of interest. The Second Defendant is not a bona fide purchaser for value without notice. The only consideration that appears to have been paid, if it was paid at all, is £1. The Second Defendant has assisted in the breach of Trust committed by the First Defendant. It is also notable that the Original Trustee refused to transfer the share to the Second Defendant on the basis that it was not in the best interests of the Beneficiaries thus the First Defendant and the Second Defendant were both on notice that the Original Trustee had refused to undertake the transfer to the Second Defendant and the reason why. Further the First Defendant admits being funded by the Second Defendant for carrying out its services including the purported transfer of the share in the Third Defendant with no identifiable benefit for the Beneficiaries and that the Second Defendant undertook to indemnify it against liabilities to third parties including any liabilities incurred as a result of transferring the Trust’s primary asset to himself. I am satisfied that the transfer was a deliberate breach of trust and made contrary to the interests of the Beneficiaries and whilst it is likely that the First Defendant acted knowing that this transfer was contrary to the interests of the Beneficiaries, I am satisfied that the First Defendant acted at the very least with reckless indifference to their interests. The First Defendant does not appear to have turned its mind at

all to the interests of the Beneficiaries and having found that there has been a dishonest breach of trust to benefit the Second Defendant constituting a fraud on a power, it is not necessary for me to make findings of dishonesty against the Second Defendant to make the declaratory relief sought although I do consider that there is sufficient evidence before me to conclude that he was the knowing recipient of property transferred or paid out in breach of trust and that the Second Defendant engineered the circumstances which lead the First Defendant to take the actions which it did. This does not mean that the Plaintiff is prevented from seeking further findings against the Second Defendant in due course for the outstanding relief. However, I have taken into account the principles of granting declaratory relief in these circumstances and I have concluded that it would be right for me to exercise my discretion to grant the following declaratory relief: that having found that the Second Defendant is not a bona fide purchaser for value without notice and that the transfer of the share in NDIL to the Second Defendant of the NDIL share to the Second Defendant was made in breach of trust, such a transfer was void and should be set aside. I have also concluded to the extent necessary that there was no valid dissolution of the Trust by the First Defendant. I am therefore also satisfied that in all the circumstances that the Plaintiff should be granted the declaratory relief sought that the Trust has not been terminated by any action taken by the First Defendant, the Second Defendant or at all and is extant.

104. Having found that the Trust is extant I shall now consider Paragraph 2 of the Application that FFP has been a trustee of the Trust since 30 May 2020 pursuant to the 29 April Notice. The evidence before the Court is that in accordance with the Trust Deed, the Plaintiff and Mr El-Khoury have executed a valid notice. There is no evidence disputing this. FFP have confirmed they are ready and willing to act on the basis of the declarations sought by the Plaintiff including their valid appointment since 30 May 2020. I am therefore satisfied that in all the circumstances the Plaintiff should be granted the relief sought and that the Court will make a declaration that FFP is and has since 30 May 2020 been the trustee of the Trust pursuant to the 29 April notice as defined.
105. Paragraph 5 of the Application seeks a declaration that the NDIL share having been transferred to the Second Defendant in breach of trust should be followed and recovered. Section 73 of the Trusts (Guernsey) Law 2007 provides that trust property which has been charged or dealt with in breach of trust or the property into which it has been converted may be followed unless it is no longer identifiable or is in the hands of a bona fide purchaser for value without notice of a breach of trust or a person (other than a trustee) who derived title through such a purchaser. The NDIL share is in the name of the Second Defendant who is a party to these proceedings. As I have set out above, I have found that the NDIL share was transferred to the Second Defendant by the First Defendant in breach of trust. Further I have already found that the Second Defendant is not a bona fide purchaser for value without notice. As a consequence of the transfer in breach of trust he holds the NDIL share on constructive trust for the Beneficiaries. and therefore there is no reason for the Court to refuse an order under the terms set out under section 73 of the Trusts (Guernsey) Law 2007. However, I do not consider that this is appropriate for declaratory relief, rather that this should be an order in those terms (as sought in the Amended Cause) i.e. an order that the NDIL share being trust property dealt with in breach of trust shall be followed and recovered.
106. Paragraph 6 seeks a declaration that the NDIL share is held by FFP in its capacity as current Trustee of the Trust. Having found that the transfer of the NDIL share was made in breach of trust and that the transfer to the Second Defendant was void, the share in NDIL belongs wholly to the Trust. FFP in its capacity as the Trustee of the Trust is therefore the true owner of the NDIL Share. However again I do not consider that this is appropriate for declaratory relief rather (as sought in the Amended Cause) that this is an order i.e. an order that that the NDIL share shall be held by FFP in its capacity as current Trustee of the Trust.

107. Paragraph 7 of the Application requires the Second Defendant to transfer the NDIL share to FFP within 14 days of any Order and in the event that he does not co-operate other parties are authorised to take such steps as may be necessary to reflect the effect of the other declarations and orders made by the Court. The register of members of NDIL currently identifies the Second Defendant as the owner of the NDIL. Having ordered that the transfer be set aside as set out above and having found that the Second Defendant is holding the NDIL share on constructive Trust for the beneficiaries and that he is a knowing recipient of property transferred or paid out in breach of trust he is holds the NDIL share on trust for the beneficiaries not being a bona fide purchaser for value without notice the Second Respondent is therefore required to assist the Beneficiaries in recovering the trust property. I also consider that Section 77 of the Trusts (Guernsey) Law is of assistance providing:

*(1) A person who derives a profit from a breach of trust, or who obtains property in breach of trust, shall be deemed to be a trustee of the profit or property unless he derives or obtains it in good faith without notice of the breach of trust.*

*(2) A person who becomes a trustee by virtue of subsection (1) shall deliver up the profit or property to the person properly entitled to it.*

108. I consider that on the facts in this case that the Second Defendant has not obtained the share in NDIL in good faith and had notice of the breach of trust. Therefore in accordance with Section 77 (2) the Second Defendant must deliver up the NDIL share to FFP. I therefore order that the Second Defendant must transfer the NDIL share to FFP within 21 days of the Court order (to take into account the Christmas period). I consider it appropriate in circumstances where the Second Defendant has demonstrated on many occasions that he is willing to ignore the orders of this Court that in the event that he does not cooperate and the transfer is not effected within 21 days, the Plaintiff and/ or the First Defendant and/or the Third Defendant are authorised to take such steps as may be necessary to ensure that any share certificates or other documentation or records reflect the effect of the other declarations made by the Court with regard to the true ownership of the NDIL share including that the Plaintiff has liberty to return to the Court to seek further orders.

109. Paragraph 9 of the Application requires the Third Defendant to rectify its register of members within 14 days of any Court Order in reliance on the declarations made herewith. The Third Defendant has had notice of this Application and has made no representations on the basis of its neutrality. Having made the findings above including that the true owner of the NDIL share is FFP and the absence of representations to the contrary from the Third Defendant I am satisfied that it is appropriate to make the order sought by the Plaintiff. However I am going to allow 21 days to take in account the Christmas period and to take into account the resignation of Mr Brenner as liquidator.

110. At Paragraph 8 of the Application, the Plaintiff seeks a declaration that the Second Defendant shall assign the benefit of a loan which I have defined above as the TKC Loan to FFP in its capacity as Trustee of the Trust. Within the documents disclosed by the First Defendant in January 2022 was the TKC Loan Assignment whereby the First Defendant assigned the benefit of a loan of £635,198.28 owed to it by NDIL to the Second Defendant for £1. The Plaintiff at paragraph 64A of the Amended Cause pleads that such an assignment was made by the First Defendant in breach of trust. As the First and Second Defendants did not amend their defences, there are no pleaded defences whether struck out or otherwise. There is no mention of the TKC Loan nor the considerations given to the assignment by the First Defendant in the documentation provided by the First Defendant. There is no mention of the TKC Loan in the Curacao Proceedings. The same considerations that are set out above in relation to the transfer of the share apply. TKC was and is a professional trustee and provider of fiduciary services, as admitted in its defences and is bound by the duties imposed by law, including its duty to perform the Trust and the Trust Deed. There is no evidence before the Court that the TKC Loan Assignment was in the interests of the Beneficiaries, creating an obligation owed by NDIL to

the Second Defendant who is a stranger to the Trust, for nominal consideration. There is no evidence of the First Defendant loaning NDIL any money nor of any considerations how the alleged loan or subsequent assignment is said to have benefitted the Beneficiaries. The assignment by TKC of the TKC loan to the Second Defendant was therefore only to the benefit of the Second Defendant. The evidence is that at no time had the TKC Loan or this assignment nor the intention assigning the TKC Loan been disclosed to or discussed with the Beneficiaries. The Second Defendant is not a bona fide purchaser for value without notice. Thus applying the same principles I have set out above in relation to the transfer of the NDIL share, the assignment was in breach of trust and the assignment to the Second Defendant was void and the Second Defendant holds the benefit of the TKC Loan on constructive trust for the Beneficiaries. In the Amended Cause rather than a declaration, the Plaintiff seeks an order that the Second Defendant shall assign the TKC Loan to FFP in its capacity as Trustee of the Trust. For the reasons I have set out above in relation to the transfer of the NDIL Share including Section 77 of the Trusts (Guernsey) Law, I consider that this is the appropriate relief to grant to the Plaintiff and therefore within 21 days of the date of this Order the Second Defendant shall assign the TKC Loan to FFP in its capacity as Trustee of the Trust. In the event that the Second Defendant does not co-operate, the Plaintiff and/ or the First Defendant and/or the Third Defendant are authorised to take such steps to as may be necessary to deal with the assignment of the TKC Loan and the Plaintiff has liberty to return to the Court to seek further Orders.

111. At paragraph 4 of the Application, the Plaintiff seeks a declaration that the resolution to put NDIL into liquidation be set aside. In April 2021, NDIL was placed into voluntary liquidation by shareholder resolution, signed by the Second Defendant as admitted by the Second Defendant in his defences. This was undertaken less than a week after the Plaintiff applied to the Royal Court for Declaratory Relief and as such he was on notice (to the extent he was not already) as to claims of the Beneficiaries' continuing beneficial ownership of the NDIL share. In any event as I have found that the transfer of the NDIL share to the Second Defendant was void, the Second Defendant is not the legal owner of the NDIL share and any shareholder resolution placing NDIL into liquidation was therefore void and the exercise of a power to place NDIL into liquidation was ultra vires. In his submissions the Second Defendant argues that NDIL is understood to be insolvent and that there is no evidence before the Court as to what would happen if this declaration was made. This was also set out in a letter to Collas Crill from Bow Trustees on 27 January 2020. However the Plaintiff's evidence is that she and Mr El-Khoury are in a position to fund the company. In this regard, the Plaintiff confirms that the main creditors of NDIL are the Bank and Mr El-Khoury, that the Plaintiff and Mr El-Khoury have a dialogue with the Bank and are in a position to fund the mortgage and make arrangements for the arrears, Mr El-Khoury does not intend to enforce his loan, and the Plaintiff and Mr El-Khoury are in a position to deal with the outstanding tax. There is also the TKC Loan which I have ordered that the Second Defendant will assign to FFP as trustee of the Trust. FFP have confirmed that they are willing to take on the Trust on the basis of the orders sought which included the assignment of the TKC Loan to them as Trustee of the Trust and the declaration that the NDIL resolution be set aside. At the time of the resolution Bow Trustees were the directors of NDIL therefore I do need to consider the impact of the declaration upon them. Taking into account all the circumstances, the evidence before me and the need to do justice I do consider that it is appropriate to grant the declaratory relief sought however I will give Bow Trustees 21 days to liberty to apply to the Court if it wishes to make representations in relation to this declaration.

#### **Further orders**

112. The Plaintiff also seeks an order that the First Defendant shall pursuant to Section 26 of The Trusts (Guernsey) Law 2007 provide full and accurate information as to the state and amount of trust property of the Trust including all necessary accounts detailing all costs and expenses incurred by the Trust and NDIL since the appointment of the First Defendant as trustee of the Trust. The Trust Deed at Clause 2.2 provides that:

*Section....26(1) shall not apply to this Settlement and all or any of the liabilities or obligations imposed on the Trustees by all or any of such provisions or orders are hereby negated and excluded and shall have not application to the Trustees or this Settlement.*

113. However, Section 26 (2) and (3) of the Trust (Guernsey) Law 2007 provides that:

- (2) *Where the terms of the trust prohibit or restrict the provision of any information described in subsection (1), a trustee, beneficiary, trust official or settlor may apply to the Royal Court for an order authorising or requiring the provision of the information.*
- (3) *The person applying to the Royal Court for an order under subsection (2) must show that the provision of the information is necessary or expedient –*
  - (a) *for the proper disposal of any matter before the court,*
  - (b) *for the protection of the interests of any beneficiary, or*
  - (c) *for the proper administration or enforcement of the trust*

In all the circumstances of this case which I shall not repeat here it is both necessary and expedient for the provision of this information to the Plaintiff for the protection of the interests of all of the Beneficiaries and for the proper administration of the Trust. I therefore I will make the order sought and the First Defendant must comply with this order within 21 days.

#### **Costs**

114. In relation to costs, the First and Second Defendant have put the Plaintiff to considerable cost and expense. The Second Defendant has been unsuccessful in resisting the strike out of the defences by operation of the Unless Order and the Application. As the First Defendant did not play any active part in this stage of the proceedings I do not consider it would be fair for the First Defendant to be liable for the costs jointly and severally with the Second Defendant after the hearing on 16 September 2022. The Plaintiff has applied for the costs of the Third Defendant also to be paid by the First and Second Defendant. Up until March 2022 the Third Defendant was represented by Babbé along with the Second Defendant. The Third Defendant filed joint defences with the Second Defendant. I do not know what the funding arrangement was however I do note that the Second Defendant was able to instruct AFR in August 2022. However, I do not consider in those circumstances it would be appropriate to order the Third Defendant's costs to be paid by the First and Second Defendant up until the Third Defendant took a neutral stance. The Third Defendant has been neutral since 22 April 2022 and has not been represented therefore any costs are likely to be minimal, but I consider that from this point the First and Second Defendant should be joint and severally liable for the Third Defendant's costs. I therefore order that the First Defendant and the Second Defendant pay the Plaintiff's costs, jointly and severally up to and including the hearing on 16 September 2022 and the Second Defendant be solely liable for the Plaintiff's costs thereafter; and the First and Second Defendant be jointly and severally liable for the Third Defendant's costs from 22 April 2022 up to and including the hearing on 16 September and the Second Defendant be solely liable for the Third Defendant's costs thereafter.

115. The Plaintiff also seeks an order that First Defendant not be indemnified for any legal fees or disbursements in connection with these proceedings and that any such sums which have been paid shall be repaid to the Trust.

116. Clause 17.2 of the Trust Deed provides:

*“A Trustee shall be entitled to be indemnified out of the Trust Fund for all (if any) obligations or liabilities which it may incur as a trustee of this Settlement save that*

*nothing in this case shall entitle a Trustee to be indemnified in respect of its own fraud wilful misconduct or gross negligence”.*

117. In this case and in the circumstances that I have set out above and taking into accounts that facts that I have found and the declaratory and other relief I have ordered above in particular my findings as to the fraud on a power and dishonest breach of trust of the First Defendant I order that the First Defendant shall not be entitled to be indemnified for any legal fees or disbursements in connection with these proceedings from the Trust and that any such sums which have been paid shall be repaid to the Trust.
118. The relief for equitable compensation for breach of trust and/or damages under Paragraph 11 of the Application and in the prayer for relief in the Amended Cause including interest is adjourned sine die.