

This judgment deals with the issue of how to construe the provision in the Trust Instrument of what is now the ESMS Employee Benefit Trust (“the EBT”), made on 18 August 2014 between Medical Toxicology and Information Services Limited.

[2023]GRC075

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

**IN THE MATTER OF THE ESMS EMPLOYEE BENEFIT TRUST**

**BETWEEN:**

**TRIDENT TRUST COMPANY (GUERNSEY) LIMITED**

**Applicant**

**-AND-**

**(1) ESMS GLOBAL LIMITED**

**(2) ALASTAIR SCARBOROUGH & RITA FITZPATRICK  
(AS REPRESENTATIVES OF THE EMPLOYEE BENEFICIARIES OF  
THE FIRST RESPONDENT)**

**(3) RAJESH & SARITA SOOD**

**(4) SIMON & JENNIFER WEBSTER**

**Respondents**

**Date of hearings: 10<sup>th</sup> November 2023**

**Decision handed down: 28<sup>th</sup> December 2023**

**Before: Sir Richard McMahon, Bailiff**

**Applicant’s representative: Advocate R G Morris**  
**First Respondent’s representative: Advocate C H Edwards**  
**Second Respondent’s representative: Advocate M G Ferbrache**  
**Third Respondent’s representative: Advocate M C Newman**  
**Fourth Respondent’s representative: Advocate D O’Hanlon**

**Cases and legislation referred to:**

*In the matter of the R Trust* [2020] GCA 065

*In the matter of the K Trust* [2020] GCA 080

*In the matter of the C Trust* [2013] GLR 105

*In the matter of the Internine and Intertraders Trusts* 2005 JLR 236

The Trusts (Guernsey) Law, 2007

The Companies (Guernsey) Law, 2008

The Companies Act 2006

*Re Sprout Land Holdings Limited (in administration)* [2019] EWHC 806 (Ch)

The Inheritance Tax Act 1984

The Income and Corporation Taxes Act 1988

*Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526

## **Introduction**

1. This judgment deals with a preliminary issue arising from the Application dated 31 May 2023 made by the trustee of the ESMS Employee Benefit Trust, Trident Trust Company (Guernsey) Limited, which I directed on 8 September 2023 should be heard before the other relief sought by that Application is addressed. It concerns para. 2 of the Application, which seeks a declaration or order:

*“That, pursuant to Clause 11.1 of the Trust Instrument dated 18 August 2014, the Trustee is unable to vote on any written resolutions proposed by the shareholders of ESMS Global Ltd (the “Company”) unless directed to do so by the Company.”*

This issue raises a question of how to construe that provision in the Trust Instrument of what is now the ESMS Employee Benefit Trust (“the EBT”), made on 18 August 2014 between Medical Toxicology and Information Services Limited, the former name of ESMS Global Limited, and the trustee, Trident Trust Company (Guernsey) Limited.

2. The parties convened to the Application are ESMS Global Limited (“the Company”), Alastair Scarborough and Rita Fitzpatrick, as representatives of the employee beneficiaries of the Company, and so of the EBT, Rajesh and Sarita Sood, and finally Simon and Jennifer Webster. The couples comprising the Third and Fourth Respondents were added as parties because of the different views that they have taken about whether the Applicant as trustee is unable to vote on written resolutions. As a result of the current deadlock between the two sets of directors, it has been difficult, although not impossible, for the Company to give instructions. This impasse has resulted in related proceedings being commenced in England before the High Court of Justice.
3. At the conclusion of the hearing on 10 November 2023, I reserved judgment. This judgment now contains my reasons for declining to grant the relief sought by the Applicant.

## **Background**

4. I do not propose to set out in detail all the background to how this construction issue has come before the Court. However, I do need to place the issues that have arisen into context.
5. The evidence from which this summary derives starts with the Affidavit in support of the Application of Ryan Dekker, who explains that he is an authorised signatory of the Company, and which he swore on 31 May 2023. I also have the benefit of an Affidavit of Alastair Scarborough, sworn on the 25 July 2023, and of Rita Fitzpatrick, sworn on 26 July 2023. There is a Fourth Affidavit of Aaron Sanders, sworn on 6 October 2023, a First Affidavit of Rajesh Sood, sworn on 19 October 2023 and a Fifth Affidavit of Mr Sanders, sworn on 8 November 2023. Although I have considered each of these Affidavits, some of the content is not directly relevant to the construction issue. This is particularly the case where it relates to events that happened much later than at around the time the trust instrument was executed, including the underlying reason why this Application has been brought. Indeed, as I will explain, I have concluded that I cannot have regard to Mr Sanders’ Fourth Affidavit. Some of the submissions made at the hearing also strayed beyond what I regard as relevant to this construction issue,

touching on the duties of a trustee, which only arise once it is apparent what the Trust Instrument means. It is one of the reasons why I do not feel I need to describe all the evidence adduced in detail.

6. The business of the Company was acquired from Guy's and St Thomas's NHS Foundation Trust ("the Seller") by a Business Purchase Agreement ("the BPA") dated 30 September 2011. At that time, Medical Toxicology and Information Services Limited was the name of the Company. It had been incorporated for the purpose of acquiring the business previously run by the Seller by Messrs Sood and Webster through their investment vehicle, Ivy Partners Limited. The business was sold by the Seller as a going concern and its employees were to transfer to the Company. Their names are set out in Annex C to the BPA and Rita Fitzpatrick was one of the 12.

7. By clause 12.1.3 of the BPA, the Company undertook to the Seller that:

*"in accordance with Schedule 6, within 9 months from the Completion Date, it shall (a) establish an employee benefits trust in favour of the employees of the [Company] and (b) issue 20% of its issued share capital to the trustees of such employee benefits trust. The Seller will be permitted to withhold from the [Company] the sum of £100,000 due from the Seller pursuant to Schedule 4 until such time as the [Company] complies in full with the provisions of this clause 12.1.3."*

Schedule 6 then contains further details of what this employee benefit trust should provide. I need only refer to two of the paragraphs therein, on the basis that paragraphs 4 and 5, dealing with drag along and tag along are not relevant.

8. Paragraph 2 deals with the establishment of the trust. It provides:

*"2.1 In order to ensure the employees of the [Company] have a stake in the business of the [Company] and the development of the business, the [Company] will establish a trust to be known as the Medical Toxicology and Information Services Employee Benefit Trust (the **Trust**) within 12 months of the date of this agreement with such independent trustees as may be agreed between the Employees and the Buyer as its initiation trustees (the **Original Trustees**). The deed establishing the Trust (the **Trust Deed**) shall be in such form as the Original Trustees shall require provided it is for the benefit of all or most of the employees of the [Company] and complies reasonably with the provisions of section 86 of the Inheritance Tax Act 1984 and may be in the form of an interim declaration of trust with the full terms of the trust to be set out in a subsequent trust deed to be entered into within no more than 12 months. In this Schedule the **Trustees** are the Original Trustees or the trustees for the time being of the Trust. The [Company], Rajesh Kumar Sood and Simon Philip Webster (nor any Privileged Relation of these two individuals) shall neither be Trustees nor beneficiaries of the Trust.*

*2.2 The [Company] will on the execution of the Trust Deed transfer to the Original Trustees the sum of £200 or such other amount as is required to enable the Original Trustees to subscribe for or otherwise acquire 20% of the issued share capital of the Buyer (the **Share Acquisition**), such shares to be ordinary shares of the same class and with the same rights as all other ordinary shares in the [Company]."*

Although it does not affect how to construe the trust instrument, the proceedings before the High Court of Justice allege *inter alia* that the Company did not comply with these obligations.

9. Paragraph 3 of Schedule 6 to the BPA contains what are described as “guiding principles”. It provides:

- “3.1 *The [Company] and its subsidiaries (if any) from time to time (the **Group**) shall be operated in accordance with the following principles:*
- 3.1.1 *that employees are encouraged to assume responsibility for maximising their contribution to the Group in their capacity as employees having regard to the interests of future as well as present employees of Group companies;*
- 3.1.2 *that employees receive information concerning the major policies and actions of Group companies;*
- 3.1.3 *that opportunities are afforded to employees whether individually or through representatives to participate in decision-making within the Group;*
- 3.1.4 *the bonuses and other remuneration payable to employees shall be set on the basis that no account is taken of any benefits which they may receive from the Trust as a result of its shareholding in the [Company] or any dividends or other distributions made by the [Company] to the Trust; and*
- 3.1.5 *such other principles as may from time to time be agreed in writing between the Trustees and the board of directors of the [Company] (the **Board**).*
- 3.2 *In order to promote the integrity of the business of the Group, the [Company] shall procure that, except where the consent of the Trustees is received, the [Company] shall not in the period after Completion make any change in the share capital structure of the Buyer or to the Articles of Association of the Buyer where such change would constitute a material adverse change to the class rights attaching to any shares held by the Trust (where those shares form a separate class from any other shares in issue).*
- 3.3 *The [Company] will give to:*
- 3.3.1 *the Trustees within 9 months of the end of each financial year copies of audited accounts of every Group company and audited consolidated Group accounts (if there are any); and*
- 3.3.2 *the then current employees of the [Company] within 14 days of the end of each month management accounts and statistics for the performance of the Group during such month.*
- 3.4 *The [Company] shall:*
- 3.4.1 *ensure that the [Company] is operated in accordance with the principles set out in this paragraph 3; and*
- 3.4.2 *(to the extent that it is able to) procure that its shareholders hold their shares subject to and in accordance with the rights set out in paragraphs 4 and 5 below.”*

10. It took the Company longer than the timeframe envisaged by the BPA to establish the EBT. The reasons for the delay are irrelevant to the issue I need to determine. Prior to the EBT being executed, the Company received advice from Kingston Smith in a letter dated 4 July 2014. It appears that one of the purposes of the letter was because the Applicant had requested some tax advice being obtained, as set out in para. 3.2:

*“It has been suggested (without detailed advice which is now provided in this letter) that the EBT should not be resident in the UK but resident outside the UK and it is proposed that it should be resident in Guernsey with Trustees provided by Trident Trust Company (Guernsey) Limited. Trident have requested sight of a letter of tax advice from us to you outlining the establishment and running of the Trust and the relevant parameters from your company’s, the employees’ and the Trustees’ points of view.”*

This letter also clarifies that a draft of the EBT Deed had been produced by Messrs Cripps Harries Hall on the basis that it would be governed by English law (para. 3.1), but had also been viewed by Guernsey lawyers, who recommended some changes for a Guernsey-based trustee and to be subject to Guernsey law (para. 3.3).

11. Paragraph 3.5 of the letter of advice states:

*“The Trust Deed provides that the Trustees waive all rights to dividends from their 20% shareholding in the company and that they will unless instructed to do so by the company refrain from voting their shares. These are standard provisions in EBT’s but the latter might not comply with Schedule 6 to the Business Purchase Agreement.”*

12. Again, I do not need to set out the tax advice contained in this letter, which will not assist with the construction issue, but there is a description of what the transaction might involve (for example, at para. 1.6):

*“It is proposed that the company initially provides c.£1million to the EBT which initially buys 10% of the issued shares from the two current shareholders for c.£1million. We understand that further tranches of shares will be acquired by the EBT from the shareholders up to a total of 20%.”*

13. The final passage from this letter to which I will refer is para. 6.9, because it touches on one of the matters found in the BPA:

*“As mentioned above the Trustees will not be liable to UK capital gains tax because that should not be UK resident at any time during the EBT’s existence. Sections 86 and 87 of the Taxation Chargeable Gains Act 1992 attributes gains of a non resident trust to either the settlor or to individuals who receive payment or benefits from the EBT. It is not considered that either of these provisions should apply in this case because it is demonstrable, in our view, that the Trust was established for good commercial reasons, namely in pursuance of an obligation to the seller in the Business Purchase Agreement to ensure that the employees of your company have a stake in the business and so the formation of the EBT lacks the necessary element of bounty.”*

14. The EBT Instrument was then executed on 18 August 2014. At that time, despite the references to it in the letter from Kingston Smith, the Applicant trustee had not seen the terms of the BPA. Clause 21 provides that the EBT is to be governed by, and construed in accordance with, the laws of Guernsey and this also contains an exclusive jurisdiction clause. Clause 29 disapplies sections 23(b), 26(1) and 29 of the Trusts (Guernsey) Law, 2007.

15. The clause that is the subject of this decision appears in a provision relating to voting. Clause 11.1 provides:

*“Unless the Company directs that the Trustee may vote on any particular occasion, the Trustee shall abstain from voting at any general meeting of any member of the Group any Shares held in the Trust Fund for which the Trustee holds the whole of the beneficial interest.”*

In order to place that provision into context, the remainder of clause 11 provides:

*“11.2 If the Company directs the Trustee to vote Shares for which the Trustee holds the whole of the beneficial interest, the Company cannot direct the manner in which the Trustee exercises its vote, and the Trustee may in its absolute discretion vote (or abstain from voting) in the manner which it thinks fit.*

*11.3 If a beneficial interest in any Share held in the Trust (other than a right to acquire such Share) is held by a Beneficiary:*

*11.3.1 the Trustee shall seek irrevocable directions from each relevant Beneficiary as to the exercise of voting rights attaching to his interest in Shares;*

*11.3.2 the Trustee shall comply with each relevant Beneficiary’s directions regarding voting his interest in Shares; and*

*11.3.3 if the Trustee does not receive a Beneficiary’s directions by any deadline specified in writing by the Trustee, the Trustee shall abstain from voting that Beneficiary’s interest Shares.*

*11.4 The Trustee shall not be entitled to vote on a show of hands on a particular resolution in respect of Shares held on behalf of Beneficiaries unless all directions received from those Beneficiaries who have given directions in respect of that resolution are identical.*

*11.5 The Trustee shall not be under any obligation to call for a poll, but in the event of any poll the Trustee shall vote each Beneficiary’s interest in Shares in accordance with the Beneficiary’s directions.”*

16. Some of the terms found in clause 11 are defined in clause 1. It is set out that the Trust Fund:

*“shall comprise:*

- (a) the sum of £100 (referred to in Background (C));*
- (b) property added to it at any time through accumulation of income, capital accretion, payment, transfer, gift, loan or otherwise; and*
- (c) all money, investments and other Property representing or derived from, (a) and (b).”*

As regards Shares, they are *“fully paid ordinary shares in the capital of the Company or its holding company”*. The term Beneficiary is defined as *“an Employee or a spouse, civil partner, surviving spouse, surviving civil partner, minor child or minor step-child of an Employee, excluding any person resident for tax purposes in Guernsey”*.

17. Just as the sum of £100 was initially settled into the EBT by the Company, the first of the recitals found under the heading *“BACKGROUND”* explains that *“The Company has decided to establish a trust, to be constituted as an employees’ share scheme under section 1166 of the Companies Act 2006, on the terms of this Instrument.”* Clause 2 then contains the parties’ obligations:

*“The Trustee and the Company shall procure that the Trust constitutes and remains part of an Employees’ Share Scheme and a trust for the benefit of employees (as defined in section 86 of IHTA 1984).”*

18. Clause 7 contains the provision relating to waiver of dividends:

*“Until the Company directs the Trustee otherwise, the Trustee shall waive its entitlement to dividends on Shares held in the Trust Fund for which the Trustee holds the whole of the beneficial interest.”*

19. Clause 12.1 relates to dealing with shares held in the Trust Fund. It provides:

*“If any offer is made to the holders of Shares to acquire their Shares:*

*12.1.1 the Trustee shall, in relation to any Share held in the Trust in which a beneficial interest (other than a right to acquire such Share) is held by a Beneficiary, seek irrevocable directions from each relevant Beneficiary regarding the sale of that Beneficiary’s Shares (or interest in Shares) pursuant to the offer; and*

*12.1.2 if the Trustee holds the whole beneficial interest in any Shares which it proposes to use to satisfy options or awards held by Beneficiaries which will vest at or after the completion of the acquisition of shares pursuant to the offer, the Trustee may, but shall not be obliged to, seek an expression of wishes from each relevant Beneficiary regarding the offer made for any Shares to which that Beneficiary will become entitled, but if it does so, the Trustee shall comply with each relevant Beneficiary’s directions; and*

*12.1.3 if the Trustee decides not to seek expressions of wishes from each relevant Beneficiary in relation to an offer as set out in clause 12.1.2, the Trustee may take such action in relation to such Shares as it thinks fair, having regard to all the circumstances.”*

20. Reference was also made at the hearing to clause 8.3, which provides:

*“The Trustee shall not be obliged to:*

*8.3.1 diversify the investment of the Trust Fund; or*

*8.3.2 become a director or officer of, or interfere in the management or affairs of, the Group or any company whose shares or stock are held in the Trust Fund for the time being, even if the Trustee has a substantial holding in, or control of, any such company (whether directly or indirectly); or*

*8.3.3 seek information about the affairs of any such company. The Trustee may leave the conduct of such company’s affairs to its directors (or other persons managing the company), so long as the Trustee has no notice of any act of dishonesty by such directors (or others) in connection with the management of the company.”*

21. The final provision to which I will refer is clause 17, which deals with the ability to amend the provisions in the Instrument. The first two sub-clauses provide:

*“17.1 Subject to clause 17.2, the Trustee shall have power to amend, restrict, release or extend the trusts, powers and provisions of this Instrument in any manner by deed during the Trust Period.*

*17.2 No exercise of the power contained in clause 17.1 may:*

- 17.2.1 *breach or remove the restrictions in clause 3.5, clause 7 or clause 11; or*
- 17.2.2 *extend the power conferred by clause 17.1 or remove the restrictions contained in this clause 17.2; or*
- 17.2.3 *alter or affect the rights of any person accrued before the date of the amendment (except with that person's prior consent in writing); or*
- 17.2.4 *invalidate any previous payment or application of the Trust Fund, or affect any part of the Trust Fund to which any person has previously become absolutely entitled."*

The limitation placed on the general power to amend explicitly means that the waiver of dividends and the provisions about voting found in clauses 7 and 11 cannot be changed. Clause 3.5 features within the clause setting out the trusts on which the Trust Fund are to be held for the benefit of the Beneficiaries, part of which is a requirement to divide the Trust Fund into as many sub-funds as are required by clause 3.4.1 ("*all assets contributed by any one member of the Group and all income and other assets derived from those assets, shall be allocated to a single sub-fund*").

22. After the execution of the EBT Instrument, the Applicant Trustee was issued 800,000 fully paid Ordinary Shares in the Company on 19 January 2015. Each share was for £0.0001. This involved an additional 800,000 shares being issued above the 8 million shares that were previously the share capital of the Company, held beneficially equally between the Third and Fourth Respondents. The shares that have since vested in the Trustee had a nominal value of £80. This was a different approach to what had been envisaged when Kingston Smith advised, which had been for the Third and Fourth Respondents to sell some of their shares to give effect to the terms of the BPA.
23. At around this time, the Company prepared an Enterprise Management Incentive (EMI) Share Option Plan. The copy of the Rules relating thereto exhibited by Mr Dekker is unexecuted and undated. Quite why the Trustee does not have a finalised version has not been explained. He also exhibited a document that shows those employees to whom share options have been allocated. Some were allocated in 2015 and others in 2018. Rita Fitzpatrick has been allocated a significantly larger number of shares than anyone else. The second highest number on the document is for Alastair Scarborough, arising only from the 2018 allocation. When an employee has left the Company, any share options previously allocated drop back to zero. The document shows that more share options have been granted than the 800,000 shares held by the Trustee. The document also indicates that the remaining shares to be issued to reach 20% of the Company (being 1,760,000 shares) appears to be envisaged. There is a minute of the Trustee dated 13 May 2015 accepting the 2015 allocation.
24. The structure of the share capital of the Company was modified in 2018. Two new classes of shares were created. The Trustee continues to hold 800,000 shares that are now Ordinary 'A' shares. Between them the Third and Fourth Respondents beneficially own half each of the 8,000,000 Ordinary 'B' shares and the 8,000,000 Ordinary 'C' shares. The Trustee's understanding of the rights attaching to each class of shares is set out in Mr Dekker's Affidavit, where the class 'B' shares appear to be similar to the rights of the Trustee's class 'A' shares, whereas the class 'C' shares provide only a return of capital limited to the nominal value of each share. This modification to the share structure was brought about by a written resolution of the Company, which the Trustee signed on 7 March 2018, which adopted new Articles of Association.

25. The new Articles of Association amended those originally adopted on 13 February 2014. Each time, they apply the Model Articles, which are those for private companies limited by shares contained in Schedule 1 of the Companies (Model Articles) Regulations 2008 (SI 2008/3229). Model Article 13 (dealing with a casting vote) continued to be deleted and replaced with the words, “*If the numbers of votes for and against a proposal at a meeting of directors are equal, the chairman or other director chairing the meeting does not have a casting vote.*”
26. Because of the insertion of a new Article 15 into the Company’s Articles of Association relating to the modified share capital, the subsequent numbering has been changed but unfortunately without changing the internal cross-references. As a result, when it comes to the Articles dealing with decision-making by shareholders, to which I was referred, they do not make sense unless one reads into them the changed numbering. I will set them out in the form in which they have been exhibited in the evidence.
27. Article 28 concerns written resolutions. It provides:
- “28.1 *Subject to article 27.2, a written resolution of members passed in accordance with Part 13 of the Act 2006 is as valid and effective as a resolution passed at a general meeting of the Company*
  - 28.2 *The following may not be passed as a written resolution and may only be passed at a general meeting*
    - 28.2.1 *a resolution under section 168 of the Act 2006 for the removal of a director before the expiration of his period of office, and*
    - 28.2.2 *a resolution under section 510 of the Act 2006 for the removal of an auditor before the expiration of his period of office*
  - 28.3 *Subject to article 27.2, on a written resolution, a member has one vote in respect of each share held by him*
  - 28.4 *No member may vote on a written resolution unless all moneys currently due and payable in respect of any shares held by him have been paid.”*
28. Articles 29 to 31 then deal with proceedings at a meeting, covering how poll votes are conducted, dealing with proxies and finally the quorum. The first two amend Model Articles 44 and 45. No one provided any copy of those Model Articles and, save to note that these provisions exist to deal with general meetings of the Company, I do not need to consider these further. Article 31 provides:
- “31.1 *A quorum at a general meeting shall comprise two persons entitled to attend and vote upon the business to be transacted, each such person being an actual member of the Company or a proxy for a member or a duly authorised representative of a corporation*
  - 31.2 *Whensoever the Company has only a single member, then a quorum shall be constituted by that sole member being present either in person or by means of a proxy In the case of another Company being a sole member, attendance by a duly authorised person of that Company shall be deemed to be a quorum*
  - 31.3 *All and any decisions taken by a single member in a general meeting of the Company or by way of written resolution shall be deemed to be effective and all and any such decisions so made shall be recorded in writing and entered into and maintained in the minute book of the Company, being the dedicated book held and maintained by the Company for such purpose.”*

29. The final provision to which I will refer is the deadlock provision found in Article 32 as follows:

- “32.1 A deadlock will occur if a resolution is proposed at a duly convened meeting of the Board or at a duly convened meeting of the Company and either*
- 32.1.1 a quorum is not achieved at the meeting other than through the non-attendance of the proposer of the resolution and a quorum is also not achieved at any adjourned meeting, or*
- 32.1.2 a director or member (other than the representative of the proposing party) votes against the resolution with the effect that there is an equality of votes for and against such resolution*
- 32.2 Every director present at a meeting of the Board and every Shareholder present at a duly convened meeting of the Company (or their duly appointed alternate or proxy as the case may be) shall either vote for or against every resolution proposed at the meeting and no such person shall abstain from voting*
- 32.3 Any party may, within 10 Business Days of the event that has given rise to the deadlock, serve notice (Deadlock Notice) on the other parties stating that in their opinion a deadlock has occurred and identifying the matter over which the parties are deadlocked*
- 32.4 The parties undertake that within 10 Business Days of service of the deadlock Notice they shall be bound to meet together to discuss the proposal and all advantages thereof including the objections to it and any alternative proposals put forward with a view to a mutual agreement of the matter in dispute*
- 32.5 In the event that the parties are unable to agree to a resolution of any such matter following the procedure set out in clause 31 4 above within a period of 10 Business Days from the service of the Deadlock Notice, the parties shall be bound within a further 10 Business Days of it to convene a formal meeting at which a representative of the Auditors and the solicitors of the Company shall be present to discuss the proposal and any alternative proposal with its advantages and reasons and all aspects of it including the objections to it and any alternative proposals put forward with a view to reaching a mutual agreement of the matter in dispute*
- 32.6 Meetings to be held pursuant to clauses 31 4 and 31 5 shall be at such times and at such places as the parties shall agree or, failing agreement, at a time and place nominated by the Auditors*
- 32.7 If the parties are unable to agree to a resolution of any such matter following the procedure set out at clause 31 5, the matter shall within 10 Business Days of the meeting referred to at clause 31 5 be referred to a mediator who shall be an individual chosen by the Auditors and the parties shall try in good faith to settle the matter by mediation in accordance with the prevailing rules of the Centre for Effective Dispute Resolution*
- 32.8 If the parties cannot agree to a resolution of the dispute in question by the end of the second day of mediation, the decision shall be referred for a final decision to an Expert.”*

30. Because the Third and Fourth Respondents do not agree about the proposal by the Fourth Respondents that Alastair Scarborough should be appointed as an additional director, effectively as a means of breaking the deadlock that frequently exists between the Third Respondents and the Fourth Respondents, the Applicant Trustee has received a written resolution and wishes to know whether, as it claims, it is unable to vote on the resolution by reason of clause 11.1 of the EBT Instrument. It is that issue, and nothing further, that falls to be resolved on this preliminary issue.

### Legal principles

31. One matter on which all Counsel agreed is that there is Court of Appeal authority about the approach to take to construing a trust instrument. Indeed, on behalf of the Company, this was the only submission made by Advocate Edwards. There are two recent cases that distil the applicable principles. They are *In the matter of the R Trust* [2020] GCA 065, where the judgment of the Court was delivered by Mountfield JA, and *In the matter of the K Trust* [2020] GCA 080, with the judgment being delivered by McNeill JA. In both cases, the approach taken approved what I had said in *In the matter of the C Trust* [2013] GLR 105. In that case, I had applied and adopted the guidance given in the Royal Court of Jersey in *In the matter of the Internine and Intertraders Trusts* 2005 JLR 236.
32. The way it was summarised in the *R Trust* case is found in para. 19:

*“The principles to be applied in interpreting the Declaration of Trust are familiar, not in dispute and, at any rate for the appeal before us, need little elaboration or reference to authority. The aim is to arrive at the meaning which a reader of the Declaration of Trust would understand to have been intended by the settlors (the relevant trustees of the various predecessor trusts). It is common ground that the Court’s task is to identify the objective meaning of the language of the Declaration of Trust, and not to speculate on the subjective intentions of persons involved in drawing it up. But a reader’s understanding of what is meant by provisions in an instrument is not formed simply by considering literal meanings of words. Words and phrases derive meanings from the way they are used, and so this construction exercise requires attention to be paid to the words used in the context in which they have been used. And considering the context in which words are used and trying to find the sense to be given to the words involves an appreciation of the impact of alternative interpretations, where alternative interpretations are available.”*

After quoting from the first instance decision in the *K Trust* case and referring in the following paragraph to some of the cases on which Advocate Davies had relied, the judgment continues (at para. 22):

*“We fully accept that ordinarily the words used in a legal instrument are approached as being those which the maker has chosen to use to convey the intended meaning; and that determining the meaning of words used is an objective, not subjective exercise. But the exercise of finding the intended meaning, when the instrument is to be construed, also requires the words to be considered in the context of the instrument, and the setting in which the instrument has been made. Quite properly Advocate Davies drew our attention to the guidance given by Sir Thomas Bingham MR (as he then was) in *Arbuthnott v Fagan* [1995] CLC 1396, where at 1400 he said “to my mind construction is a composite exercise neither uncompromisingly literal nor unswervingly purposive”. That approach was further explained by Lord Hodge (with whom all the other Supreme Court Justices agreed) in the *Wood* case, above, in a lengthy passage from his judgment at paragraphs [10] to [13]: he described the*

*approach as “a unitary exercise”, involving an “iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated”. That approach, applicable as it is to legal instruments such as the Declaration of Trust, is as appropriate in Guernsey as in England and Wales.”*

33. In the *K Trust*, the full text of paragraphs 62 and 63 from the judgment given by Commissioner Page in the *Internine and Intertraders* case was quoted (at para. 30):

“62. *The correct approach to the task before the Court is to a large extent the same as it is for any instrument the meaning of which is in contention:*

- (i) the aim is to establish the presumed intention of the maker(s) of the document from the words used: in the present case, there being no settlor-signatory, the maker must be taken in each case to be the trustee – or possibly the trustee and Sheikh Abdullah as the parties to the letters of instruction which conferred authority on the trustees to execute the declarations of trust (it makes little difference which in the present case);*
- (ii) words must, however, be construed against the background of the surrounding circumstances or ‘matrix’ of facts existing at the time when the document was executed – a principle that has been the bedrock of English law since the judgment of Lord Wilberforce in Prenn v. Simmonds ([1971] 1 WLR 1381) and appears now to have been accepted as also properly reflecting the approach that this court should adopt in relation to such matters;*
- (iii) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the maker at the time or, where there are more than one, known to the makers of or the parties to the document, and include (to use the language of Lord Hoffmann in Investors Compensation Scheme Ltd v. West Bromwich Bldg Socy ([1998] 1 W.L.R. 896, at 913), from whose speech only Lord Lloyd of Berwick dissented) – “... absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”;*
- (iv) evidence of subjective intention, drafts and negotiations and other matters extrinsic to the document in question is inadmissible, as is evidence of events subsequent to the making of the instrument (evidence of this kind being relevant where an estoppel is said to arise but not in this jurisdiction, unlike some others, as an aid to construing the original meaning of the document);*
- (v) the critical provisions, cll. 2(b), 6(c) and 6(f), as with all words and phrases, have to be read in the context of the document as a whole;*
- (vi) words should as far as possible be given their ordinary meaning: “Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation”: per Lord Steyn in Society of Lloyd’s v. Robinson ([1999] 1 W.L.R. 756, at 763); and*

- (vii) *this last precept may, however, have to give way if consideration of the document as a whole, having regard to the principles set out above or common sense, points to a different conclusion: “common sense” in this context being best reflected by the passage from the words of Lord Reid in Schuler (L.) A.G. v. Wickman Machine Tools Sales Ltd. ([1974] A.C. 235, at 251) in which he observed:*

*“The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make the intention abundantly clear.”*

*(See also Lord Steyn, again in Society of Lloyd’s v. Robinson ([1999] 1 W.L.R. 756, at 763), and Lord Hoffmann’s observations in the Investors Compensation Scheme case concerning the need, on occasion, for a court to accept that the parties must have used the wrong words or syntax.)*

63. *It is also elementary, first, that when attempting to discern the true meaning of a power conferred in a trust deed or other instrument the court must have regard to the nature of the deed and the purpose for which the power appears to have been granted – though this will depend to a large extent on the terms of the instrument itself; and secondly, that a power of amendment reserved in a trust must be exercised for the purpose for which it was granted and not for one beyond the contemplation of the makers of the original instrument (Lord Steyn (*ibid.*), citing Hole v Garnsey [1930] A.C. 472).”*

Given that these principles are binding on this Court, there is generally no need to refer to the various English law decisions that were also included in the material placed before the Court. Because these were the principles to which Counsel referred, elsewhere in this judgment I will refer to each as the principle as numbered in this paragraph.

34. In addition to these principles, it is also appropriate to refer to section 14(1) of the Trusts (Guernsey) Law, 2007, which provides:

*“Subject to the terms of the trust, all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust, including (without limitation) questions as to –*

- (a) *the capacity of the settlor,*
- (b) *the validity, interpretation or effect of the trust or disposition or any variation or termination thereof,*
- (c) *the administration of the trust, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of trustees and enforcers,*
- (d) *the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such functions,*
- (e) *the distribution of the trust property.*

*are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.*

*For these purposes “the law of Guernsey” does not include the Guernsey rules of private international law, except those set out in this section.”*

### **The parties’ submissions**

35. This summary of the submissions is taken from the Skeleton Arguments, as supplemented by the oral submissions.
36. The Applicant Trustee advances the positive case that clause 11.1 of the EBT instrument has to be construed in favour of granting the declaration sought. Advocate Morris highlights that the provisions in the Companies (Guernsey) Law, 2008 support that view. Unless the Company directs the Trustee to do so, the terms of clause 11.1 should be construed so as to extend to written resolutions, because section 175, save for one exception, enables the company to resolve either at a general meeting or by written resolution. This is because the passing of a resolution by either of these methods are two sides of the same coin.
37. On behalf of the Company, Advocate Edwards offers no positive case either way. Given the different views of the Third and Fourth Respondents, it seems apparent that the directors of the Company are split on this construction issue.
38. For the Second Respondents, Advocate Mark Ferbrache argues against the relief sought by the Applicant Trustee. He suggests that the Court should have regard to the commercial purpose and the genesis of creating the EBT. In doing so, he has referred to a number of other English law cases. He further suggests that the wording of clause 11.1 is plain and unambiguous and is consistent with Guernsey’s law on company resolutions.
39. On behalf of the Third Respondents, Advocate Newman adopts the arguments set out in an Opinion obtained from Lexa Hilliard KC. However, to the extent that these submissions relate to the validity of what was done by the other directors of the Company, that is not relevant to the construction issue I have to determine. If there have been shortcomings in the process used by Mr Webster, that in itself does not affect the Guernsey law construction to be given to clause 11.1 of the EBT Instrument. On the construction issue, the Third Respondents support the relief sought by the Trustee.
40. The Fourth Respondents’ position is aligned to that of the Second Respondents. The route taken by Advocate O’Hanlon, however, differs from that of Advocate Ferbrache. Greater reliance is placed on the BPA and the Company’s Articles of Association, but they agree that the natural and ordinary meaning of the words in clause 11.1 has not been displaced and Advocate O’Hanlon suggests that the Trustee has manufactured a presumption of intention on the part of the Settlor.
41. In his reply, Advocate Morris has concentrated on the submissions against the relief being sought. This is understandable and he seeks to address the way in which each has sought to apply the applicable principles. He notes, in particular, that the only issue for the Court at present is the proper construction to give to clause 11.1 and not to comment on the wider disputes between the Company and the Second Respondents and as between the two sets of directors.

### **Discussion**

42. I can explain briefly first why I have not had any regard to the Fourth Affidavit of Mr Sanders. This Affidavit exhibits correspondence which has been had with legal publishers. As far as I

am concerned, this is the type of extrinsic evidence to which the Court cannot have regard when seeking to construe the relevant provision in the EBT Instrument. It matters not whether a precedent has been used and whether it has been changed recently. None of this will assist with what was the presumed intention of the makers of the Instrument at the time of executing it. In my view, this is material that falls within principle (iv), which is why I have not had regard to it on the basis that it is inadmissible.

43. The way in which para. 2 of the Application is drafted is unhelpfully couched as a type of double negative. It is further arguable that it should not have referred to “*written resolutions proposed by the shareholders of ESMS Global Ltd*” because, as set out in the Opinion of Lexa Hilliard, to which I have had regard because it was adopted by Advocate Newman, under the Companies Act 2006 it is the Company that must circulate the proposed written resolution. In doing so, she relies on *Re Sprout Land Holdings Limited (in administration)* [2019] EWHC 806 (Ch), which indicates that the directors must give due consideration to the request to circulate. If the relief sought had been couched in positive terms and related to the requirement on the face of clause 11.1 that the only occasion on which the Trustee is permitted to vote is when that Company has directed that it may vote on that particular occasion, subject to the analysis that follows, I might have been more inclined to grant some form of relief.
44. Turning first to the use that can be made of the BPA, whilst it is obvious that the Company was a party to it and so would have been aware of its terms, I accept the evidence on behalf of the Applicant Trustee that it had not received a copy of the BPA until many years later. To that extent, the Trustee cannot have been informed by any of the obligations of the Company under the terms of the BPA and, in particular, any of the requirements found in Schedule 6. Whilst it is surprising that the Trustee, having had sight of the letter from Kingston Smith dated 4 July 2014, did not request a copy of the BPA at that time, aside from the references in that letter to the obligations under the BPA, the Trustee was unaware of that particular piece of background information. I appreciate, as several of the Advocates submitted, that the BPA might be regarded as the genesis of the EBT, but that is not what is required for me to have regard to it when construing any provision of the EBT. What all this means is that, however much the Company may have been influenced by the terms of the BPA, the obligations undertaken by it were outside the knowledge of Trustee. As such, I am not persuaded that the BPA assists in the construction of the EBT Instrument. The BPA may have been circumstances that were both relevant and admissible (in accordance with principle (iii)), but the failure to ensure that the Trustee had sight of the BPA in full at that time means that its full terms fall outside the matrix of facts (principle (ii)) existing at that time. It offers only a partial picture of what was in the minds of the parties at the time of executing the EBT Instrument.
45. In any event, it seems that the Company has not complied with what it promised to do in establishing the EBT. Paragraph 2.2 of Schedule 6 required it to transfer to whichever person became the Original Trustees £200 or such other amount as was required to enable the Original Trustees to subscribe for or otherwise acquire 20% of the Company’s issued share capital. On the face of the EBT Instrument, only £100 was transferred and the number of shares acquired was considerably below the 20% envisaged. Further, the way in which the Trustee’s shares could be voted did not, in itself, give the employees concerned that opportunity to participate in decision-making, as found in one of the guiding principles for the operation of the Group (para. 3.1.3 read with para. 3.4). It would only become a means by which to participate if the sub-funds required by clause 3.4 of the EBT Instrument had been created and the Trustee thereafter complied with clause 11.3 *et seq.* Whatever this guiding principle attaches to, I am not satisfied that it assists in how to construe clause 11.1. These are matters that will fall to be resolved in other proceedings, but I am not satisfied that para. 2.1 of Schedule 6 to the BPA providing for employees of the Company to have a stake in the business of the Company has a

bearing on how to construe clause 11.1. The shares in the Company are those that fall to the Trustee to decide how to vote, and not any held directly on behalf of a Beneficiary employee.

46. I have to have regard to the fact that there is an express reference in clause 11.1 of the EBT Instrument to “*voting at any general meeting*”. By the time the instrument was executed in 2014, the possibility of voting by written resolution was well-established. On its face, the different means by which voting can be carried out needed to be addressed fully if the limitation imposed by clause 11.1 was to be effective for written resolutions in the same manner as when voting at a general meeting.
47. In this regard, it is important to remember to read clause 11.1 “*in the context of the document as a whole*” (principle (v)). Further, the words used should “*as far as possible be given their ordinary meaning*” (principle (vi)). However, that ordinary meaning may be displaced if it were to lead to an unreasonable result (principle (vii)). In my judgment, these are the primary principles applicable in ascertaining the presumed intention of the makers objectively.
48. I was surprised that so little was made of putting clause 11.1 into context. Even though they are not directly relevant, the other sub-clauses of clause 11 have a bearing on how to approach clause 11.1. For example, clause 11.2 necessarily has to be read with clause 11.1. Even if the Company directs that the Trustee may vote, the Company is unable to direct the Trustee as to how to exercise its right to vote. As a result, the Trustee, once directed, can vote as it sees fit. There is even express reference to the Trustee retaining the ability to abstain from voting. However, if the beneficial interest in any Share held in the Trust is held by a Beneficiary, the Trustee is obliged to seek that Beneficiary’s directions. Failure to obtain direction from the Beneficiary means that the Trustee is obliged to abstain from voting that Beneficiary’s interest. In clause 11.3, there is no limitation relating to voting at a general meeting. It follows, therefore, that this requirement is of general application. Clause 11.4 relates to voting on a show of hands, and so applies when voting at a general meeting on behalf of one or more of the Beneficiaries. Similarly, if there were a poll, clause 11.5 confirms that the trustee must vote in accordance with any Beneficiary’s directions. I take the view that the breadth of what is found in clause 11.3 supports the view that in clause 11.1 the reference to “*voting at any general meeting*” was deliberate. The inclusion of those words in that sub-clause when other provisions of clause 11 are drafted in general terms supports that conclusion.
49. I find further support for this view from the terms of clause 17. In clause 17.2.1 there is reference to “*the restrictions in ... clause 11*”. The Trustee’s power to amend does not extend *inter alia* to clause 11 and I regard the description of these as “*restrictions*”, especially when read with clause 7 about waiving rights to dividends, as demonstrating that these are forms of limitation placed on the Trustee which the Trustee cannot amend. I take the view that seeking to read into clause 11.1 additional words is a form of impermissible amendment unless it can be said that the result is such an unreasonable one that it has to be construed in that broader fashion.
50. My starting point, therefore, is that the ordinary meaning of the words used refer only to voting at any general meeting and should not be read more expansively to encompass voting on written resolutions as well. It is in relation to this narrow issue that I disagree with the submissions made by Advocate Morris about treating clause 11.1 as applying equally to written resolutions that are circulated as if the restrictions applied to voting in respect of them.
51. Because section 14(1) of the 2007 Law requires the EBT Instrument to be construed according to Guernsey law, the provisions relating to voting applicable as a matter of Guernsey law need to be considered. According to section 175(2) and (3) of the Companies (Guernsey) Law, 2008, any resolution of the members may be passed either at a general meeting or as a written

resolution, except that a resolution to remove an auditor under section 268 may not be passed by written resolution. (This is similar, in any event, to the provisions under the Companies Act 2006, save that section 288 also prevents a private company passing a written resolution to remove a director before that director's term of office has expired under section 168.) Section 181 of the 2008 Law explains how to propose a resolution by way of a written resolution, which is again similar to the terms of section 288 of the 2006 Act.

52. I do not consider that section 181(2) of the 2008 Law assists. It provides that:

*“Subject to any contrary intention, references in enactments passed or made before or after this Law comes into force to –*

*(a) a resolution of a company in general meeting, or*

*(b) a resolution of a meeting of a class of members of the company,*

*have effect as if they included references to a written resolution of the members, or of a class of members of a company, as the case may be.”*

This provision operates as a form of interpretation provision. It expands references in other legislation so that a reference to resolving in general meeting can be read as an opportunity to resolve by way of a written resolution. The fact that this subsection can also operate prospectively, whereas section 288(4) of the 2006 Act is only retrospective, does make this something of general application outside of how to construe a statutory provision. In particular, this provision does not assist in how to construe the EBT Instrument.

53. Although section 14 of the 2007 Law requires the trust instrument to be interpreted according to Guernsey law, but always subject to the terms of the trust, even if one recognises that the Company is registered in England and Wales and so subject to the terms of the 2006 Act, these provisions do not assist. They have to be placed into the context of what was being established. This was always intended to be a trust to which section 86 of the Inheritance Tax Act 1984 applied. Further, it was established as an Employees' Share Scheme, which was given the definition found in section 1166 of the 2006 Act. These were matters that the Company and Trustee agreed needed to be met from the outset and that they will continue to be met throughout the existence of the EBT, as set out in clause 2 of the instrument. I take the view that the voting provisions in clause 11 have to be placed in this context.

54. I also consider that the voting provisions need to be considered in the light of how the Company was established. It was a form of quasi-partnership. Article 5 of the Articles of Association removes any casting vote. As a result, there is the possibility of using the deadlock provisions if either side wishes to do so, but otherwise the apparent intention in the Company was for decisions to be taken by both sides. I accept that this is part of the relevant factual matrix to which I can have regard.

55. However, when the EBT Instrument was executed, as I have explained, there was already a known difference, both in English law and also by that time in Guernsey law, in a company resolving at a general meeting or by way of a written resolution. This fact must be taken to have been known to the parties at the time the EBT Instrument was executed. Accordingly, I think that the inclusion of the words relating to abstaining from voting at any general meeting must be presumed to have been intended to cover that situation only.

56. As a member of the Company, the Trustee would be entitled to attend any general meeting of the Company's members. If it chose to do so, and the Company had not directed the Trustee to vote at the meeting, then clause 11.1 required the Trustee to abstain from voting. If the Company had directed that the Trustee could vote at that particular general meeting, then clause

11.2 clarifies that the Trustee would be free to vote as it sees fit, including though choosing not to vote by abstaining. Whilst the Trustee could choose to attend the general meeting, it could equally choose not to do so, even if the Company had directed that the Trustee could vote that the particular meeting. Accordingly, I construe clause 11.1 as imposing a restriction on the Trustee if it had chosen to attend a general meeting and had not been directed by the Company to vote. I do not consider that there is anything contradictory or inconsistent in each of these outcomes.

57. Adopting the iterative process endorsed in the *R Trust* case, it seems to me that there are two ways of approaching the opening words in clause 11.1 (“*Unless the Company directs that the Trustee may vote on any particular occasion*”). These words either relate only to voting at a general meeting or they are of general application. It follows that I need to consider each interpretation in turn.
58. The context of clause 11.1 is that it then makes provision for abstaining at any general meeting, without referring at all to voting on a written resolution. The narrow meaning of the opening words would, therefore, apply only to voting at a general meeting. When construing clause 11.1 with clause 11.2, there is again no violence to the construction that this applies only to voting at a general meeting. The qualification to voting at the general meeting, in whichever manner the Trustee thinks fit, is qualified by the requirement that the Company must have directed the Trustee to vote before it can vote at all, otherwise it is obliged to abstain. In other words, the Trustee is only permitted to cast a vote, including exercising the option of abstaining, when attending at a general meeting, if the Company has permitted it to do so. (I did not find the submissions of some parties that it would be impractical for an offshore trustee to attend a general meeting of a company registered in England as being of any relevance. The ability to vote is exercisable by way of a proxy, so physical attendance would not be required. These submissions did not assist in how to construe clause 11.1.)
59. If those opening words are given a wider meaning, because the inclusion of the words “*may vote on any particular occasion*” are taken to include voting in respect of a properly circulated written resolution as well as at a general meeting, the qualification for voting at all is that there must be a direction from the Company, even in respect of a written resolution. Because there is no reference in clause 11.2 to voting only at a general meeting, it would apply to both forms of resolution. Within the context of the instrument as a whole, the opening words could, therefore, be construed as being of general application.
60. It is in relation to these two possible constructions that I can turn to principle (vii) relating to the different levels of reasonableness of these outcomes. However, I am not persuaded that either is more unreasonable than the other. In my view, each of them has merit. Because of the explicit reference to voting at a general meeting and the absence of any reference to voting on a written resolution in clause 11.1, I cannot find that it is necessary to read in those additional words to avoid what would otherwise be an unreasonable interpretation. Accordingly, I come back to context as to how to construe these provisions and, in particular, clause 11.1.
61. Because I find that the natural and ordinary meaning of clause 11.1 is that it relates to voting at a general meeting, and has intentionally omitted any reference to voting on written resolutions, I prefer the narrower approach to the opening words. In their context, they require a direction from the Company before the Trustee can vote at a general meeting. I am satisfied that that is the natural and ordinary meaning of the words and it fits with the context in which they are used. It does, however, mean that the EBT Instrument is silent about what happens when a written resolution is circulated, but I doubt that this is something that requires a broader construction to be given to those opening words. In the Opinion of Lexa Hilliard, there is a detailed analysis of whether or not the Trustee would be an eligible member for the purposes

of section 289 of the 2006 Act. However, this depends on whether or not those opening words apply generally rather than only to voting at a general meeting. Compliance with the 2006 Act does not, in my view, help with the construction of this provision as a matter of Guernsey law, which is why this question necessarily has to be left open, principally because it is a matter for the Company to deal with and not the Trustee as a member of the Company. Further, I do not consider that the terms of the trust mean that regard must be had to the provisions of the 2006 Act, especially where clause 1.3 simply refers to words and expression not defined in the EBT Instrument being given the meaning found in the Income and Corporation Taxes Act 1988. Accordingly, I take the view that clause 11.1 applies to voting at a general meeting and the reference to “*on any particular occasion*” operates only in respect of voting at a general meeting.

62. Even if I am wrong to prefer that narrower meaning of the opening words, the relationship between clause 11.1 and clause 11.2 on the wider meaning means that it will always be open to the Trustee, once it has been directed to vote, to choose not to do so by abstaining. It is certainly not obliged to vote in any particular way, as is made clear by clause 11.2. Accordingly, because the Company is a form of quasi-partnership, once it has been directed that it is free to vote, the Trustee would not be obliged to choose to vote for or against any resolution, whether proposed at a general meeting or by circulation of a proposal by way of written resolution. However, if the opening words to clause 11.1 are wide enough to cover all resolutions proposed, it necessarily follows that, save where the Company has directed the Trustee that it may vote, it would be precluded from doing so. Therefore, subject to avoiding granting the declaration in the form pleaded, if I should have opted for the broader meaning of the opening words, I would have been able to confirm that, unless and until the Company directed the Trustee, it would not have capacity to vote on any proposed resolution.
63. In reaching the conclusion that I have, I have not felt the need to address a number of the arguments developed by Advocate Ferbrache. He touched on *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526 both for the way in which the redundancy argument was addressed, although the relevance of that rather escapes me, and for business common sense. As I have just indicated, I am satisfied that the natural and ordinary meaning of the words should be given their effect and there is also no need to base this conclusion on any contra proferentem rule or even by way of red lining. I did not find the references he made to clause 8.3 of the EBT Instrument of much assistance either. It is clearly a permissive provision rather than an obligation,. But I did not consider that it helped me to decide one way or the other as to the meaning to be given to clause 11.1. Similarly, I have not attempted to address every submission made on behalf of the Fourth Respondents by Advocate O’Hanlon as they relate to the English statutes and the Articles of Association, because I am not persuaded they assist. I also do not find any need to take judicial notice of the decision of Julia Dias KC in the English proceedings ([2022] EWHC 2941 (Comm)) for the factual summary contained therein, as I was invited to do by Advocate Newman, on the basis that I can recount the relevant facts as I have already done earlier in this judgment from the evidence adduced before this Court.

## Conclusion

64. For the reasons I have given, I cannot grant the declaration or order sought by the Applicant. As I have explained, I do not find that clause 11.1 falls to be expanded so that it applies both to a direction given by the Company to the Trustee to vote at a general meeting as well as on a written resolution. This would involve adding wording to what is present in the EBT Instrument which in my opinion cannot be done under the applicable principles.

65. As regards costs, I indicated that I would reserve them. The Applicant will now have to decide how to pursue the remainder of the Application now that this preliminary issue has been resolved, at which time the costs issues can be dealt with.