Application seeking a ruling on whether shares of Argent Enterprises Limited and Stanhill Limited, and proceeds from the sale of two plots of land in Portugal, were validly transferred into the G.E.B. Settlement. If the court finds the transfer invalid, the applicants requested a declaration that the shares are held in trust for Mr. Anthony John Austin.

[2025]GRC020

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Civil No. 2358

IN THE MATTER OF THE G.E.B SETTLEMENT

-and-

IN THE MATTER OF THE TRUSTS (GUERNSEY) LAW, 2007

Between:

MR NICHOLAS AUSTIN AND MS REBECCA AUSTIN
EACH IN THEIR CAPACITY AS BENEFICIARIES OF THE G.E.B. SETTLEMENT

Applicants

-and-

EQUIOM (GUERNSEY) LIMITED
(IN ITS CAPACITY AS TRUSTEE OF THE G.E.B. SETTLEMENT)

Respondent

Judgment handed down: 31 March 2025

Before: Jessica E Roland, Deputy Bailiff and Jurats: Steven John Morris, Stuart Michael Crisp and Felicity Quevâtre

Counsel for the Applicants: Advocate M W Rogers
Counsel for the Respondent: Advocate B B D Manchak

Cases, texts, legislation referred to:

R Hitchins, Levy and S Hitchins v Hill and Lloyds TSB Offshore Trust Company Limited [2011-12 GLR 336]
Credit Suisse v Haggiag et al 47/2015

Grey v Inland Revenue Commissioners [1958] Ch. 378 at 387
Whitlock v Moree [2017] UK PC 44, (2017) 20 IT ELR 658

Gany Holdings (PTC) SA v Kahn and others [2018] UK PC 21
Ng Man Sun v Peckson Limited and Chen BVIHCMAP2019/0011

Wong v Grand View [2022] SC 44 (com)

The Trusts (Guernsey) Law, 2007

Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009

Statute of Frauds, 1677

Introduction

1. This is an application pursuant to Section 68, 69 and 71 of the Trusts (Guernsey) Law, 2007 ("the Trusts Law") and the inherent jurisdiction of the court for directions and/or declarations regarding whether shares in each of Argent Enterprises Limited ("Argent") and Stanhill Limited ("Stanhill") were validly settled upon the G.E.B. Settlement ("the GEB Settlement" or the "Trust") and whether the sale proceeds from the sale of Plot 9 and Plot 10, Encosta de Lago Quinta do Logo Almancil, Portugal ("Plot 9" and "Plot 10") are assets of the GEB Settlement (the "Application"). If the court determines that the shares in Argent and Stanhill were not settled validly into the GEB Settlement, the Applicants seek directions and/or a declaration that the shares of Argent and Stanhill are held on bare trust or by a nominee or on resulting trust or such other manner as the court deems fit for Mr Anthony John Austin ("Mr Austin")("the Amended Application").

2. The Applicants are the children of the late Mr Austin in their capacities as the beneficiaries of the GEB Settlement. Mr Austin died on 5 May 2024. The GEB Settlement was established pursuant to an instrument dated 16 November 1998 (the "Settlement Deed") between Michael Boyd Marshall ("Michael Marshall") and Ocean Marine Trustees Limited ("OMTL") as the original Trustee. Mr Austin was the economic settlor, Michael Marshall a former employee of the Respondent. He appears to have been the main (although not the sole) point of contact for the Respondent with Mr Austin during the relevant period. Pursuant to a Deed of Addition and Exclusion of Beneficiaries instrument dated 22 July 2005, Mr Austin and his children, Rebecca and Nicholas, were added as beneficiaries of the GEB Settlement (and the original charitable beneficiaries excluded) with effect from 16 November 1988.

3. The original name of the Respondent (or "Trustee") was International Marine Trustees Limited. It changed its name on 17 February 1977 to OMTL. OMTL became Bachmann Trust Company Limited ("Bachmann") on 27 January 1994. Bachmann became Ardel Trust Company (Guernsey) Limited ("Ardel") on 5 August 2010. On 20 April 2015, Ardel became Equiom (Guernsey) Limited ("Equiom") who are the current Trustees of the GEB Settlement.

4. Before considering the main issues in the Application, sitting as a judge alone I decided as a preliminary issue that the law applicable to the purported transfer of the beneficial interest in the shares was British Virgin Islands ("BVI") Law.

5. It is the Applicants' position that Mr Austin was the beneficial owner of the shares in Argent and Stanhill and, as a consequence, the sale proceeds of Plot 9 and Plot 10 are not GEB Settlement assets. The Respondent's position is that Mr Austin's beneficial interest in the shares of each of Argent and Stanhill had been validly settled into the GEB Settlement and that the sale proceeds from Plots 9 and 10 are assets of the GEB Settlement. The Respondent does not seek a positive declaration as it says it has treated, and continues to treat, the beneficial interests in the shares in Argent and Stanhill as assets of the GEB Settlement since the transfer of the beneficial interest to the GEB Settlement in September 1998.

6. The parties had agreed that this matter could be dealt with on the affidavits. The vast majority of documents relied on were exhibited to the affidavits, however both parties produced additional documents during the course of the hearing but no point was taken that they were not

exhibited to an affidavit. The relevant facts of the case were largely agreed between the parties. Due to the decision by the parties to deal with this on affidavits and because the main protagonists at the time of the purported transfer were not able to give evidence, this case was almost entirely based on hearsay evidence by both parties.

7. Hearsay evidence is evidence, but nevertheless the Jurats must decide how much weight to attach to it. In deciding what weight to attribute to each piece of hearsay evidence I directed the Jurats that they are to take account of all the circumstances from which any inference may be drawn as to the reliability or otherwise of the evidence. In deciding what weight to attribute to each piece of hearsay evidence, I further directed that they are to take account of all the circumstances from which any inference may be drawn as to the reliability or otherwise of the evidence and that it is a matter which is to be left entirely theirs to decide. I directed the Jurats towards Section 4 of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 which provides as follows:

> "*Considerations relevant to weighing of hearsay evidence.*
>
> *Section 4. (1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings, the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.*
>
> *(2) Regard may be had, in particular, to the following –*
>
> *(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness,*
> *(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated,*
> *(c) whether the evidence involves multiple hearsay,*
> *(d) whether any person involved had any motive to conceal or misrepresent matters,*
> *(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose,*
> *(f) whether the circumstances in which the evidence is adduced as hearsay suggest an attempt to prevent proper evaluation of its weight, and*
> *(g) any other circumstances which the court may, in the interests of justice, consider relevant*."

8. In support of the Amended Application, the court considered the first affidavit of Michaela Kerry Rees sworn on 17 January 2024 ("Rees 1") and the second affidavit of Ms Rees sworn on 8 March 2024 ("Rees 2"). Ms Rees is the founding member and a director of Sterling Rees Limited ("Sterling Rees") which is an accountancy firm in the UK. Mr Austin had been a client of Ms Rees's previous firm, Sefton Potter Tax Advisors Limited where Ms Rees assisted him on a regular basis from 2001 to 2005, in relation to his personal tax compliance. Mr Austin instructed Sterling Rees in 2016 in relation to his tax. His daughter (one of the Applicants) usually dealt with Mr Austin's administrative affairs and contacted Sterling Rees in 2018 in relation to a 10 year anniversary trust charge in respect of the GEB Settlement, hence the involvement of Ms Rees in the Application. A running thread through the evidence that was filed on behalf of the Applicants is that Mr Austin was not properly advised on the trust structure. However, as was made clear at the PTR and also at the hearing, this Application deals only with the relief sought in the Application and not any allegations of negligence. Unfortunately, both Rees 1 and Rees 2 also contain a lot of the opinion of Ms Rees (who is not an expert witness), rather than evidence, which was not of assistance to the court in coming to its conclusions.

9. The Respondent relied on the first affidavit of Mr Alister Bruce Watterson sworn on 23 February 2024 ("Watterson 1"). Mr Watterson is an Executive Director of Client Services at Equiom. He was not employed by Equiom at the time of the alleged transfer, but officers of Equiom have conducted a file review and documents exhibited and the comments in his affidavit are based on the outcome of that review.

10. The matter was heard on 16 and 17 September 2024. This judgment has been prepared in accordance with the provisions of Section 16(5) of the Royal Court (Reform) (Guernsey) Law 2008 ("the 2008 Law"). I did not sum up to the Jurats in open court, but instead retired with them, as I am permitted to do under Section 14(2) of the 2008 Law. I reminded the Jurats of their respective roles. I am the sole judge on questions of law and procedure, and the Jurats are the sole judges on question of facts. The Jurats must accept my directions on the law and follow them. I directed the Jurats to have regard to the whole of the evidence presented to the court and to form their own judgements about the oral and affidavit evidence and the exhibits thereto, and which evidence each of them regarded as reliable and accepted and which is not. I directed that the facts of the case are the Jurats' responsibility. If at any time I appeared to express any views concerning the facts, or emphasised any aspect of the evidence, the Jurats were not to adopt these views unless they agreed with them. When it comes to the facts of this case, it is the Jurats' judgement alone that counts.

11. The decision of the Jurats was unanimous.

Background

12. On 8 November 1998, by way of a letter addressed to the Bachmann Group of Guernsey including OMTL, Mr Austin confirmed his intention to create the GEB Settlement. The letter reads as follows:

> *"Dear Sirs,*
>
> *I hereby confirm my instruction to incorporate and establish the G.E.B. Settlement and request you to provide administrative, secretarial and/or trusts services, fees in respect of which you will be charged in accordance with your published standard tariff which is subject to review from time to time.*
>
> *I hereby indemnify you against the consequences of any action taken in accordance with my instructions.*
>
> *It is understood that all instructions will be given by me in writing unless separate arrangements are made for use of a telex test key or code word.*
>
> *Yours faithfully"*

13. The letter is signed by Mr Austin and witnessed by a third party. On the same date, Mr Austin wrote a letter of wishes (the "Letter of Wishes") which was directed to OMTL. The main hand-written paragraph of the Letter of Wishes sets out the following:

> "*I desire that the following persons benefit under the Trust: myself during my lifetime and in the event of my death my children Nicholas Anthony Austin (born 14/1/1971) and Rebecca Jane Austin (born 5/3/1973) in equal proportions. In the event of my death before the children attain the age of 21 years the Trustees should provide sufficient funds to maintain their education and lifestyle. In the event of the death of either child then the survivor be the sole beneficiary."*

The Letter of Wishes also acknowledges that the Trustee was:

"in no way bound by any views which I may have concerning the administration and distribution of the Trust Fund, I should like you to have a note of my wishes as regards the administration of the trust, so that you may consider them when taking your decisions."

14. The first schedule to the Settlement Deed provides that the initial trust funds were $10. A bank account in the name of the GEB Settlement was opened with Bank Julius Baer in Guernsey on 15 November 1988. There is a board minute of OMTL entitled '*First Meeting of the Trustees of the GEB Settlement held at Frances House Sir William Place St Peter Port Guernsey on 16 November 1988*' which records *"the sum of $10 had been received from the Settlor and it was resolved that these funds be utilised to purchase the issued share capital of Lamsden Limited.*" It was also resolved that the Trustees would accept donations totalling £125,820 to the GEB Settlement and would make an interest free loan of £10,333.81 to Lamsden Limited.

15. It is common ground between the parties that the purpose of the GEB Settlement was to hold shares in companies that would invest in Portuguese property. Mr Watterson says in Watterson 1 that it was his understanding, that in or around the time the GEB Settlement was set up, Bachmann had a book of clients who made this type of investment. He says that typically the directors would enter into Powers of Attorney with lawyers in Portugal and they would deal with purchases, sales and day to day matters. The lawyer in Portugal used in relation to the relevant transactions is called Dra. Elia Apolo ("Dra. Apolo").

16. On 27 July 1988 Lamsden Limited was incorporated in the BVI.

17. Stanhill and Argent were incorporated in the BVI on 9 June 1997.

18. On the incorporation of Stanhill two shares were issued. One share was held by Bachman Alpha ("Alpha") and one share was held by Bachman Beta ("Beta"). Alpha and Beta were nominee companies owned by Bachman. By a declaration of trust dated 30 June 1997, the shares were declared to be held on trust for the original owners/developers of Plot 9, Encosta do Lago Empreendimentos Imobiliários, S.A. ("Encosta do Lago"). Likewise, on the incorporation of Argent, one share was held by Alpha and one share was held by Beta and the shares were declared to be held on trust for Encosta do Lago, who were also the original owners/developers of Plot 10.

19. Argent and Stanhill appointed Dra. Apolo as Attorney on 26 June 1997 for the purpose of buying Plot 9 and Plot 10, respectively.

20. On 2 July 1997, Mr Austin paid £182,727 direct to Dra. Apolo as a deposit for Plot 9.

21. There is some dispute about the nature and effect of an agreement that appears to have been executed on 4 July 1997 between Encosto do Lago, Mr Austin and Dra. Apolo in relation to Plot 9 owned by Stanhill. Advocate Rogers submitted that the agreement was attached to a fax dated 7 July 1997, although it is not referred to in the fax. In any event, on 7 July 1997 Mike Marshall faxed Dra. Apolo stating: "*I confirm that I have now transferred the beneficial ownership of* [Argent] *to* [Mr Austin] *and am in the process of transferring the beneficial ownership of* [Stanhill] *to yourself"*.

22. On 8 July 1997, Alpha and Beta respectively declared that they held the shares in Argent for the benefit of Mr Austin.

23. On 8 July 1997, Alpha and Beta declared that the Stanhill shares were held on trust for the benefit of Dra. Apolo.

24. On 28 July 1997, Stanhill entered into an agreement to purchase Plot 9 and Argent agreed to purchase Plot 10.

25. On 13 November 1997, an Overseas Property Management Agreement ("OPMA") was entered into in relation to Plot 10. In that agreement, the "Client" is described as Mr Austin and the "Company" as Argent. Bachman is described as the Manager. The Agreement is executed by all three parties. It is set out in the recitals that "*the Client has requested the Manager to allocate the Company to the beneficial ownership of the client or his Trustees and the manager has agreed to manage the Company on behalf of the client in the manner and for the consideration hereinafter set out*". A board minute for Argent dated 13 November 1997 confirmed the resolution of the directors of Argent to enter into the OPMA.

26. On 19 June 1998, Alpha and Beta declared that the Stanhill shares were to be held on trust for the benefit of Mr Austin.

27. On 11 August 1998, a board minute for Stanhill confirmed the resolution of the directors of Stanhill to enter into an OPMA in relation to Plot 9 between Bachman, Mr Austin and Stanhill in broadly similar terms to the Argent OPMA. The OPMA is dated 12 August 1998.

28. On 3 September 1998, Tara Property Limited ("Tara") was incorporated, and two share certificates were issued for Tara to Alpha and Beta, respectively. On 3 September 1998, Alpha and Beta declared that they held the shares in Tara for Bachmann, as Trustees for the GEB Settlement.

29. On 15 September 1998, Mr Austin wrote to the Bachmann requesting that they allocate Tara to his beneficial ownership or the GEB Settlement and to issue a power of attorney to Dra. Apolo for the purpose of negotiating the purchase of a plot of land at Encosta do Lago.

30. On 16 September 1998, there is a new client sheet for Tara with client name as *"B.T.C as Trustees of the GEB Settlement".* In the section "*client's background & source of funds*" it says: "*M.D. of colour processing co. client for 10 Years – Lamsden Ltd (A J Austin).*"

31. On 25 September 1998, there is a Memorandum on the Bachmann file (the "Memorandum") from Michael Marshall (referring to himself as Mike M) to another officer "*Hazel*" in the "*Secretarial*" Department which says the following:

> "*Subject*
> *Argent Enterprises Ltd*
>
> *Stanhill Ltd*
>
> *Both the above are owned by Tony Austin in his own name.*
>
> *He now wants them to be owned by BTC as Trustees of the G.E.B. Settlement (like Lamsden Limited and Tara Property Limited).*
>
> *Which is the easiest way".*

It appears to be signed by Michael Marshall. In different handwriting, it says "*Confirmed to TA by telephone*." The comment is also signed although it looks like a different signature from Mr Marshall.

32. There is a handwritten note (the "Note"). It is common ground that it is in Mr Austin's handwriting. The Note is undated but is date stamped 25 September 1998 setting out the following:

"Mike, please find enclosed cheque to value £2.164.00 in respect of :-

Lamsden £794.00

Stanhill £685.00

Argent Ent £685.00

£2,164.00

Please confirm that both Stanhill and Argent have been dealt with as discussed.

Regards

T"

33. The date stamp on the Note which appears to be an internal Bachmann stamp which says:

"Attention MM

25 September 1998"

Actioned

File and it is initialled.

34. In Watterson 1, Mr Watterson says that the Note was faxed to Bachmann.

35. On 25 September 1998, declarations of trust were executed by Alpha and Beta respectively declaring that they held the shares in Stanhill on trust for the GEB Settlement. On 26 September 1998, declarations of trust were executed by Alpha and Beta respectively declaring that they held the shares in Stanhill as trustee for the GEB Settlement.

36. Statements for Argent and Stanhill showing the payments referred to in the Note of £685 being credited "*Cash rec'd- Thank you*" on each company's accounts on 25 September 1998.

37. On 30 September 1998, the GEB Settlement's bank account was closed.

38. On 28 July 1999, Michael Marshall faxed Mr Austin with the reference Lamsden Ltd stating he had received a request from Dra. Apolo to "*get you to sign the attached letter of authority. Not knowing the background to this deal I would be grateful if you could phone me as a matter of urgency to confirm all is in order and will you please sign the attached Letter of Authority to the Trustees of the Trust and return to me by fax*". Mr Austin, on the same date, in a fax addressed to the Trustees of the GEB Settlement marked for the attention of Michael Marshall asked the trustees to transfer the issued share capital of Lamsden to the beneficial ownership of a Gibraltarian company. He confirmed that he had received full consideration for the sale of the shares and asked the Respondent to liaise with Dra. Apolo.

39. On 13 June 2000, a property agent in Portugal confirmed to Mr Austin direct that their client had agreed to purchase the shares of Lamsden for £215,000.

40. On 7 August 2000, Michael Marshall faxed Tony Austin headed Lamsden Ltd confirming that *"we"* hold £215,000 on *"our clients (sic) account."* He then says he is due to pay £12,000 in sales commission and then various amounts are due to "*Bachmanns*" in relation to Argent,

Lamsden, Stanhill and Tara. He then asks "*Can I have your written authority as to where to transfer funds and also permission to deduct our fees*". There is no reference to the GEB Settlement. On the Respondent's ledger reference "the GEB Settlement" on 10 August 2000 there is a debit for £135,546.25 reference Mr A Austin (Elia Apolo).

41. On 11 August 2000, Mr Austin faxed Michael Marshall a handwritten note asking for the exchange of the *"balance of monies you hold to my account to Portuguese Escudos."*

42. On 8 September 2000, the Respondent requested a transfer for value on the 15 September 2000 from its Treasury Department for 21,559,510 Portuguese Escudos to Mr Austin's Barclays' account in the Algarve reference sale of Lamsden. On 15 September 2000, there is a debit of 21,559,510 Portuguese Escudos shown on the GEB Settlement ledger.

43. The G.E.B. Settlement accounts for the period from 16 November 1988 to 31 December 2002, which were signed off by the Respondent on 24 April 2003, include in the *'Fixed Assets' section: 2 shares of US$ 1.00 each in the following companies:* [*Argent*] [*Stanhill*] [*Tara*]. The accounts then set out that "*The investments represent 100% of the issued share capital of the above companies which were incorporated in the British Virgin Islands to hold property in Portugal.*" The accounts also set out that the GEB Settlement had made loans to Argent, Stanhill, Tara and Conizorio Limited amounting to GBP 1,214,808. The accounts set out that the loan balances *"represent funds advanced for property investment and for the payment of administrative expenses less the cost of the issued share capital in the respective companies. These loans are interest free, unsecured and do not have fixed dates for repayment.*"

44. The Argent accounts for the period 9 June 1997 to 31 December 2002 state that *"The Beneficial Owner of the shares in the company throughout the period was The G.E.B. Settlement"*. These accounts were signed off by the corporate directors in April 2003. The Stanhill accounts for the period of 9 June 1997 to 31 December 2002 state that "*The Beneficial Owner of the shares in the company throughout the period was The G.E.B. Settlement".* These accounts were also signed off by the corporate directors in April 2003. Ms Rees says, although Sefton Potter saw the accounts before they were signed off, it was not engaged by Equiom but rather by Mr Austin in his personal capacity.

45. The Tara accounts were produced during the hearing for the period 3 September 1998 to 31 December 2002. The accounts state that the beneficial owner of the shares in the company throughout the period was the GEB Settlement. The accounts show that £294,020 was a loan from the beneficial owner for the cost of the plot and funds advanced to the company to pay administrative expenses less payments for share capital.

46. Provided by the Applicants during the course of the hearing is an internal email between officers of the Respondent under the subject heading "*The GEB Settlement*" dated 12 February 2001.

> *James.*
>
> *The above trust holds shares in three PSCHEME Companies, [Stanhill], [Argent] and [Tara.*
>
> *The accounts for GEB to 31/12/00 are currently being produced. The trust records do not show any cash for the purchase of the properties or ongoing expenses- do your records agree with this?*
>
> *The loan accounts in the books of the Trust, which have the following balances as at 31/ 12/00:-*
>
> *Stanhill £693*

Tara *£708*
Argent *£693*

The loans have arisen from fees paid by the Trust out of the proceeds of sale of [Lamsden].

The inter-entity positions between the Trust looked after by Leigh and the companies looked after by Mike need to be agreed.

Are you able to confirm these figures so that we can sign off on the trust accounts?

47. Also produced during the hearing by the Respondent is an email dated 18 February 2004 from an officer of the Respondent to Dra. Apolo headed "*GEB Trust/Tara Property Ltd*" which says:

> *"Further to our telephone conversation, please confirm that the funds received from the sale of [Tara]will be held to the order of the owner of the company which is Bachman Trust Company Limited, as trustee of the GEB settlement. You need to acknowledge that the ownership of the funds is the trust and any bank accounts should reflect this fact.*
>
> *The trustees authorise you to apply the funds received from the above sale towards the purchase of various portuguese (sic) properties owned by a portuguese company (sic) which is owned by [Stanhill].*
>
> *Upon receipt of your confirmation, we will sign the share sale agreement.*
>
> *My other questions are:-*
>
> *Please confirm the name of the Portuguese company and that the funding of the portuguese (sic) company will be by way of a loan from [Stanhill]. Please let me know the amount and terms of the loan.*
>
> *I understand that the portuguese (sic) company is half owned by [Stanhill] and half owned by Gibraltar company called Hansdon? Properties Ltd. Please confirm the number of shares held.. The ownership of the Gibraltar company is to be transferred to the Trustees of the GEB Trust, and possibly the management will be transferred to Bachmanns. Would Tony Austin please arrange this as a matter of urgency. It would be helpful to know the contact details of the management company so I can chase them.*
>
> *In due course we will need to know the sales price of the plots which were sold last year by [Tara]. Please confirm where the funds are. I presume for bookkeeping purposes they were lent to [Stanhill]which made a loan to the Portuguese company. Please let me know the amount and terms of the loan and send me a copy of the title documents to the shares in the Portuguese company.*

48. On 25 April 2003, Mr Austin signed a personal client application form for the Respondent. The form related to the provision of services to Mr Austin in his personal capacity. In relation to the source of funds introduced and/or assets to be introduced the description is '*Sale of Shares'*.

49. On 19 December 2003, Bachmann wrote to Dra. Apolo referencing an enclosed Power of Attorney (although the power of attorney is not exhibited) "*relating to yourself and Stanhill"* for the period 18 December 2003 to 17 December 2005. The letter sets out that in "*completing a sale of the property*" the funds "*which you handle must at all times be held to account of [Stanhill]. You will also be required to take the instruction of us as Directors in this regard.*" The letters further states that "*The Granting of this Power of Attorney is conditional upon you*

providing us with confirmation that any Portuguese Capital Gains Tax Liability raised on the Company will be paid by the beneficial owner."

50. After an instruction from Mr Austin, Stanhill and Argent were redomiciled to Delaware in the USA on or around 1 December 2004.

51. On 18 November 2011, the Respondent chased Mr Austin for fees for Argent, Stanhill and the GEB Settlement.

52. On 24 January 2013, the Respondent wrote to Mr Austin reference Argent. This letter advised that the Respondent had been advised that there could be an issue for Delaware corporations having Guernsey directors. As a consequence, the Guernsey directors had resigned and appointed Scott Clayton, of Ardel Trust Corporation PLC based in the UK, as sole director and officer with effect from 28 December 2012. The letter also says that the directors of the Respondent were not happy to make these changes without the full knowledge and consent of their clients, the beneficial owners. There is not an equivalent letter exhibited for Stanhill before the court, however, it is not disputed that the Guernsey directors resigned from both companies and Mr Clayton was appointed.

53. Mr Austin was charged fees in 2013 for the UK resident director of Argent and Stanhill.

54. On 17 April 2019, a new share certificate number 5 was issued, and a stock transfer form completed which confirmed that the two shares in Stanhill were held by Equiom as trustee of the G.E.B. Settlement. Similarly, on 17 April 2019 a new share certificate number 4 was issued, and a stock transfer form completed which confirmed that the two shares in Argent were held by the Respondent, as Trustee of the GEB Settlement.

55. In August 2019, an undertaking was given by Mr Austin under the heading Argent (it wrongly describes Mr Austin as a lawyer). In this undertaking, Mr Austin agrees that all sale proceeds received following the sale of Plot 10 will be held by Dra. Apolo as attorney *"until such time that she is instructed by [Argent] to transfer the balance to me and after which I further understand will be once all taxes, fees or claims in connection with [Argent] and the property have been paid in full."* There is a similar document for Stanhill referring to Plot 9.

56. On 9 September 2019, Dra. Apolo executed undertakings in relation to both Argent and Stanhill where she undertook that the sale proceeds (save for taxes, commission and legal fees to be paid in Portugal and any funds to be paid to the buyer, as a result of the completion apportionments etc) were to be held to the order of Stanhill or Argent, respectively, and will not be paid to the "*beneficial owner*" (not defined), or "*to his order, or to any person purporting to be acting on his behalf, until such time that she is instructed to do so"* by the director of Stanhill or Argent once all taxes, fees or claims in connection with Stanhill or Argent or Plot 9 or 10 have been paid.

57. On 27 February 2020, Plots 9 and 10 were sold and the sale proceeds retained by Dra. Apolo.

58. On or about 7 April 2020, Mr Austin and the Respondent executed a Deed of Appointment and Indemnity. The appointed fund was £500,000. It was made by the Respondent in its capacity as the Trustee of the GEB Settlement.

59. In an email chain dated 17 February 2021 to Scott Clayton from Ms Rees, she says under the subject heading [Stanhill]/[Argent]:

> *"Dear Mr Clayton,*

I am writing to introduce myself as Mr Tony Austin's professional adviser. He has engaged us to review the GEB Settlement and the underlying companies. I understand that you are a UK resident Director of [Stanhill] and [Argent], both domiciled in Delaware.

Could you please provide details of the income and expenditure accounts for the companies by return? We are having to work quickly as penalties and interest are accruing and the Trustees are concerned about meeting their filing obligations with HMRC so I would be grateful if you would provide a speedy response."

60. This enquiry is subsequently passed by Scott Clayton to the Respondent who replied on 18 February 2021:

"Pre 2020:
We've had not accounted for any income or expenditure for Stanhill or Argent; these are the 2 Delaware property holding companies. All fees were settled by the BO directly, not through the companies.
In 2020:
We bookkept the proceeds of the sale and expenses paid (mostly lawyers/agents fees and Portuguese tax) based on the cash book that the lawyer in Portugal provided to us."

61. In an email dated 17 March 2021 to the Respondent, Mr Austin refers to instructions given to Dra. Apolo "*my money*".

Expert Evidence

62. The court had the benefit of the joint expert evidence of Mr Jeremy Child, a barrister on the role of the Eastern Caribbean Supreme Court since September 2011 and qualified to practice BVI law. In addition to his written expert opinion dated 10 May 2024, the court had the benefit of oral evidence from Mr Child, as well as correspondence between Ogier and Mr Child, in relation to certain aspects of the evidence.

63. Mr Child confirmed that Argent was domiciled in the BVI from its incorporation on 9 June 1997 until 31 January 2005, when it was struck off the register. As regards Stanhill, the entity was domiciled in the BVI from its incorporation from 9 June 1997 until 12 January 2015, when it was struck off the register.

64. He explains that both companies were BVI IBC companies, which are entities incorporated under the IBCA (now repealed). In essence, an entity so incorporated was prohibited from conducting business with people resident within BVI (and was exempt from BVI tax and stamp duty). Shareholders of BVI IBC companies holding registered shares were required to be listed in the Register of Members which was required to contain the following information:

a) the name and addresses of persons who hold registered shares in the company,
b) the number of each class and series of registered shares held by each person,
c) the date upon which the name of each person was entered on the share register, and
d) the date upon which any persons ceased to be a member.

65. He also confirmed that it was not a requirement for the register of members to record details of beneficial or equitable ownership and so, typically, the register of members of an IBCA company does not evidence beneficial or equitable ownership, although on rare occasions notes have been voluntarily added to a register of members containing extra information concerning the beneficial or equitable ownership.

66. Mr Child opined that there is no modern BVI statute which seeks to impose formalities either in respect of equitable assignments generally, or specifically, in situations where the beneficial owner of shares directs the holder of the legal title to hold the shares for a third party.

67. If any such formalities do apply in the BVI, it would be as a result of Section 9 of the Statute of Frauds, 1677[1] which states: "*and be it further enacted, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise or else shall likewise be utterly void and of non-effect."*

68. He opines that this raises two significant issues. Firstly, whether the Statute of Frauds, 1677 is in force in the BVI (which is arguable). Secondly, if it is in force whether the requirements of Section 9 of the Statute of Frauds, 1677 would anyway apply where the beneficial owner of shares directs the owner of the legal title to hold the shares for a third party. However, Mr Child concluded that his own view is that the BVI court may be reluctant to find that a formality of writing exists in a case such as this one, relying on the conclusions of Upjohn J (in *Grey v Inland Revenue Commissioners [1958] Ch. 378* at 381) where he concluded that the Section 9 of the Statute of Frauds did not apply where there is a direction to a trustee to hold it on trust for the assignee) but the point remains arguable. He did not consider that the BVI courts would follow the *Wong v Grand View [2022] SC 44 (com)* decision (which he understands to be under appeal). It is a first instance decision of Bermudan Court and has no binding effect on the BVI courts. There is no reference in the *Wong v Grand View (supra)* case *to (PTC) SA v Khan and others (2018) UK PC 21* ("*Gany Holdings")*. However, he tentatively opined (as this was a Bermudan case not a BVI case) that he did not consider that the *Wong v Grand View (supra)* case would apply, in any event, to a case (like the instant one) where the legal and beneficial interest was kept separate.

69. He further opined that the BVI court would follow the Privy Council decision in *Gany Holdings (ibid)* and in particular:

> *"the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one."*

70. In answer to the question, as to whether the Memorandum and the Note would comply with the necessary formalities for the transfer of an equitable interest over shares in the two BVI companies. He said that the formalities would only exist under the BVI law if (i) the Statute of Frauds, 1677 was in force in the BVI at the relevant date, and (ii) that Section 9 of the Statute of Frauds, 1677 applies in the present circumstances (contrary to the conclusions of Upjohn J *in Grey v Inland Revenue Commissioners (ibid)*). If both were found to be the case, in order to assign the beneficial interest it would require Mr Austin to have carried out the relevant assignment in writing and to have signed the same. If this was the case he does not believe the Memorandum and the Note would suffice. However, he said that he expressed no view as to whether these documents might otherwise be of use in providing evidence of the parties' intentions having not been asked to do so. However, he did not consider that the BVI court would conclude that those formalities were required in any event.

71. If there are no BVI formalities for the transfer of an equitable interest of the shares in a BVI company (which he considered is what a BVI court would decide), Mr Child confirmed that BVI statutes expressly provide that the English rules of equity and common law apply in the

[1] The Statue of Frauds 1677 is no longer in force in relation to this issue in England & Wales.

Territory. Accordingly, English equitable principles will be applicable to the transfer of an equitable interest of the shares in the BVI company. As confirmed in *Gany Holdings (ibid)*, BVI law and English law do not in principle differ in respect of the presumption of advancement or resulting trusts. He said the BVI court would follow the process set out in *Gany Holdings (ibid)*.

The Law

72. *Section 69 of the Trusts Law:-*

> *(1) On the application of any person mentioned in subsection (2) the Royal Court may-*
> *(a) make an order in respect of –*
> *……*
> *(iv) any trust property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof……*
> *……*
> *(b) make a declaration as to the validity or enforceability of a trust,*
> *……*
> *(2) An application under subsection (1) may be made by –*
> *……*
> *(d) a beneficiary*

Brief Summary of Submissions

73. The parties were in agreement that in principle the discretionary remedy of declaratory relief could be sought in the circumstances of this case, where there is deadlock between the Applicants and the Respondent about the status of the sale proceeds, if the other requirements of declaratory relief are considered met by the court.

74. The Applicants argue that the burden is on the Respondent to adduce evidence of a transfer of the beneficial interest into the names of the Trustee, in accordance with the requirements for an equitable assignment of an interest in BVI company shares. The Applicants distinguish *R Hitchins, Levy and S Hitchins v Hill and Lloyds TSB Trust Company Limited [2011-12 GLR 336]* (which the Respondent relies on to supports its view that the burden is on the Applicants) on the basis that in that case there was a transfer document signed by the beneficial owner and that the decision on the question of validity related to the circumstances under which the transfer was made and the wording used in the document was capable of amounting to a direction to hold shares on trust. Also, they argue that Mr Austin was diagnosed with mixed type dementia on 25 January 2023, and therefore, it would be illogical to expect or require him to prove that the equitable transfer did not occur (by the time of the hearing he had sadly passed away).

75. The Applicants' position is that they accept that during the relevant time the legal title to the shares remained with Alpha and Beta. However, they say that the evidence in support of the equitable transfer of the beneficial interest of the shares in the Company from Mr Austin to the Respondent does not meet the threshold required to demonstrate that there has been any divestment of the equitable interest, or that Mr Austin intended that beneficial interest was to be held by the Respondent. They also submit that the actions of Mr Austin from the time Plot 9 and Plot 10 were initially purchased were consistent with the beneficial ownership remaining with Mr Austin after September 1998.

76. Advocate Rogers says the court should follow *Wong v Grand View (ibid)*, that BVI Law requires an equitable transfer to be in writing and that section 9 of the Statute of Frauds applies

to personalty and that as a consequence on the evidence, there was no transfer of the beneficial interest to the GEB Settlement. As there was no transfer, the Respondent held the beneficial interests in the shares as a bare trustee and the court should exercise its discretion to make a declaration that the sale proceeds are held on the same basis for Mr Austin's estate.

77. In the alternative, the Applicants also rely on *Gany (ibid)* at paragraph 17 where it says:

> *"It is convenient to begin with a re-statement of the basic principles by which equity (which in this respect is shared by England and Wales and the British Virgin Islands) provides for identification of beneficial interests arising from a gratuitous transfer of property. First, if either the transferor or the transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them: see for example Whitlock v Moree [2017] UKPC 44, (2017) 20 ITELR 658. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. Finally, recourse may be had to time-honoured presumptions, such as the presumption of advancement or the presumed resulting trust, where there really is no evidence from which an inference as to common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the forensic tools for the ascertainment and weighing of evidence are more readily available to the court".*

78. The Applicants also say that the test to be applied by the court (which they also say should be considered as the minimum criteria apparent from the evidence) is:

> (i) Is there a clear outward expression of an immediate and irrevocable intention from Mr Austin to make an immediate disposition of the subject matter of the assignment?
> (ii) Is it possible to identify an act by Mr Austin from which his intention can be inferred to divest him of the equitable interest in favour of the Respondent?
> (iii) Is it possible to identify the right or interest to be assigned, on the terms to be agreed?

79. They say the facts of this case do not fulfil the requirements of the first category or second categories identified in *Gany Holdings*. They submit that the Memorandum does not make clear whether Mr Austin wishes to change the future ownership of the legal or beneficial title, or both, and it does not amount to a written or oral declaration as to those beneficial interests, nor is it in the agreed form (as set out in the original instructions). They argue that it cannot be inferred that what was intended was the transfer of the beneficial interest to the Respondent as the wording is ambiguous. They say that the Memorandum is not the written reflection of an oral declaration of Mr Austin. The reference on the Memorandum "*Confirmed to TA*" may be a reference to Mr Austin i.e. something said to Mr Austin (but not the other way round).

80. They also submit that the meaning behind the Note where it says "*Please confirm that that both Stanhill and Argent have been dealt with as discussed"* is not clear. Advocate Rogers, in his submissions, questioned whether it was in fact a fax as it did not have the hallmarks of a fax nor could it enclose a cheque which appears from statements produced by the Applicants for Argent and Stanhill to have been credited on the 25 September 1998. The Applicants also rely on the evidence after 25 September 1998 which they say demonstrates Mr Austin continued to treat the shares as his own and thus supports their position that there was no such transfer. They

say at all times, the Respondent and Mr Austin treated Stanhill and Argent as being in the beneficial ownership of Mr Austin. Whilst the Applicants accept that Lamsden was a trust asset and previously the Applicants had agreed that Tara was also a trust asset, by the end of the hearing the position of the Applicants was that they do not know whether Tara was a trust asset.

81. With regard to the second category of Gany Holdings (ibid) they say there is no evidence from which a common intention as to beneficial ownership may be inferred. The words used are not a verbatim script of what Mr Austin said and the words used by Michael Marshall on the Memorandum do not make clear what Mr Austin said or instructed. In analysing the Memorandum, the court should consider how the conversation proceeded, given that Mr Austin at the time was the beneficial owner of the shares of both companies and had signed the OPMAs shortly before. Mr Austin would have had to make clear that he wished for an oral transfer of his beneficial interest in the shares of Argent and Stanhill. The use of the words in the Memorandum are insufficient to show a common intention, it is not clear what he intended and what the Respondent accepted. The Note is also ambiguous. The Applicants also question the motive for this step given that the GEB Settlement bank account had been closed. The Applicants say there is not sufficient evidence to draw the inference necessary, including notification to Dra. Apolo. They say that there is not one document which the Respondent can point to which sets out why this step would have been taken. They submit that if the beneficial ownership had changed that the OPMAs would have had to be amended as these agreements were on the basis of Mr Austin being the beneficial owner. They also ask the court to take note that the 26 September 1998 is a Saturday.

82. The Applicants also rely on *Gany Holdings* to support their submission that even after a considerable amount of time has passed from the alleged transfer, a party can rely on evidence to demonstrate the beneficial ownership of the assets. In particular, paragraph 43 where Lord Briggs says:

> *"It is material to note, in that context, that no evidence was produced to the court that Gany ever prepared or kept company accounts, which it might have been expected to do if it beneficially owned assets of its own rather than held them purely as trustee."*.

83. On 2 September 2004, Mr Austin requested the redomiciliation of Argent and Stanhill with advice from Dra. Apolo. Mr Austin was the decision-maker about the redomiciliation of the companies not the Trustees. They say this was part of a pattern of conduct which demonstrates that the parties were acting in such a way because Mr Austin was the beneficial owner of the shares. The terms of the undertakings in 2019 required Mr Austin pay any Portuguese Capital Gains Tax as *"beneficial owner"*. They say that there is a lack of evidence supporting the Respondent's case for example, the lack of Trustees' minutes dealing with the purchase and the costs and expenses for the Plots 9 and 10. The Applicants say the email sent by Mr Austin on 17 March 2021 is a relevant statement made by one of the parties to the purported transfer. In this email Mr Austin refers to "*my"* money which is contrary to the beneficial ownership of the shares by the GEB Settlement. It was Mr Austin who made the decisions with regard to the companies and their assets. Frequently there are references to the *"beneficial owner"* which the Respondent says are references to Mr Austin as beneficial owner of the Companies' not as beneficial owner of the GEB Settlement. Similarly, the fees and expenses that were paid by Mr Austin direct and not through or by the GEB Settlement are all indicative of his beneficial ownership of the companies. The email response of the Respondent of 18 February 2021 about the bookkeeping pre 2020 is inconsistent with Argent and Stanhill being in the beneficial ownership of the GEB Settlement. They say there is a lack of evidence that funds to purchase the Properties were ever transferred to Stanhill or Argent or to the GEB Settlement but rather the funds went direct from Mr Austin to Dra. Apolo to Encosta do Lago. They rely on Stanhill and Argent not having bank accounts. They say there is no evidence that Mr Austin or the GEB Settlement loaned or subscribed for shares in return for the transfer of the money for the

purchase of the Properties in either Stanhill or Argent. In summary, all decisions were made by Mr Austin on his own accord because he was the beneficial owner.

84. In the absence of evidence of a transfer of the equitable interest, following the authority of *Gany Holdings* the court should apply the presumption of a resulting trust in favour of Mr Austin. It is for the Respondent to rebut the presumption of a resulting trust (see *Tribe v Tribe [1996] Ch 107)*. However, the Applicants say there is no evidence which shows that Mr Austin intended to make a gift of the beneficial interest of the shares and his actions demonstrate an intention to retain the ownership rather than transferring them into the GEB Settlement (see page 129 of *Tribe v Tribe(ibid)*).

85. The Respondent submits that the burden of proof is on the Applicants, as they have brought the Application. Relying on *R Hitchins, Levy and S Hitchins v Hill and Lloyds TSB Offshore Trust Limited [2011-12 GLR 336]* at paragraph 43:

> *"the Deputy Bailiff directed the Jurats that the burden of proof was on the Plaintiff's throughout. The standard of proof was a civil standard on the balance of probabilities. To establish something on the balance of probabilities meant to prove something was more likely so and not so. It was for the Plaintiff's to prove that the late Mrs Kathleen Hitchins did not validly transfer her beneficial ownership of the Chair in Compton Farms Limited ("CFL") to the first Defendant; it was not for the first Defendant to prove that the transfer was valid".*

86. The Respondent says that the court should take into account that the relationship between Mr Austin and the Respondent was a long one even before 25 September 1998. The Respondent accepts there is generally a lack of documentation, but this is indicative of a different time and a developed and informal relationship between Mr Austin and the Respondent, and particularly with Michael Marshall. Nevertheless, all the relevant documents should be considered in the round and in the light of the business relationship at that time. The Equiom Group provided corporate services for companies set up for Mr Austin for investment in property in Portugal. The purpose of the GEB Settlement was to hold at least some of Mr Austin's property investment within it. The sale proceeds of one sale of a company or asset being used to discharge any of that company's liability and also to fund further property investments. This is demonstrated by Mr Austin's fax dated 28 July 1999 to the Respondent requesting the transfer to the beneficial ownership of Richter Holdings Limited. The property was sold and the funds were paid into the Respondent's client account. The Respondent's fees were paid, £65,490.45 was sent to Mr Austin to settle legal and notarial costs locally. The balance was sent to Dra. Apolo for onward investment into Tara and another company.

87. The OPMAs which Mr Austin entered into for these companies provided that Bachmann (as it was called then) was the Manager (as defined in the agreement) providing the corporate services. Mr Austin (who is defined as the Client) funded the arrangement, including paying the liabilities. The Recitals of the OPMAs set out that:

> *"The Manager has incorporated the company at its own expense and the client has requested the manager to allocate company to the beneficial ownership of the Client or his Trustees and the Manager has agreed to manage the company on half of the client. In the manner and for the consideration hereinafter set out."*

88. At paragraph 1 the OPMAs say:

> *The Client covenants to discharge the Manager's initial standard fees and disbursements and the annual fees and disbursements thereafter as set out from time to time by the Manager, and in consideration thereof the Manager covenants to allocate the Company to the beneficial ownership of the Client or his Trustees…..*

89. Thus, under the terms of the OPMAs it did not matter whether Mr Austin was the beneficial owner of the shares or the shares in the company were held for the benefit of the GEB Settlement and they also allowed for that ownership to change, therefore, the fact that this was signed before 25 September 1998 does not assist the Applicants. Clause 4 and 2 of the OPMAs provides:

> *"4. The Client hereby covenants with the Manager and as a separate covenant with the Company to make available sufficient resources to the Company to enable the Company to maintain all and any contractual obligations entered into by the Company for the purchase of the Property and arising from the issue of the Power of Attorney and moreover covenants to reimburse the Manager and as the case may be, the Company for all costs, expenses and disbursements incurred by the Manager or the Leader or the Company whilst acting under this agreement."*

90. The terms of the Argent OPMA provides that Mr Austin defined as the Client and as such he covenanted at clause 8 to:

> *"The Client, in consideration of being able to occupy the Property and/or receive any rental income that may accrue from letting the Property, hereby covenants with the Manager and as a separate covenant with the Company:-*
>
> *(a) to maintain the property in a good and proper state of repair complying with such Owners Association rules and regulations as may apply;*
> *(b) to pay all rates and taxes incurred locally and produce receipts for these items;*
> *(c) to contract with any Residents or Owners Associations concerning the fixing and collection of community taxes;*
> *(d) to ensure that all running, maintenance and service expenses are properly paid;*
> *(e) to properly represent the company at any community meetings where applicable;*
> *(f) to use the property only for holiday/residential purposes, and not in any way that may constitute a change of use and breach of local or community laws or regulations."*

Clause 10 of the Argent OPMA says that the Client is responsible for the property insurance.

91. As the Manager, Bachmann promised at clause 6:

> *"The Manager undertakes to procure the services of one or more of its employees or Associates or Directors to take responsibility for the administrative work required by the law of the Company and moreover undertakes to direct each member of the Board of Directors to act in accordance with the Client's bona fide instructions PROVIDED ALWAYS THAT:-*
>
> *(a) the instructions are not contrary to the Law or unethical or impair the reputation or standing of the Manager;*
> *(b) during such period as a loan shall be secured on the Property by a Lender who has taken a security over the Issued Share Capital of the Company, the Directors shall not carry out instructions that would prejudice the Company's position with the Lender;*
> *(c) the Manager will only act without the instructions of the Client where in the opinion of the Manager such an action would be in the best interest of the Company and the Client, such option being at the sole discretion of the Manager and provided such action is used only where necessary to safeguard the Manager's reputation or safeguard the Company's assets."*

92. In the Stanhill OPMA similar clauses are at clause 6 (Client's covenants) and 4 (Manager's undertaking). The terms that property insurance must be provided by the Client is at clause 8.

93. Thus their roles and obligations were set out in the OPMAs and there is no question that Mr Austin had a very significant role in the conduct of the business, but this does not mean that Stanhill and Argent were not held in trust. They are all part and parcel of a structure where some companies were outside the Trust structure but where it was always foreseen they could be transferred into the GEB Settlement. It was incumbent on Mr Austin to fund the costs and expenses, including tax. Thus, the payment by Mr Austin of these costs is not evidence that Mr Austin was in fact the beneficial owner of the shares of Argent and Stanhill but rather the operation of the terms of the OPMAs whether or not the companies were trust assets. Clause 12 of the Stanhill OPMA and clause 14 of the Argent OPMA provides that the OPMA can only be varied with the consent of all parties hereto "*together with the consent of a party for the time being having the beneficial ownership of the Issued Share Capital*". This supports the Respondent's position that the OPMAs provided for a third party i.e. the Trustees of the GEB Settlement, who are not a party to the OPMAs to hold the beneficial ownership of the company and for this to change during the pendency of the OPMAs.

94. The Respondent says that on the facts, Mr Austin did transfer his beneficial interest in the shares in each of Argent and Stanhill to the GEB Settlement. The Respondent says he did so by expressing his intention during the call with Michael Marshall on 25 September 1998, as recorded in the Memorandum. Further, this was confirmed by the Note from Mr Austin dated the same date. The declarations of trust made on the 25 and 26 September 1998 for Stanhill and Argent, respectively are indisputable evidence of the transfer of the beneficial interest. The Respondent says both Lamsden and Tara were trust assets. Mr Austin knew Tara and Lamsden were already beneficially owned by the GEB Settlement so both Mr Austin and Michael Marshall must have known what this meant.

95. The Respondent says that in addition to *Gany Holdings (ibid),* the court should consider *NG Man Sun v Peckson Limited and Mei Huan Chen BVIHCMAP2019/0011* at paragraphs 81 where Farara JA explains how the principles elucidated in Gany Holdings should be applied in practice:

> *[81] Accordingly, where one or both parties to a gratuitous transfer of property makes a declaration, written or oral, as to who will hold the beneficial interest upon the making of the transfer, such declaration falls squarely within the first category identified by Lord Briggs, and is generally decisive. Furthermore, in relation to first category declarations, neither the common intention of the parties nor their respective subjective intentions at the time of the transfer are relevant. Accordingly, if the 22nd November 2017 Declaration is to be construed as falling squarely within the first category, as Mr. McDonnell, QC, for Madam Chen, contends, Madam Chen wins, and the learned judge's decision and consequential declarations, must be upheld. This position in law was accepted by Mr Jones, QC, for the appellant, during his oral argument before this Court, albeit he contended for the Declaration to be more appropriately treated as falling within Lord Briggs' second category, and for it to be treated as but one of the relevant pieces of documentary and other evidence to be taken into account by the court, together with the 'context' and surrounding circumstances of the transaction, in inferring what was the common intention of the parties to the Transfer at the time of its execution.*

96. At paragraph 88 Farara JA continues:

> *[88] Firstly, there is nothing in Lord Briggs' formulation of the first category which stipulates or even suggests that such declarations are to be limited to documents 'dispositive' of the interest being transferred. Importantly, first category declarations*

as to where the beneficial ownership lies following a gratuitous transfer of an asset or property, may be made either in writing or orally (established by cogent evidence accepted by a court); and may be made by either the transferor or the transferee, or by both of them in an agreed form. It follows that such a declaration may be made either within the four corners of an instrument or instruments transferring the property or asset or the interest therein, or separate from such instruments, and need not be made contemporaneously with the instrument of transfer. Furthermore, such a 'declaration' as to the legal and beneficial interests can be made either before or after the transfer. [89] The essential requirements for such a declaration are that it must be made by one of the parties to the transfer; it must relate to or concern the transfer in question and the property, the subject of that transfer; and, most importantly, it must identify what happens or has happened to the beneficial interest in the property. Such a declaration must accomplish the foregoing in clear terms, so as to be decisive of where the beneficial interest lies. In relation to such declarations, it would seem to me that statements by the transferor as to the beneficial interest, such as in the instant matter, are quintessentially of the greatest significance, and would carry much weight in a court's identification of the beneficial interest upon a transfer of property.

97. The Respondent says that the 25 and 26 September 1998 declarations of trust made by Alpha and Beta in relation to Stanhill and Argent following the instruction of Mr Austin are the evidence which satisfies the requirements of the first category in the *Gany Holdings*. The declarations are dated the same date and the day after the Memorandum and File Note. The Respondent is the Transferor acting on the instructions of Mr Austin making the declaration that shares in Stanhill and thereafter Argent held on behalf of the GEB Settlement. A nominee can only act on the lawful instructions of the beneficial owner. The declarations are clear on the terms that the beneficial interest was transferred into the GEB Settlement and is decisive as to where the beneficial interest lies.

98. If its primary argument is wrong, the Respondent says Lord Briggs's second category is satisfied as there is evidence of common intention to transfer the beneficial interest including the September declarations of trust, as well as the Memorandum and the Note. It is common ground that prior to the 25 September 1998, the legal ownership of both Stanhill and Argent was in the names of Alpha and Beta, but that Mr Austin owned the beneficial interest of the shares in both companies. Both Mr Austin and Mr Marshall had a common understanding of this. Thus, contrary to the submissions of the Applicants, Mr Austin in his instruction to Mr Marshall can only have meant the transfer of the beneficial interest to the GEB Settlement because it was only the beneficial interest that he held. The Memorandum is a contemporaneous file note which the Respondent immediately acted upon. The reference to Lamsden and Tara in the Memorandum also supports this submission because both had been settled into the GEB Settlement. Further, the Respondent relies on the previous procedure adopted by Mr Austin and the Respondent for Tara where the letter from Mr Austin dated 15 September 1998 is confirmation of instructions already given, as evidenced by the Declarations of Trust which are dated 3 September 1998.

99. It is not necessary for the court to consider a resulting trust because the evidence supports the transfer of the beneficial interest to the GEB Settlement. However, the Respondent accepts that if the first or second category have not established a transfer of the beneficial interest then it will not seek to rebut the presumption of last resort that the shares are held on resulting trust for Mr Austin's estate.

Discussion

100. Having decided as a preliminary issue that the applicable law was BVI law, it is necessary to consider whether, under BVI law, the assignment of a beneficial interest is required to be in writing to be valid. Advocate Rogers urges this court, in the first instance, to disregard to the

joint expert evidence on BVI law and to follow the conclusions of Assistant Justice Kawaley (as he was then) in the first instance decision of the Bermudan Supreme Court in *Wong v Grand View (ibid)*. However, given that *Wong v Grand View* is not binding on the BVI court, that there is no evidence before me that this has been found to be persuasive in the BVI and the joint expert in BVI law considered the BVI court would likely find against the existence of any formalities and would not follow Wong v Grand View, I consider that the correct test for this court to apply is the application of the equitable principles outlined in the Privy Council decision of *Gany Holdings* (as followed in the BVI Court of Appeal decision of *NG Man Sun v Peckson Limited and Mei Huan Chen) (ibid))*.

101. The circumstances of this case are undoubtedly sad ones. Mr Austin in his final years was suffering from dementia and died before the issues which form the background of this case were resolved. Nevertheless, despite the difficulty that this presents in terms of first hand evidence from him or from Michael Marshall and the lack of documentation, this does not impact on the burden of proof. The Applicants are seeking to prove that there was no transfer of the beneficial ownership of the shares of two companies and for the court to make a declaration that the funds from the sale of the properties belong to the estate of Mr Austin and not to the GEB Settlement. In this case it is not in doubt that the registered title of Argent and Stanhill is with Alpha and Beta. The declarations of trust made by the Alpha and Beta on 25 and 26 of September 1998 declare that the beneficial ownership of the shares is "*as nominee of and trustee for Bachman Trust Company as Trustees of The GEB Settlement*." This is prima facie evidence of where the beneficial ownership lies and the burden is on the Applicants to show that, on the balance of probabilities Mr Austin, nevertheless, retained the beneficial interest in the shares in Argent and Stanhill. If the Applicants establish that Mr Austin did retain the beneficial interest in the shares giving rise to a presumption of a resulting trust in his favour, the burden shifts to the Respondent to rebut that presumption. I therefore directed the Jurats accordingly and reminded them that to establish something on the balance of probabilities means to prove that something is more likely so than not so.

102. Although there is a paucity of first hand evidence and documentation dealing with the previous changes of ownership of the beneficial interest, the agreed position of the Applicants and the Respondent is that, following a number of declarations of trust, the beneficial ownership of the shares in both companies moved a number of shares culminating in declarations of trust in Mr Austin's favour made on 8 July 1997 with respect to the shares in Argent and 19 June 1998 with respect to the Stanhill shares.

103. The first principle set out in *Gany Holdings (ibid)* by Lord Briggs is that if either the transferor or the transferee makes a written or oral declaration as to those beneficial interests, or they do so together in an agreed form, that will generally be decisive, regardless of the subjective intentions of either of them. At paragraph 90 of *NG Man Sun v Peckson Limited and Mei Huan Chen (ibid)* gives further assistance in considering what might amount to a first category and its effect:

> *[90] Accordingly, a party may make statements or declarations as to who retained or received the beneficial interest in the property, or whether the beneficial interest was transferred or intended to be transferred by virtue of the instrument of transfer. These statements or declarations may be made either in writing or orally, especially to the other party to the transaction or, as is the case in the instant matter, to the company whose shares are being transferred.*
>
> *[91] In the circumstances, such statements will be decisive as to who holds the beneficial interest upon a gratuitous transfer. This is provided that they are sufficiently clear and are not contradicted by other material evidence accepted by the court. Indeed, such a declaration, because it is decisive, would dispel the application of any presumption of a resulting trust or presumption of advancement. This is both the tenor and legal effect*

of Lord Briggs' formulation of the first category. Furthermore, where the first category is not applicable, such presumptions, again being matters of last resort, would also not be applicable to an assessment of the evidence under the second category, in determining what was the common intention of the parties to a transfer.

104. As set out in the case of *Whitlock & another v Moree* [2017] UKPC 44 (see in particular paragraph 23) whether or not a written instrument does address beneficial ownership is a matter of construction of the instrument. This is an objective process in which evidence as to the subjective intention of the maker of the instrument is inadmissible.

105. The *NG Man Sun v Peckson Limited and Mei Huan Chen* case is also instructive as to how this should be applied at paragraph 142 onwards:

[142] Accordingly, the starting point in identifying the beneficial interest, is to construe the instrument or instruments by which the property was transferred. The Bahamian case of Whitlock v Moree is a case concerning a joint bank account. As determined by the Privy Council, the determination of the beneficial ownership of the money in the joint account involved construing the account opening documents, and, accordingly, there was no room for the doctrine of presumed resulting trust, and an examination of the subjective intentions of the account holders or those who had deposited money into the account, was irrelevant and impermissible. Lord Briggs summarized the relevant principles at paragraph 23:

"There are well-established principles which assist the courts in resolving disputes as to beneficial ownership of property, and the order in which what may be described as the contents of an equitable toolkit are to be deployed for that purpose. Thus, where the relevant property is transferred to the legal holders by a written instrument, a statement as to the beneficial ownership of the property in that instrument is usually conclusive: see Vandervell v IRC [1967] 1 All ER 1 at 8, [1967] 2 AC 291 at 312 per Lord Upjohn. The same passage makes clear that any question whether the instrument does address beneficial ownership, and any issue as to what that beneficial ownership is, falls to be decided as a matter of construction of the instrument, which is an objective process, in which evidence as to the subjective intention of the maker of the instrument is inadmissible."

[143] However, in the very recent case of Gany, Lord Briggs, considering the position in law in seeking to identify the beneficial interest in gratuitous transfers, formulated the first category to cover both written and oral 'declarations' as to the beneficial interest, whether made by one or the other of the parties to the gratuitous transfer, or by both 'in an agreed form'. As already stated, this clearly does not limit such documents to the actual instrument of transfer or to 'dispositive instruments', as Mr Jones, QC, for Mr. Ng submits. In Gany, Lord Briggs did not seek to limit a 'declaration' as to the beneficial interest by the parties to a gratuitous transfer, to declarations to be made or found only in the instrument by which title was transferred (an example of which is to be found in Whitlock v Moree), but to encompass as well, declarations made as to the beneficial ownership in any document under the hand of both or one of the parties to the transfer, or to declarations made orally by either of them to the same effect.

106. It is also necessary to consider paragraph 145 where the BVI court of appeal went on to say:

[145] The important point in Whitlock v Moree is that the question as to whether such a declaration of beneficial ownership is made, is to be determined by construing the instrument of transfer or the written declaration of one or both of the parties to the transfer; and a determination that it identified the beneficial interest, will be conclusive. Accordingly, if the Declaration made by Mr. Ng on 22nd November 2011, properly

construed, clearly states, as it does, that Mr. Ng, as the transferor, disposed of all (or did not retain any), rights or interest in the Shares to Madam Chen when he executed the Transfer, that declaration is conclusive and decisive as to where the beneficial interest lies in the Shares as a result of the Notes and Transfer. Any evidence as to what was the subjective intention of the parties, or of Mr. Ng alone, at the time is irrelevant.

107. The second principle in the "*equitable toolbox*" is that the court looks for evidence from which a common intention as to beneficial ownership may be inferred. This may include evidence of statements made by either party before, at the time of or even after the relevant transfer, the parties' conduct, and the factual context in which the transfer takes place. Sometimes, a choice between possible conclusions as to beneficial interest may properly be arrived at by a process of elimination, whereby the most unlikely conclusions are first removed, leaving the least unlikely as the correct one. In *NG Man Sun v Peckson Limited and Mei Huan Chen* at paragraph 82 the BVI Court held:

> *"It is important to bear in mind that the second category only applies in circumstances where there is no declaration of the first category type which speaks decisively to the beneficial interest in the property or asset being transferred. In relation to the Second Category, the court must seek to infer, from the accepted evidence, what was the intention of the parties to the transfer in relation to where the beneficial interest rests. Thus, it is in relation to this category, and only in relation thereto, that a court must embark upon an assessment of the evidence as to what was the common intention of the parties to the transfer. In carrying out such an assessment, a court is entitled to rely on a range of relevant evidence, whether oral or documentary, whether coming into existence before or at the time or after the transfer was effective, to the conduct of the parties and their evidence before the court, and to the context in which the transfer was made."*

108. In this case the transferor as the holder of the beneficial interest in the shares was Mr Austin and the transferee the Trustee. This context is relevant as Lord Briggs said at paragraph 18 of *Gany Holdings*:

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

109. I directed the Jurats that as the arbiters of the facts, it was for them to make findings as to the purpose of the interactions between Mr Austin and Michael Marshall on behalf of the Respondent and in the context of their relationship. I further directed the Jurats were entitled to draw common sense inferences as to what was intended and of the common law maxim that no-one can give to or confer on someone else that which he does not possess.

110. In this case, there are declarations of trust dated 25 and 26 September 1998. The first step is for me, as a matter of law, to decide whether this might fall within the first category identified by Lord Briggs in *Gany Holdings*:

> *[89] The essential requirements for such a declaration are that it must be made by one of the parties to the transfer; it must relate to or concern the transfer in question and the property, the subject of that transfer; and, most importantly, it must identify what happens or has happened to the beneficial interest in the property. Such a declaration must accomplish the foregoing in clear terms, so as to be decisive of where the beneficial interest lies. In relation to such declarations, it would seem to me that statements by the transferor as to the beneficial interest, such as in the instant matter,*

are quintessentially of the greatest significance, and would carry much weight in a court's identification of the beneficial interest upon a transfer of property.

111. Although the Respondent submitted that the declarations of trust of 25 and 26 September 1998 were conclusive, these were not declarations by either the transferor or transferee nor are they a record of a statement or declaration being made to Alpha and Beta by the transfer or transferee but by Alpha and Beta. Therefore, as a matter of law these on their own cannot be construed with the first category identified by Lord Briggs. Therefore, it is necessary to consider the other evidence.

112. The Jurats found that by the time of the purported transfer, Mr Austin had been engaged with the Respondent in the transfer of the beneficial interests of these companies on a number of occasions. Further, they found that on the evidence before them, by September 1998, that the shares of two other companies, namely Lamsden and Tara, which were part of Mr Austin's property investment enterprise in Portugal were, through the beneficial ownership of the shares by the GEB Settlement, Trust assets. By the time 25 September 1998, Michael Marshall and Mr Austin were on first name terms. Further, although it was a business relationship, there had developed a level of informality in the relationship which is demonstrated in the documentation. The Jurats found that on 25 September 1998, there was a phone call between Mr Austin and Michael Marshall on behalf of the Respondent i.e. the beneficial owner of the shares (and economic settlor of the Trust) with the representative of the Trustee of the GEB Settlement. They further found that the Memorandum represented a record, although not a verbatim record, of the conversation between Mr Austin and Michael Marshall. There was no evidence to show that this was not an accurate record of the conversation. Objectively, the Memorandum shows that Mr Austin wanted a change of ownership of the shares immediately. The Jurats found that there was no evidence before the court that he thought he was the legal owner of the shares nor that he did not know or understand that he was the beneficial owner of the shares. The Jurats found that the reference to Lamsden and Tara provided further confirmation that the intention was that the beneficial ownership of the shares in Argent and Stanhill were to be trust assets from that point. The Jurats decided that contrary to the submissions of the Applicants that the words were not ambiguous. The purpose of the note was to inform the Respondent as Trustee of the GEB Settlement that Mr Austin wished to transfer the beneficial interest from his ownership to the Trustee so that the shares were trust assets of the GEB Settlement.

113. Given that the Applicants accepted that the handwriting on the Note was Mr Austin's handwriting, the Jurats found that the Note was a written request by Mr Austin to the Respondent for confirmation that his oral instruction had been undertaken. They found that it was likely to have been received by the Respondent on 25 September 1998 as this was the date of the stamp. Despite the lack of a typical faxed header on the Note, in the absence of evidence to the contrary, the Jurats were satisfied that this had been received by fax. References to the enclosed cheque may mean that the Note was also sent, however, this did not undermine their conclusion that the Note was a request by Mr Austin for confirmation that the transfer of the beneficial ownership had been executed as he had requested by telephone. Mr Austin clearly wanted action and as he was not the legal owner and was the beneficial owner, what he wanted "*dealt with*" was the transfer of the beneficial ownership to the Trustee, there being no other common sense explanation of what he meant.

114. Having received this instruction from Mr Austin, the Jurats found that the Respondent caused Alpha and Beta to make the declarations of trust for Stanhill and Argent on the 25 and 26 September 1998, respectively.

115. In the absence of either of the parties to the conversation in September 1998 the Jurats were cautious about concluding that the Memorandum amounted to a record of an oral declaration, however they came to the conclusion that in all the circumstances that the Memorandum was evidence of a declaration by Mr Austin as to transfer of the beneficial interests of the shares to

the Trustees of the GEB Settlement. However, although they had come to this conclusion, the Jurats went on to consider the alternative position if the Memorandum was not evidence alone of a declaration, the Jurats found that the Memorandum along with the Note and the Declarations of Trust are all evidence of a common intention that the beneficial interests were to be held from that point by the Trustee of the GEB Settlement. The Jurats came to the conclusion that it is clear from the Memorandum and the Note that Mr Austin intended to transfer and to cause the necessary steps to be taken to transfer the beneficial interest in the shares to the GEB Settlement and that the declarations of trust demonstrate that it was the intention of the Respondent to accept the beneficial interests.

116. The Jurats considered that the evidence of the accounts of the GEB Settlement and the two companies which are documents which were seen and considered at the time they were created by Mr Austin and those advising him as well as the Respondent all support this conclusion. No-one at the time raised any issue that Argent and Stanhill should not be recorded as GEB Settlement assets. The Jurats noted that the Trustees were not always kept informed about what was happening with the properties in Portugal which appear to have been dealt with by Mr Austin and Dra. Apolo and that under the arrangements Mr Austin continued to pay fees taxes and other disbursements. This course of conduct appears to have been the same with Lamsden which it was accepted was owned by the Trust, where it was Mr Austin who appears to have signed the paperwork committing to the purchase and organised the sale of the shares of Lamsden. It is also evident that although there was no separate GEB Settlement bank account, the Respondent was accounting for monies moving in and out of the GEB Settlement through its internal ledgers. Likewise, although there was no separate company bank accounts, statements reference Stanhill and Argent were produced by the Respondent (and there was no evidence that Mr Austin had bank accounts for the companies). The terms of the OPMAs do not preclude the ownership of Stanhill and Argent remaining with Mr Austin or transferring to the GEB Settlement. Therefore, the Jurats concluded that none of these factors nor any of the other submissions of the Applicants in relation to the subsequent acts of the parties undermines what happened in September 1998 when the beneficial interests in Argent and Stanhill were transferred to the GEB Settlement.

117. It follows that, the Jurats having come to the conclusions that they did, I directed that the Memorandum fell within the first category identified in *Gany Holdings (ibid)* however, I directed that in the alternative, based on the conclusions of the Jurats, the Memorandum, Note and declarations of trust fell within the second category set out in *Gany Holdings (ibid)*. Having come to these conclusions, resort cannot be had to the third category and the presumption of a resulting trust. Accordingly, the transfer of the beneficial interest in the shares to the Trustees of the GEB Settlement in September 1998 does not give rise to the presumption of a resulting trust in favour of Mr Austin or on any of the alternative bases submitted by the Applicants.

Conclusion

118. I directed the Jurats on the principles set out in *Credit Suisse v Haggiag et al 47/2015* at paragraph 120:

> *"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."

119. Although the Respondent is not seeking a declaration, the Applicants are seeking declaratory relief even if it is contrary to the position argued by them. Having come to the conclusions set out above and having been directed by me that declaratory relief was a discretionary remedy, the Jurats unanimously came to the conclusion that it was appropriate to exercise the court's discretion to make a declaration that the shares in Argent and Stanhill were validly settled upon the GEB Settlement and the sale proceeds from the sale of the shares are assets of the GEB Settlement.

120. In terms of the costs of the Amended Application, if the parties can agree an appropriate order, they are invited to do so. If agreement cannot be reached, either party can list the matter before a suitable Interlocutory Court, with a view to making an application in respect of the costs of this Application.