IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No FSD 205 of 2017(NSJ)

BETWEEN:

(1) LEA LILLY PERRY
(2) TAMAR PERRY

Plaintiffs

and

(1) LOPAG TRUST REG
(2) PRIVATE EQUITY SERVICES (CURACAO) NV
(3) FIDUCIANA VERWALTUNGSANSTALT
(4) GAL GREENSPOON
(5) YAEL PERRY
(6) DAN GREENSPOON
(7) RON GREENSPOON
(8) MIA GREENSPOON
(9) ADMINTRUST VERWALTUNGSANSTALT

Defendants

JUDGMENT

Before: **The Hon. Mr Justice Segal**

Appearances: **Paul Chaisty KC instructed by Nick Dunne of Walkers (Cayman) LLP for the Plaintiffs**

Graeme McPherson KC instructed by Shaun Tracey of Campbells LLP for the Trustees

	Tracey Angus KC instructed by Guy Dilliway-Parry of Priestleys for the Fifth Defendant
Heard:	**25 October 2023**
Draft judgment circulated:	**21 November 2023**
Judgment handed down:	**19 January 2024**

Introduction

1 I have before me an application by the Plaintiffs, made by their summons (the ***Summons***) of 24 July 2023, for orders (a) that they be released from their undertakings previously given to the Court so as to allow distributions to be made by Solid Fund Private Foundation (***SFPF***) including a distribution of US$20 million to the First Plaintiff for the sole purpose of depositing that sum with the Court (or on another basis ordered by the Court) on terms that it will stand as security for the Plaintiffs' liabilities in respect of their cross-undertaking in damages, (b) for the discharge or amendment of the freezing injunctions previously made in relation to the Plaintiffs upon such security being provided and (c) for the Receivers to be directed/enabled to facilitate such distributions.

2. The Plaintiffs' application is made in relation and pursuant to my order dated 9 June 2023 (the ***Order***). The Order was made following the consequentials hearing on 1-2 June 2023 which was listed to deal with consequential matters following the dismissal of the Plaintiffs' final appeal by the Privy Council in January 2023. The reasons for my decisions on the applications made at the consequentials hearing were briefly set out in my judgment dated 14 June 2023 (the ***Judgment***). The background to the Plaintiffs' application can be found in the Judgment and a large number of earlier judgments handed down in relation to these proceedings.

3. By the Order, the Court discharged the proprietary injunction previously granted to the Plaintiffs and granted worldwide freezing injunctions restraining each of the Plaintiffs from disposing of, dealing with, or diminishing the value of her assets up to the value of US$20 million. The Court also ordered that the Plaintiffs' Undertakings and Further Undertakings (as defined in the Order, being the undertakings given to the Court on 10 April 2018 and 15 January 2021) should remain in force until the conclusion of the inquiry as to damages or further order (see [3] of the Order).

4. By [4] of the freezing injunctions (set out in Annexes A and B of the Order), the Plaintiffs were restrained from exercising any rights they have in respect of the assets of SFPF and/or Solid Holdings NV (***Solid***) in a manner that prevented such rights (or funds or assets derived from such rights) being available to the Trustees to satisfy a judgment of this Court. Solid is a company incorporated in Curacao and SFPF is a private foundation formed under the laws of Curacao. [5] of the freezing injunctions stipulated that this prohibition covered funds (insofar as they were under the direct or indirect control of either of the Plaintiffs) held by SFPF and Solid in accounts with Pictet & Cie (***Pictet***) in Geneva, Switzerland.

5. By [4] of the Order, the Plaintiffs were given liberty to apply to vary or terminate the Undertakings and the Further Undertakings if they wished to withdraw or deal with the funds held by Solid or SFPF or act in a manner that would otherwise contravene those undertakings. In addition, by [18] of the Order, the Plaintiffs were given liberty to apply in respect of the proper treatment of the Pictet accounts for the purpose of the freezing injunctions.

6. SFPF's account (the ***Pictet Account***) has a credit balance of US$93 million (see the Second Plaintiff's Twenty-Eighth Affidavit (***TP 28***) at [7]). This sum derives from a dividend paid by Solid to SFPF after Solid issued shares to SFPF and diluted the shareholding of Britannia Guarantee National Insurance Company (***BGNIC***), a Cayman company which, prior to the issue of such shares, was the holder of all the shares in Solid. The issue by Solid of these shares, and the payment of the dividend by Solid to SFPF has been referred to as the Solid Dilution and has or had been challenged by the Trustees (as holder of the share in BGNIC's parent company Britannia Holdings 06 Limited, also a

Cayman company) and by BGNIC. The Trustees' challenge in their own right had been set out in the counterclaim in these proceedings which was, on their application, dismissed in the Order (see [9] of the Order and [12]-[15] of the Judgment). BGNIC has commenced proceedings against both Solid and SFPF in the Joint Court of Appeal of Aruba, Curacao and St Maarten and of Bonaire, St. Eustatius and Saba (the ***Curacao Court***) although the proceedings taken to date against SFPF have been dismissed.

The Plaintiffs' submissions

7. The Plaintiffs' position can be summarised as follows. They submit that they should be entitled to procure that SFPF makes distributions to them and other members of the class of SFPF beneficiaries (which comprise the First Plaintiff, the Second Plaintiff and her children and the Fifth Defendant) in circumstances where the funds to be distributed will initially be used to create a deposit in this jurisdiction in an amount equal to the financial limit imposed by the freezing injunctions and where:

(a). the Order expressly made provision for them to apply for permission (and the variation of the freezing injunctions and the Plaintiffs' Undertakings and Further Undertakings to permit them) to procure the making of distributions by SFPF and withdrawals from the Pictet Account subject to the need for them to show that the position of the Trustees would be protected.

(b). the challenge to the Solid Dilution is the subject of the ongoing proceedings in the Curacao Court (where BGNIC and not the Trustees is named party and claimant in those proceedings) and is no longer an issue in these proceedings or otherwise before in this Court.

(c). this Court's role is now limited to the determination of the inquiry as to damages (with respect to the Plaintiffs' liability under their cross-undertaking in damages).

(d). there is no basis on which this Court can or should seek to restrain SFPF from making distributions to beneficiaries out of its assets (and making payments from the Pictet Account) or to restrain the beneficiaries of SFPF including the Fifth

Defendant (other than the Plaintiffs) from exercising their rights in relation to SFPF.

8. The Plaintiffs argue that the only basis on which the Court can or should seek to restrain them from exercising (or otherwise dealing with) their rights (as beneficiaries) in relation to SFPF arises by reason of the freezing injunctions (which may legitimately affect the Plaintiffs' assets and rights). However, since the Court has determined that the freezing injunctions only restrain the Plaintiffs from dealing with their assets to the extent of US$20 million (albeit that for the time being that requirement applies separately to each Plaintiff), they should be entitled to be paid the sums held in the Pictet Account in excess of that amount (to the extent that they are entitled to such sums) and there should be no restrictions on further payments out of the Pictet Account if and after US$20 million has been deposited by the Plaintiffs with the Court (or in an account and on terms approved by the Court).

9. The Plaintiffs submit that the Plaintiffs' Undertakings and Further Undertakings should not affect or limit the exercise of their rights with respect to SFPF (and through SFPF in relation to the Pictet Account) beyond the restrictions imposed by the freezing injunctions. The Court held in the Judgment (at [9]) that Plaintiffs' Undertakings and Further Undertakings were given on the basis that they continued "*until the proceedings before the Court have been determined and that includes [and now is limited to] the determination of any claim under the Plaintiffs' cross-undertaking in damages.*" Accordingly, they served the same purpose as (and should be treated as only supporting) the freezing injunctions and should therefore be subject to the same limitations.

10. It must follow, the Plaintiffs say, that the Trustees will be fully protected if $20 million is distributed by SFPF to the First Plaintiff (with the approval of all SFPF's beneficiaries) from the Pictet Account and deposited with the Court (or in another deposit account approved by the Court). Upon that being done, the Trustees do not have grounds or standing in these proceedings to object to the balance of the Pictet Account being paid away and disbursed to the Fifth Defendant and the other beneficiaries in such manner as the beneficiaries agree.

11. The Plaintiffs claim that SFPF's right to make distributions and to deal with its assets is not challenged or a live issue in the Curacao (or any other) proceedings (see TP28 at [12]) and no order of the Curacao Court or provision of Curacao law prevents the Plaintiffs (and the other beneficiaries) procuring that SFPF transfers funds from the Pictet Account to fund the deposit account in this jurisdiction or to pay the other beneficiaries. The existence of BGNIC's claim in the Curacao proceedings is not a proper or good reason for refusing to grant the Plaintiffs' application.

12. The Plaintiffs adduced and relied on evidence as to the Curacao proceedings and Curacao law from Mr Jacob Cornegoor. Mr Cornegoor is a partner in Hoff Advocaten and acts for Solid and acted for SFPF in relation to the Curacao proceedings (and is therefore not an independent expert on these matters). He is admitted to practice in the Netherlands, from 1997 until 2000 lived and practised in Curacao and continues regularly to undertake matters there.

13. Mr Cornegoor responded (in his First Affidavit) to the evidence adduced by the Trustees who relied on a report (the ***Bartman Report***) prepared by an independent Curacao lawyer, scholar and author, Prof. Steef M. Bartman (***Professor Bartman***). Professor Bartman was admitted to the Dutch Bar in 1992, became a partner and then of counsel in several Dutch firms, has held a number of academic positions including as Professor of company law at the University of Leiden Law School and has published a leading Dutch law volume on corporate law.

14. Mr Cornegoor agreed with Professor Bartman that the issue of shares by Solid to SFPF (pursuant to the Solid Dilution) is valid unless and until it is set aside and nullified by the Curacao Court, which has not to date happened. Therefore, he argues, SFPF remains under the full and unrestricted control of its directors. He noted that the Curacao Court has the power to make orders in respect of SFPF and that the Trustees and BGNIC had unsuccessfully sought relief against SFPF in the Curacao proceedings. The Trustees and BGNIC had sought an order replacing the board of SFPF and alternatively preventing it from making distributions. That application had been denied and the current position was therefore that no restriction exists in Curacao in relation to SFPF and its assets.

15. Mr Cornegoor disagreed with Professor Bartman's opinion (set out at [63]-[67] of the Bartman Report) that because the Curacao Court might in future, in new and subsequent proceedings against or involving SFPF, annul the issue of shares in Solid to SFPF, SFPF's directors were currently prevented (under Curacao corporate law) from making distributions to beneficiaries. In his view, the applicable standard to be applied when assessing the position and duties of SFPF's directors was "*that the board should refrain from making distributions if it knows or should know that the distributions would cause the inability of the corporate entity to pay its debts.*" SFPF's board was required "*independently [to] assess the likelihood of an adverse outcome of the [current enquiry proceedings relating to Solid] and, in the event of such outcome, the likelihood of a claim for refund of the dividend [paid by Solid to SFPF] being awarded*."

16. Mr Cornegoor also disagreed with Professor Bartman's view that, if SFPF were now to make distributions to beneficiaries (of all its assets) and then the Curacao Court subsequently annulled the issue of shares to SFPF, BGNIC and the Trustees could seek compensation from SFPF for the loss sustained by reason of SFPF's resulting inability to refund to Solid the dividend. In his opinion, under both Curacao and Dutch corporate law this was "*plainly absurd*" because there is a rule of law (known after its leading case as the XtBP/Poot-doctrine) under which, where a corporation sustains damage only the corporation and not its direct or indirect shareholders can claim compensation. Accordingly, if Solid suffered a loss of the kind contemplated by Professor Bartman only Solid could bring a claim for compensation.

17. The following extract from Mr Cornegoor's First Affidavit sets out his views as to the impact of the challenge in the Curacao proceedings to the issue of shares to SFPF by Solid, both in terms of the remedies available to BGNIC (and Solid) and of the duties of SFPF's directors:

> *"Validity of the share issue*
>
> *11. I agree with the position taken by Professor Bartman that the issue of shares is valid unless and until such issue is nullified. As at the date of this affidavit, it has not been nullified and thus it remains valid. SFPF remains under the full and unrestricted control of its directors.*

12. *I further agree that the Joint Court has the power to make orders in respect of SFPF. Indeed, both the trustees and BGNIC have sought just such an order at distinct stages of the Curacao proceedings. I refer in this respect to the trustees' original petition of 14 July 2021 (see for the pertinent part page 152/153 of Prof. Bartman's report; translation at page 112/113) and I furthermore refer to BGNIC's petition of 22 March 2022, a petition which Prof. Bartman fails to mention (see for the pertinent part paragraph 91; page 271 of Prof. Bartman's report; translation at page 248). As can be seen at those pages, both the trustees and BGNIC sought an order replacing the board of SFPF and, alternatively, preventing it from making distributions. It follows from the Joint Court's decision of 25 January 2022 that the trustees' request was denied because their whole petition was declared inadmissible. It follows from the Joint Court's decision of 17 January 2023 that BGNIC's request was denied as well. Thus, the current state of affairs is that no restriction exists in Curacao in relation to SFPF and its assets.*

13. *I find it surprising, to say the least, that the trustees are now requesting that the Grand Court grant restrictions in relation to SFPF, on the basis of proceedings before the court in Curacao, which the Joint Court has itself been asked to impose yet declined to do so.*

Obligations of Directors

14. *I strongly disagree with paragraphs 63 through 67 of Professor Bartman's report, where he argues that the mere possibility that the Joint Court might upon a future petition annul the issue of the shares to SFPF would under Curacao corporate law prevent the board of SFPF from making distributions to is beneficiaries. His analysis suffers from four fundamental errors.*

15. *Firstly, the linchpin of his argument is that under Article 2:14(4) of the Curacao Civil Code, the board should take into account the legitimate interests of 'those involved with the corporation'. It is readily evident that neither BGNIC nor the trustees are 'involved' with SFPF since there is no corporate relation between them. One would have expected Prof. Bartman to explain why he considers them to be included in the scope of 'those involved with the corporation', but his report is silent in that respect. I am left with the impression that he has confused Solid with SFPF.*

16. *Secondly, Prof. Bartman bluntly asserts that if SFPF were to make distributions and the Joint Court was to subsequently annul the issue of shares, BGNIC and the trustees could seek compensation of the loss they sustain because SFPF would then be unable to refund the dividend it received to Solid. Under both Curacao and Dutch corporate law, this is plainly absurd, because there is a standard rule (known after its leading case as the XtBP/Poot-doctrine) that where a corporation sustains damage, only the corporation and not its direct or indirect shareholders can claim compensation. In the scenario which Prof. Bartman speculatively assumes, the damage would be sustained by Solid and neither BGNIC nor the trustees could bring a claim for compensation. There are certain narrow exceptions*

to the ABP/Poot-doctrine, but rather than arguing that such an exception would apply, Prof. Bartman simply ignores the whole doctrine.

17. Thirdly, there is no jurisprudence to support that the mere possibility of a future claim would prevent the board from making distributions. No such jurisprudence is adduced in Prof. Bartman's report. The applicable standard would, in my view, be that the board should refrain from making distributions if it knows or should know that the distributions would cause the inability of the corporate entity to pay its debts. In other words, SFPF's board is required to independently assess the likelihood of an adverse outcome of the enquiry proceedings and, in the event of such outcome, the likelihood of a claim for refund of the dividend being awarded."

18. The Plaintiffs also submitted that there was no jurisdiction to grant freezing injunctions that restrained dealings with the Pictet Account by SFPF (and that the Plaintiffs' Undertakings and Further Undertakings and the Receivers' appointment should not be continued in a manner that interfered with SFPF making withdrawals from the Pictet Account and thereby from dealing with its assets). The funds credited to the Pictet Account were the property of SFPF. The Plaintiffs had no interest in those funds nor was there a process of enforcement by which the Trustees would be able to enforce a judgment against the Plaintiffs over or in respect of those funds. Accordingly, the Plaintiffs argued that [5] of the Order was objectionable and the Court should reconsider that part of the Order.

19. The freezing injunctions included the following terms:

"4. The First Plaintiff [and the Second Plaintiff] shall not exercise any rights that she has or claims or purports to have in respect of the assets of Solid Fund Private Foundation ("SFPF") and/or Solid Holdings NV ("Solid") in a manner that prevents any such rights (or funds or assets derived from any such rights) being available to the Trustees to satisfy a judgment of this Court.

5. Without prejudice to the ongoing dispute as to ownership of the same, this prohibition also includes the following assets insofar as they are under the direct or indirect control of the First Plaintiff [and the Second Plaintiff]:

(1) The funds held in the name of Solid with Account no. Q-645868.011 held at Banque Pictet & Cie

(2) The funds held in the name of SFPF with Account no. T-675220.011 head at Banque Pictet & Cie"

20. The Plaintiffs noted that I had indicated in the Judgment that while I was prepared to make the Order on terms that included [5] I was prepared to give them the opportunity to argue their case on this point more fully, since the issue had in my view not been adequately canvassed and considered at the previous hearing. In the Judgment I explained my decision as follows (at [28])

> *"The Plaintiffs object on the basis that it has not been shown, they submit, that these funds are the property of the Plaintiffs or that they have any interest in them or rights to deal with them. They say, I believe, that such an order would involve a freezing injunction being granted against Solid and SFPF, who are the account holders and as matters stand the owners of the funds in the Pictet accounts and that the Trustees have not made out a case for such an order on the basis of the Chabra jurisdiction. The issue was not argued at length at the hearing, but it seems to me that at least at this stage the injunctions should stipulate that for the purpose of the injunctions the funds in the Pictet accounts are to be treated as assets which the Plaintiffs have power directly or indirectly to dispose of or deal with. The Undertakings and the Further Undertakings were given on this assumption and basis and the Settlement Agreement, and the Application strongly support the view that this is so (and that there is at least an arguable case that this is the position) at least at this stage the freezing injunctions should stipulate that for the purpose. However, I shall give the Plaintiffs liberty to apply if they wish to press and further (and fully) argue their case on this point."*

21. The Plaintiffs noted that [5] of the Order had referred to the Plaintiffs having "*direct or indirect control"* of the funds in the Pictet Account (and the funds in Solid's account with Pictet) and that in the Judgment I had said that the Plaintiffs were to be treated as having the "*power directly or indirectly to dispose of or deal with"* those funds. However, the Plaintiffs argued, control over these funds was insufficient (at least in this jurisdiction) to justify the grant of a freezing order that affected SFPF's rights to deal with its own assets (and Solid's rights in respect of its assets). It was necessary for the Trustees to go further and show that there was a process of enforcement by which they would be able to enforce a judgment over or in respect of those funds and the Trustees had failed to do so.

22. The Plaintiffs relied on the following passages from the judgment of Chadwick P in *Algosaibi v Saad Investments* (2011 (1) CILR 178) (underlining added):

"43 The fact that the potential judgment debtor (the CAD) has substantial control over assets which are held by a party against whom no cause of action is alleged (the NCAD)—say, because the NCAD can be expected to act in accordance with the wishes or directions of the CAD (whether or not it could be compelled to do so)—is likely to be of critical importance in relation to the question whether there is a real risk that the assets will be dissipated or otherwise put beyond the reach of the claimant. But, as it seems to me, the existence of substantial control is not, of itself, enough to meet the first of the two requirements just mentioned. It is not enough that the CAD could, if it chose, cause the assets held by the NCAD to be used to satisfy the judgment. It is necessary that the court be satisfied that there is good reason to suppose either (a) that the CAD can be compelled (through some process of enforcement) to cause the assets held by the NCAD to be used for that purpose; or (b) that there is some other process of enforcement by which the claimant can obtain recourse to the assets held by the NCAD.

44. Some support for the "substantive control" test can be found in the judgments of the Court of Appeal in Hong Kong in Akai Holdings Ltd. v. Ho Wing On (1). Tang, V.-P., after referring to the observation of Robert Walker, J. in International Credit & Inv. Co. (Overseas) Ltd. v. Adham (6) ([1998] BCC at 136) that—

> *". . . it has become increasingly clear, as the English High Court regrettably has to deal more and more often with major international fraud, that the court will, on appropriate occasions, take drastic action and will not allow its orders to be evaded by the manipulation of shadowy offshore trusts and companies formed in jurisdictions where secrecy is highly prized and official regulation is at a low level,"*

went on to say ([2009] HKEC 1585, at para. 44):

> *"Such drastic action may include extending a Mareva injunction over the assets of a non-party if there is good reason to suppose as against the non-party that the assets of or held by the non-party would be susceptible to a procedure which would lead to satisfaction of a judgment."*

That proposition is, of course, consistent with the second limb of the principle set out by the High Court of Australia in Cardile (4).

45 The Vice-President then went on—after citing the passage in Dadourian (5) to which I have already referred—to observe (ibid., at para. 48) that—

> *". . . for the present purpose, it is sufficient if there is good reason to suppose that Mr. Ho has substantive control over the Ho Family Trust Assets. The nature and degree of control may have to be investigated in due course."*

46 If, by that observation, he intended to suggest that "substantive control" was, of itself, sufficient to found jurisdiction to grant Mareva relief—without the

need to consider whether (ibid., at para. 44) "there is good reason to suppose as against the non-party that the assets of . . . the non-party would be susceptible to a procedure which would lead to satisfaction of a judgment"—he went beyond the second limb of the principle in Cardile. It was, I think, unnecessary for him to do so in the circumstances that, as he said in the next sentence of his judgment, it was sufficient for his decision that (ibid., at para. 48) "for all intents and purposes, Mr. Ho has represented to the whole world that he was the beneficial owner of the trust." Be that as it may, for my part, I am not persuaded that the courts in this jurisdiction should treat the decision in the Akai Holdings case as a sufficient reason to depart from the need—emphasized in Cardile, and in the cases in England and Wales and in Australia in which Cardile has been followed—that "substantive control" is not, of itself, sufficient to found jurisdiction to grant Mareva relief: it is necessary to identify some process of enforcement which would (or might) lead to the assets of the NCAD becoming available to satisfy the judgment which the claimant may obtain against the CAD.

47 In addressing the question whether there is good reason to suppose that the assets of the NCAD can, by some process ultimately enforceable by the courts, be made available to the claimant to satisfy the judgment which the claimant may obtain against the CAD, it is pertinent to have in mind the observation of Warren, J. in Basra v. Poole (2) ([2007] EWHC 3528 (Ch), at para. 10): "As I have said, it is important that the case against the defendant is clearly formulated, but more so must the possible claim against a third party be clearly formulated."

48 With respect to Henderson, J., it is not enough to say, as he did at para. 59 of his judgment, that:

> *"It seems probable that, when the dust has settled and the true picture has emerged, the assets of many of the NCADs may become available to satisfy a judgment against Mr. Al Sanea personally."*

49 It is necessary to identify, with a degree of specificity appropriate to the evidence before the court, why it is that the court is satisfied that, following a judgment against the CAD, there is good reason to suppose that the claimant will be able to invoke some process of enforcement which will lead to the assets of the NCAD becoming available to satisfy that judgment."

The Fifth Defendant's submissions

23. The Plaintiffs' application is supported by the Fifth Defendant. She explained that her principal concern is that the orders made by, and undertakings given to, this Court should not interfere with her rights as an SFPF beneficiary to be paid distributions by SFPF. She pointed out that SFPF's constitutional documents provided that SFPF was required to distribute its assets in fixed proportions to the beneficiaries and that she was entitled to a

distribution of US$50 million (or 26.08% of SFPF's assets). The Fifth Defendant submitted that the freezing injunctions and the Plaintiffs' Undertakings and Further Undertakings had had the effect of (indirectly) interfering with her right to receive such distributions.

24. The Fifth Defendant referred to the terms of SFPF's articles (as amended by the Deed of Amendment dated 30 March 2023) which provided that SFPF (with Solid's agreement where necessary) was required to cause distributions to be made (a) to the First Plaintiff in the sum of US$60 million (being 26.08% of SFPF's assets); (b) to the Second Plaintiff in the sum of $80 million (being 34.78% of SFPF's assets); (c) to the Fifth Defendant in the sum of $50 million (being 26.08% of SFPF's assets); and (d) to each of the Second Plaintiff's children (the Grandchildren) in the sum of US$ 10 million each (being 4.35% of SFPF's assets). The right to be paid such distributions was subject to a number of provisions, in particular that where such distributions could not be made in full in a single payment then distributions would be made to each of the beneficiaries *pro rata*, that distributions could only be made if all distributions were made at the same time and that distributions (if directed by the relevant beneficiary) could be made to trusts or foundations of which the controlling person and first beneficiary was either the First Plaintiff, the Second Plaintiff, the Fifth Defendant or one of each of the Grandchildren.

25. The Fifth Defendant noted that the Plaintiffs had no right to call for distributions of the entirety of SFPF's assets and could not prior to distributions being made be said to have any interest in or right to the funds in the Pictet Account. There was therefore (as the Plaintiffs had submitted) no jurisdiction to grant freezing injunctions that restrained dealings with the Pictet Account by SFPF (and the Plaintiffs' Undertakings and Further Undertakings should not be continued in a manner that interfered with SFPF from making withdrawals from the Pictet Account and thereby from dealing with its assets).

26. The Fifth Defendant submitted that the evidence as to Curacao law did not establish that the directors would be in breach of duty if they permitted distributions to be made to the beneficiaries out of the Pictet Account or that the Plaintiffs would be liable to repay distributions received by them in the event that the Curacao Court subsequently held that the issue by Solid of shares to SFPF and the dividend paid by Solid to SFPF were invalid

and should be set aside. Professor Bartman's opinion did not say that recipients of any distributions or payments made by SFPF could be liable to repay SFPF or compensate Solid. He had only addressed the possible liability of SFPF's directors. Neither of the Plaintiffs is a director of SFPF. The directors are Private Equity Services (Curaçao) N.V. and Mr Jacob (Mr Duggan is the protector).

The Trustees' submissions

27. The Trustees oppose the Plaintiffs' application.

28. In summary they argue that the Plaintiffs were not entitled to a variation of the Order in the present circumstances; there had been no change of circumstances which justified a variation of the Order (which the Plaintiffs had failed to appeal); in any event, the Court should not permit a variation of the Plaintiffs' Undertakings and Further Undertakings in the manner proposed because they were intended to preserve the funds paid to SFPF by Solid pursuant to the Solid Dilution until the Trustees (directly or indirectly through BGNIC) had completed the steps needed to reverse the Solid Dilution and therefore until the end of the Curacao proceedings, and alternatively, the Court should not permit the Plaintiffs to substitute the proposed $20 million cash deposit for the freezing injunctions (and the undertakings) and the payment of distributions to the SFPF beneficiaries from the Pictet Account where the Curacao law evidence showed that it was at least arguable that the directors of SFPF would be acting in breach of duty if they permitted distributions to be made to the Plaintiffs and the other beneficiaries before BGNIC's current claim against Solid for the reversal of the Solid Dilution was determined (and where one consequence of that claim being upheld would be a further claim either by Solid under new management or BGNIC against SFPF for the return of all the funds received by SFPF and now held in the Pictet Account).

29. The Trustees submit that the Plaintiffs are only entitled to a variation of the Order (in particular of the terms of the freezing orders and the confirmation that they remain liable under the Plaintiffs' Undertakings and Further Undertakings) if they can show a material change of circumstances from those existing at the time when the Order was made, and they cannot do so.

30. The Trustees say that the applicable principles (even where the relevant order included liberty to apply) were set out in the judgment of the English Court of Appeal in *Tibbles v SIG plc* [2012] 1 WLR 2591. In that case, a district judge had made an order allocating the proceedings to the fast track but subsequently, upon an application by the claimant pursuant to CPR r.3.1(7), the district judge varied that order (by varying the terms of the reallocation order by adding a provision that costs incurred prior to that order were to be treated as costs in the fast track). CPR r 3.1(7) provides that "*A power of the court under these Rules to make an order includes a power to vary or revoke the order*." The decision to vary the order was appealed. A county court judge reversed that decision, holding that in the circumstances the district judge had had no jurisdiction under CPR r. 3.1(7) to vary his original order. The Court of Appeal dismissed the claimant's appeal against the decision of the county court. The Court of Appeal held that while the jurisdiction of the court to vary or revoke its own order under CPR r 3.1(7) was apparently broad and unfettered considerations of finality, the undesirability of allowing litigants to have two bites at the cherry and the need to avoid undermining the concept of appeal all required a principled curtailment of an otherwise apparently open discretion. The discretion under CPR r. 3.1(7) might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order had been made, (ii) where the facts on which the original decision had been made had been, innocently or otherwise, misstated or (iii) where there had been a manifest mistake on the part of the judge in the formulation of his order and that the interest of justice in the finality of a court's orders was such that it ought normally to take something out of the ordinary to lead to the variation or revocation of an order under rule 3.1(7), especially in the absence of a change of circumstances in an interlocutory situation. The Trustees argued that the approach set out in by Rix LJ applied to any application to vary an earlier order (even pursuant to an express term of the order giving liberty to apply) and that such a variation should not be permitted where, as here, the facts or arguments relied on to support the variation were known or ought to have been known as at the time of the original order.

31. At the last hearing the Plaintiffs had sought but failed to persuade the Court that the Plaintiffs' Undertakings and Further Undertakings should be discharged. The Court had directed that the Plaintiffs' Undertakings and Further Undertakings were to remain in

force until the conclusion of the Trustees' claim under the cross-undertaking or further order. There had been no relevant developments or change of circumstances which justified an amendment to the Order (to vary or discharge those undertakings or the freezing injunctions).

32. Even if the Plaintiffs did not need to show a change of circumstances, the liberty to apply term in the Order was subject to conditions which the Plaintiffs had failed to satisfy. They needed to show that the Trustees' position would be adequately protected after any withdrawal of funds, but the Plaintiffs' proposal would instead be prejudicial. At [9] of the Judgment I had said as follows (underlining added):

> "*Of course, it will be open to the Plaintiffs to apply, on notice to the Trustees and D5, for a variation or early termination of the Further Undertakings if they wish to deal with and withdraw (as they appear to do) funds from Solid and/or SFPF upon giving details of and adducing evidence as to how the funds will be disbursed and held pending the determination of their liability under the cross-undertaking and showing how the position of the Trustees will be adequately protected*."

33. The Plaintiffs' proposal would result in all the funds in the Pictet Account being paid away so that if BGNIC (or the Trustees as interested parties) were successful in the Curacao proceedings, they would be unable to recover the funds improperly paid by Solid pursuant to the Solid Dilution.

34. The Trustees maintained that the Plaintiffs' Undertakings and Further Undertakings were designed to prevent the withdrawal of funds from the Pictet Account until the conclusion of the Curacao proceedings. The Plaintiffs were wrong to assert that the Court had only required (or only continued to require) those undertakings to remain in place in order to protect the Trustees by ensuring that the funds in SFPF remained undiminished for the purpose of meeting whatever award of damages the Trustees might secure against the Plaintiffs on the cross-undertaking in damages. The Plaintiffs' Undertakings and Further Undertakings were instead maintained for the reason that they had been originally granted, namely to ensure that the assets of the BH06 group which were extracted as a result of the Solid Dilution were preserved *in situ* until the Trustees' rights to the BH06 share had been established. Allowing the Plaintiffs to access and withdraw funds from

the Pictet Account now would be wholly inconsistent with this objective. Indeed, as the Trustees put it in their written submissions (at [B (7)]):

> "*…. granting the Plaintiffs' application would drive a coach and horses through everything that the Court has done over the last five (and more) years and continued to do at the June 2023 hearing, namely (a) to preserve BH06's assets and ensure that they are available to the right person, (b) to ensure that the Trustees have security from the Plaintiffs in light of the Court's finding that the Plaintiffs intend to act (and have acted) so as to defeat the effectiveness of orders made by the Court and (c) to enable the Curacao [C]ourt properly to determine the Curacao proceedings without interference*."

35. Granting the Plaintiffs' application would in substance involve permitting them to meet the financial obligations imposed by the Court (in the freezing injunctions) out of SFPF funds, which are funds subject to the claims in the Curacao proceedings and claimed by BGNIC (and the Trustees) to be trust funds to which neither SFPF nor the Plaintiffs through SFPF can have any right. The Trustees say that the Plaintiffs now seek permission to use monies stolen from the Lake Cauma Trust as security for their own financial liabilities to the trustees of the Lake Cauma Trust. This is something the Court should not permit.

36. Accordingly, if the Plaintiffs' application is granted it will have the practical effect of wholly undermining the Curacao proceedings. It is, the Trustees submitted, entirely legitimate and the Court had jurisdiction to grant interim relief in support of the Curacao proceedings. They relied on the decision of the Privy Council in *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC] 24 which confirmed that there was nothing objectionable in an appropriate case in a domestic court granting (or in this case, maintaining) interim relief to assist the enforcement of a prospective foreign judgment. Granting (or maintaining) interim relief (particularly when it does nothing more than hold the ring) to prevent the purpose of a prospective foreign judgment from being undermined was no different.

37. The Trustees explained, by reference to Professor Bartman's evidence, the status and nature of the Curacao proceedings (and noted that Professor Bartman was an independent expert while Mr Cornegoor was not). They submitted that it was clear that SFPF remained subject to a claim for the return of the dividend paid to it by Solid and that

while BGNIC's application against it for the commencement of an inquiry proceeding had failed, BGNIC (and the Trustees who were treated as interested parties to the inquiry albeit not direct parties to the proceedings) maintained its claim that all aspects of the Solid Dilution should be set aside (including the resolutions passed by Solid's managing directors) so that relief against SFPF could still be ordered by the Curacao Court in due course if the result of the inquiry relating to Solid was that the steps taken by Solid's directors were to be regarded as mismanagement and in breach of duty and that the Solid Dilution should be set aside.

38. Professor Bartman had noted that BGNIC had challenged the legitimacy of the Solid Dilution in the Curacao proceedings (commenced in 2018, reactivated in 2021). On 3 June 2021, BGNIC had filed an application for an inquiry in respect of both Solid and SFPF and on 14 June, a similar request was made by the Trustees in respect of SFPF. If such an application is granted the Curacao Court appoints an investigator to investigate and prepare a report on the matters complained of (as ordered by the Curacao Court) which report can form the basis of further orders and relief ordered by the court.

39. The Curacao Court granted BGNIC's request for an investigation into the business conduct and course of affairs of Solid, especially aimed at the Solid Dilution and the granting of a loan of EUR 15 million to the Second Plaintiff (the ***Loan***). However, BGNIC's request for an inquiry in respect of SFPF was denied because the jurisdiction to order an inquiry only applies to certain types of foundation and SFPF was found not to satisfy the relevant requirements (and BGNIC's and the Trustees' appeal against this ruling has been dismissed). The Curacao Court refused an application that SFPF be treated as a closely affiliated party with Solid but decided that there were grounds for ordering that the investigator be permitted to require that SFPF's officers cooperate in relation to his investigation and to inspect SFPF's corporate documents. Subsequently, the Curacao Court granted BGNIC's application for provisional measures and prohibited Solid from making payments to any shareholder without the prior written approval of BGNIC; prohibited Solid from entering into contracts or performing legal acts exceeding a monetary value of EUR 30,000 without the prior written approval of BGNIC and suspended the voting rights of both SFPF and BGNIC. The Trustees have been treated as interested parties in relation to the Solid inquiry so that they have the right to obtain

copies of court papers including the investigator's report; to be called by the Curacao Court to appear and be heard; the right to file a separate rebuttal prior to a hearing; the right to request the Curacao Court to make further orders (take final measures) if the investigator's report proves mismanagement and to appeal any ruling made by the Curacao Court.

40. The Trustees relied in particular on the following parts of Professor Bartman's evidence in which he set out his opinion as to the position concerning the law applicable to the proposed exercise by SFPF's directors of their powers to make distributions out of the Pictet Account in the current circumstances:

> *"52. In its ruling of 25 January 2022, the joint Court motivated its decision that there were serious reasons to doubt Solid's business conduct and course of affairs as follows:*
>
> > *"It is the Solid board's duty to safeguard the interests of BGNIC as its shareholder, also as regards the latter's responsibility for its assets held in trust. Moreover, it was also Solid's own duty to watch over the assets acquired by it. BGNIC's interest as a sole shareholder has been seriously harmed by the fact that, as has remained undisputed, the shares were issued far below their real value and for the sole purpose of taking away BGNIC's grip on Solid's assets held as a trustee."*
>
> *53. On the assumption that the investigator's report, which is expected to be delivered in the course of next year, will confirm this key ruling of the court and that the court will subsequently, upon BGNIC's request or the request of Lopag c.s. for that matter, rule that these findings constitute mismanagement in Solid during the investigated period of time, both BGNIC and Lopag c.s. may request the court to take final measures in Solid. Should the court, on the basis of the investigator's report, conclude that no mismanagement has taken place, such requests will be denied.*
>
> *54. An obvious final measure to be requested in this case seems the nullification of all corporate resolutions made by Solid to effectuate the Share Issue, the Dividend Payment and the Loan, respectively, made by the management board, the supervisory board or the shareholders meeting.*
>
> *55. Suppose the Joint Court in this case will indeed nullify the said corporate resolutions – please note that the court has wide discretion here - then what are the legal consequences of such nullification on the basis of Curacao law? Let us first focus on the Share Issue.*
>
> *56. Under Curaçao (and Dutch) law, the corporate resolution to issue shares is a requirement for the validity of such share issue. As a consequence, Article*

2:22 (2) BWC provides that nullification of such resolution can be invoked against the acquirer of the shares. Together with the appointment of a director the issue of new shares is considered such a fundamentally important issue for the company that its interest prevails under all circumstances. If the acquirer, however, acted in good faith upon the acquisition of the shares, the company is obligated to compensate him for his damage.

57. *In this case, the foregoing would mean that, upon nullification of the Share Issue by the Joint Court, Solid can reclaim the Dividend Payment from SFPF, since SFPF would then - with retroactive effect - no longer be considered a shareholder in Solid, unless the Joint Court should decide otherwise. Here, too, the court has wide discretionary power, as can be illustrated by the Cordial ruling. Although the Joint Court in that case concluded that the issue of shares constituted mismanagement on Cordial's part, it denied the petitioner's request to nullify the relevant corporate resolutions stating that the issue caused no real harm to the minority shareholder. The petitioner's subsequent appeal in cassation against this ruling turned out to be successful though.*

58. *Whether SFPF may then in turn claim damages from Solid seems unlikely to me since, in the eyes of the Joint Court, SFPF also knew or should have known that the Share Issue and Dividend Payment severely jeopardized the interests of BGNIC and Lopag c.s. as trustees, given the extremely low share price applied and the strongly diluting effect of the issue. Hence, one may seriously doubt whether SFPF acted in good faith, as meant in Article 2:22 BWC, when acquiring its share stake in Solid on 24 May 2017, given the fact that it received the shares for no consideration.*

…….

61. *Assuming that the Joint Court in its final ruling will find its earlier key ruling quoted [at paragraph] 52 above confirmed by the investigator's report, I find it likely that it will subsequently grant BGNIC's (expected) request for nullification of Solid's resolution underlying the Share Issue, which under Curacao law would then lead to nullification of the Share Issue itself, creating an obligation for SFPF to repay its share received in the Dividend Payment to Solid.*

62. *The Curaçao inquiry proceedings currently only generate direct restrictions on the use of funds held by Solid because of the provisional measures taken by the Joint Court as referred to under no. 45 under ii (b and c) above. No such direct restrictions apply to SFPF since the inquiry requests from both BGNIC and Lopag c.s. aimed at SFPF were declared inadmissible. However, the pending inquiry proceedings do generate indirect restrictions on SFPF's ability to use its funds, as will be illustrated below.*

63. *Under Curaçao (and Dutch) corporate law, the managing directors of both Solid and SFPF have a duty to fulfil their tasks in a diligent and careful way.*

They are all responsible for the corporation's general affairs irrespective of their own specific task attributed to them. A violation of this duty may result in joint and several liability of each and every director toward the corporation for the damage caused (Article 2:14 (4) BWC).

64. *In performing his duty, each director should promote the interest of the corporation and the business associated with it, provided that such business exists (Article 2:8 (3) BWC). In a recent ruling, the DSC held that the interest of the corporation also requires compliance with the principle of reasonableness and fairness aimed to protect all parties involved with the corporation. The DSC held as follows:*

> *"(...) that managing directors should take into account the interests of all persons and entities involved with the corporation and that this duty of care brings about that these interests should not be disproportionally or unnecessarily harmed when promoting the interest of the corporation."*

65. *[At paragraph]. 57 above, I have expressed my opinion that the outcome of the Curacao inquiry proceedings might, subject to the Joint Court's discretion, lead to the nullification of Solid's corporate resolution underlying the Share Issue and, consequently, to an obligation for SFPF to refund the Dividend Payment to Solid. Surely SFPF's directors will also have been made aware of this possibility by their respective lawyers.*

66. *Against this backdrop, distributing SFPF's funds to a third party (e.g. Tamar) prior to the final decision of the Joint Court would not only constitute a violation of its directors' duty to promote SFPF's corporate interest, but also a violation of their duty of care toward BGNIC and the Lake Cauma Trust c.s. since obviously BGNIC's interest as shareholder and Lopag and Admintrust's interests as trustees would be severely jeopardized by such distribution.*

67. *In my opinion, BGNIC and Lopag c.s. could then seek compensation by holding SFPF's directors personally liable for their damage on the basis of wrongful act (Article 6:162 DCC), on the assumption that Curacao or Dutch law would apply. This is the indirect impact of the Curacao inquiry proceedings on the use of funds currently held by Solid and SFPF."*

Discussion and decision

There is no need for the Plaintiffs to show a material change of circumstances

41. In my view there is no need for the Plaintiffs to show a material change of circumstances before being entitled to the relief they now seek. They were given, as I have noted, liberty

to apply to vary or terminate the Plaintiffs' Undertakings and the Further Undertakings if they wished to withdraw or deal with the funds held by Solid or SFPF and to invite the Court to revisit the issue of the extent to, and manner in, which the Pictet accounts should be subject to the freezing injunctions. This was done, exceptionally, because it was not possible at the previous hearing fully to assess and form a final view on the Plaintiffs' claim that the funds in the Pictet accounts should not be subject to or affected by the restraints imposed by the freezing injunctions or the Plaintiffs' Undertakings and the Further Undertakings. I considered that a proper consideration of that issue would require further evidence and argument (by all parties) and that I should make specific provision in the Order for a further hearing should the Plaintiffs wish to press the point. Such a further hearing would give the Plaintiffs and the Trustees (plus the Fifth Defendant) an opportunity to argue their respective cases with a full citation of authority. I accept that usually the Court would wish to avoid permitting an application and issue to be reheard since finality is important to avoid unfairness and unnecessary cost but on this occasion it seemed to me that fairness required the orders giving liberty to apply that I made.

The Court does have the power to require that the sums in the Pictet Account are covered by the freezing injunctions and the undertakings

42. The Plaintiffs are clearly right that in this jurisdiction, to justify the grant of a freezing injunction against a NCAD the claimant must do more than show that the assets of the NCAD are under his control and must (as was explained by Chadwick P. in *Algosaibi*) "*identify some process of enforcement which would (or might) lead to the assets of the NCAD [SFPF] becoming available to satisfy the judgment which the claimant may obtain against the CAD [the Plaintiffs].*" The point I had sought to make (admittedly cryptically) in the Judgment was that at the time when the Plaintiffs' Undertakings and the Further Undertakings were given the Trustees had claimed that the Plaintiffs were behind and had procured the Solid Dilution and ultimately controlled (through the directors of Solid and SFPF who it was said acted on their instructions) the funds in Solid and SFPF (not only where they were held but also to whom they were to be paid) so that those undertakings were given and accepted by the Court on the assumption (without the Court deciding or the Plaintiffs accepting) that this was correct. Accordingly, the Plaintiffs were assumed to have (or at least might have) the right and ability to direct that these funds be paid to themselves so that the Court might be able to or could order them (by way of

execution of a judgment against them) to exercise that right (and their powers in relation to Solid and SFPF) to obtain those funds. The existence of such a right and power (if accepted to exist or established by adequate evidence) would be sufficient to satisfy the requirements for the grant of a freezing injunction against SFPF (and Solid) in respect of these funds.

43. I regarded the precise nature and extent of the Plaintiffs' rights in respect of SFPF (and Solid) as in dispute and not settled by adequate evidence at the previous hearing. The Settlement Agreement and the Application strongly suggested that the rights of the beneficiaries in, and indirectly to the funds held by, SFPF had been altered and manipulated by the Plaintiffs (now with the support of the Fifth Defendant) so as to improve their position in their dispute with the Trustees and their prospects of being able to withdraw the funds from the Pictet accounts before BGNIC (and the Trustees) were able to obtain relief from the Curacao Court. However, adequate expert or other evidence was not available to form a reliable view on the Plaintiffs' real position and rights.

44. Matters are not much improved at this stage. However, based on the documentary and expert evidence that has been adduced, it appears that, as matters currently stand, under SFPF's amended constitution the Plaintiffs are entitled to 60.86% of the funds in the Pictet Account (up to EUR 140 million). This amounts to approximately US$56.6 million (of the US$93 million credited to the Pictet Account). It appears that SFPF is under an obligation (with Solid "*when needed*") to cause distributions to be made to the Plaintiffs in this amount, being their proportionate share of the funds held by SFPF (see section 3.b of the articles) subject to the conditions set out in article 3.2b of SFPF's articles being satisfied. While article 7.1 of the articles gives the beneficiaries the power, by a unanimous resolution, to direct SFPF's board to take or refrain from taking specified action, there does not appear to be any need for such a resolution (or for protector consent) for the Plaintiffs to be able to enforce their right to distributions under and in accordance with article 3b.

45. It therefore seems to me that it can be said, on the available evidence, that a process of enforcement would be available to the Trustees (in respect of a judgment for sums owing under the cross-undertaking in damages) that would lead at least to a substantial part of

SFPF's assets (including the funds in the Pictet Account) becoming available to satisfy a judgment against the Plaintiffs since the Trustees could obtain an order (from this Court) requiring the Plaintiffs to exercise and enforce their right to a distribution from SFPF (under article 3b). To that extent, an injunction against or at least affecting SFPF is and would be justified.

The treatment of the Pictet accounts in the freezing injunctions and in the Plaintiffs' Undertakings and Further Undertakings

46. [5] of each of the Orders currently applies the prohibition in [4] (on either of the Plaintiffs exercising "*any rights that she has or claims or purports to have in respect of the assets of [SFPF] or [Solid] in a manner that prevents any such rights (or funds or assets derived from any such rights) being available to the Trustees to satisfy a judgment of this Court"*) to funds in the Pictet Account (and Solid's account with Pictet) "*insofar as they are under the direct or indirect control*" of the Plaintiffs. This prohibition therefore is of limited scope and effect. It only restricts the exercise by the Plaintiffs of their rights and only to the extent of preventing the Plaintiffs from taking steps that would prevent their rights or funds derived from such rights (including funds in the Pictet Account if and to the extent that those funds are under their direct or indirect control) being available to satisfy a judgment obtained by the Trustees. The freezing injunctions therefore do not affect the powers of the SFPF directors to make distributions provided that they are acting independently and not on the Plaintiffs' instructions and provided that the Plaintiffs' consent (or other action by the Plaintiffs) is not required.

47. The Plaintiffs' Undertakings and Further Undertakings stipulate that the Plaintiffs will exercise all their rights and powers (held directly or indirectly) to ensure that no distributions or payments are made from the Pictet Account (or otherwise in respect of the assets of Solid and SFPF). Once again, it is only the Plaintiffs' rights which are affected although these undertakings impose a positive obligation on the Plaintiffs to exercise their rights to prevent any distributions or payments out of the Pictet Account (and Solid's account with Pictet).

The Plaintiffs' Undertakings and Further Undertakings should reflect the terms of the freezing injunctions and be subject to the same financial limits

48. The Plaintiffs are right to say (indeed I have held in the Judgment) that their undertakings should only take effect and remain in force for the purpose of protecting the Trustees' position in relation to their claim under the cross-undertaking in damages. It follows, as the Plaintiffs submit, that the undertakings reflect the terms of and are consistent with the freezing injunctions.

49. I do not accept the Trustees' submission that the Plaintiffs' Undertakings and Further Undertakings were intended to keep the funds and assets removed from Solid (pursuant to the Solid Dilution) in place until the Trustees (or BGNIC) had been able to obtain a judgment from the Curacao Court and to grant relief in this jurisdiction to support the Curacao proceedings. The Trustees (and BGNIC) have never sought such relief. As the Plaintiffs pointed out, the party entitled to claim interim relief in this jurisdiction to prevent the improper dissipation of assets that would be available to satisfy a judgment issued by the Curacao Court would be BGNIC (which is not a party to these proceedings) and the primary parties against whom such relief would need to be sought would be Solid and SFPF. If BGNIC were to apply for interim relief (under section 11A of the Grand Court Act) a question would arise as to whether the Court could or would grant relief in circumstances where there are no proceedings currently on foot against SFPF and where SFPF and Solid have no assets in the jurisdiction (the assets against which a judgment would be enforced are in Switzerland).

50. As I made clear at the hearing, I decided in the Judgment (see [8], [9] and [15]) that the Plaintiffs' Undertakings and Further Undertakings were required to protect the Trustees from the consequences of the granting of the Injunction by (a) ensuring that the funds removed from Solid (which the Trustees were unable to take steps to recover by exercising their rights as the shareholder of BH06 by reason of the injunction) remained in place until the Trustees were able to *establish in these proceedings* their right to the share in BH06 and (b) ensuring that the Plaintiffs' rights in respect of those funds were preserved pending a determination of any liability that the Plaintiffs might have under their cross-undertaking in damages *given in these proceedings*. Once the Trustees succeeded in establishing their right to the share in BH06 and the injunction was discharged, they were free to exercise their rights and remedies and the restraints on the Plaintiffs that were justified by and flowed from the grant of the injunction were no

longer appropriate. The Trustees became able to make and prosecute claims in respect of action taken while the injunction was in place (although it was also open to the Trustees to assert a claim under the cross-undertaking in damages to the extent that the restrictions imposed by the injunction caused them loss by preventing them from taking action to reverse the Solid Dilution).

51. The freezing injunctions are each subject to a US$20 million limit. In light of the need for the undertakings to reflect, for the reasons I have given, the terms of the freezing injunctions, it seems to me that the Plaintiffs are right to say that their undertakings should also only require that their rights or assets with a value of US$20 million are retained and kept available to satisfy a judgment against the Plaintiff concerned. The undertakings would then require each Plaintiff to exercise all her rights and powers, held directly or indirectly, so as to ensure that no distributions or payments are made from the Pictet Account (and Solid's account with Pictet) if the effect of that distribution or payment would be to reduce below US$20 million the sums in the Pictet Account (and Solid's account with Pictet) available to pay and held to make distributions *to each of the Plaintiffs*. Since the Plaintiffs are entitled to 60.86% of the funds in the Pictet Account, the balance will need to remain at a level such that 60.86% of the sum in the account is at least US$20 million and it must be clear that the remaining balance is and will be available and can and will be used to make distributions to the Plaintiffs in this amount. I discuss in further detail below the precise formulation of the appropriate amendments to be made to the Plaintiffs' Undertakings and Further Undertakings.

The Plaintiffs would be entitled to have the freezing injunctions discharged and be released from the undertakings if they were able to pay into Court funds equal to the financial limit in the freezing injunctions in circumstances where there could be no challenge to the payment

52. In these circumstances, it seems to me that if US$20 million could currently and properly be withdrawn from the Pictet Account and placed on deposit with the Court (or with another reputable local bank in Cayman) then the Trustees' interests arising in these proceedings would be fully protected and the freezing injunctions could be discharged, and the Plaintiffs' Undertakings and Further Undertakings could be released. But in order to justify the discharge of the injunctions and the release of the undertakings, the funds placed on deposit must clearly belong to the Plaintiffs and the payment of those funds to

the Plaintiffs must be unimpeachable and incapable of challenge. That is not so in the present case.

53. The Curacao law evidence in my view indicates that distributions cannot at present properly be made by SFPF's directors. It appears to me that it is at least arguable that making distributions that would result in SFPF being unable to repay in full the dividend it received from Solid would be a breach of duty by SFPF's directors and result in the Plaintiffs as recipients of the funds being liable to repay the sums received, so that the US$20 million would be at risk and the security said to be provided to the Trustees in place of the freezing injunctions and the Plaintiffs' Undertakings and Further Undertakings would be qualified and potentially defeasible. This would unfairly and unacceptably prejudice the Trustees.

54. The position of SFPF and its directors, and the effect of SFPF making distributions of substantial or all amounts in the Pictet Account, as shown by the expert evidence appear to me to be as follows:

(a). while there are currently no proceedings on foot against SFPF, BGNIC asserts that the Solid Dilution (in particular, the issue of shares and the payment of the dividend to SFPF) was unlawful and that under applicable law it has a right to have the resolutions passed by the Solid board (or other corporate resolutions) to authorise and effect that share issue and dividend payment set aside.

(b). the Trustees' expert evidence confirms (see in [52]-[61] of the Bartman Report quoted above) that (i) if the investigator's report confirms that the Solid Dilution involved mismanagement by Solid's directors, BGNIC (and the Trustees) may apply for further relief from the Curacao Court (which has a wide discretion to grant appropriate relief) including the nullification of all corporate resolutions made by Solid (its management board, the supervisory board or the shareholders meeting) to effectuate the Solid Dilution (including the issue of shares to SFPF, the payment of the dividend to SFPF and the advance of the loan to the Second Plaintiff); (ii) if the Curacao Court makes an order nullifying these actions including the issue of shares to SFPF Solid would be entitled to recover the

dividend paid to SFPF from SFPF; (iii) since it is likely that the managing directors of SFPF know about BGNIC's claim and the challenge to the Solid Dilution, if the Curacao Court finds that Solid's management and shareholders acted improperly, (so as to justify a finding of mismanagement) it is likely that SFPF would be unable to claim damages from Solid; (iv) even though an inquiry proceeding has not yet been opened in respect of SFPF, the approval and payment of distributions by SFPF's directors in the current circumstances (when they are aware of BGNIC's assertion and claim that the Solid Dilution should be set aside and when the effect of making any payments will be to prevent SFPF from being able to discharge its liabilities to Solid in full) is likely to (and it is at least arguable that it would) constitute a breach of duty by them to SFPF (and to BGNIC and the Trustees as direct and indirect shareholders of Solid respectively) and (v) in such circumstances it is also likely (and at least arguable) that the directors would be liable to pay compensation to SFPF (and BGNIC and the Trustees).

(c). therefore, based on Professor Bartman's evidence, it is at least possible (and there may even be said to be a realistic prospect) that the Curacao Court will find mismanagement and make orders in due course setting aside the issue of shares and the payment of the dividend to SFPF; that if the Curacao Court does so, SFPF will be under an obligation to repay to Solid the US$99 million that it received and that the making and payment of distributions to SFPF's beneficiaries now and in the current circumstances, where SFPF's directors (and beneficiaries) are fully aware of the relevant facts and of BGNIC's claims, would constitute a breach of duty by those directors, exposing them to claims for compensation at least by SFPF and possibly also BGNIC and the Trustees.

(d). it appears that that if the Curacao Court makes a finding of mismanagement one of the final measures that it could order would be the replacement and reconstitution of Solid's boards so that Solid would once again come under the control of BGNIC (which would be reinstated as its sole shareholders). In that event, Solid's claim for repayment of the dividend would be effectively controlled by BGNIC and BGNIC would not need to make claims in its own right against SFPF. It is therefore no answer to the Trustees' claim that SFPF will become insolvent as a result of paying

away the funds in the Pictet Account that Solid will never bring a claim for repayment of the dividend.

(e). while the Plaintiffs and the Fifth Defendant are right to say that Professor Bartman did not go on to deal with the question of whether a recipient of distributions from SFPF made pursuant to a decision of SFPF's managing directors in breach of duty (to SFPF) might be liable to repay the sums received, it seems to me that his analysis must be taken at least to raise and leave open that possibility. Indeed, it is possible that a receipt-based claim in unjust enrichment might be governed by the law of the place where the receipt was received rather than Curacao law. In any event, while the evidence does not establish that the Plaintiffs would be liable to repay the distributions received by them, it does show that those involved in approving the distributions may well be liable and it seems to me that it shows that there could be a risk of such a liability. The Plaintiffs have certainly not shown that there is no possibility of such a liability. The Fifth Defendant argued that the Court should not fill in the gaps in the Trustees' evidence but the problem for the Plaintiffs is that they bear the burden of showing that their release from their undertakings is justified and will not unfairly prejudice the position and interests of the Trustees and in my view, they have failed to do so.

(f). Mr Cornegoor has challenged Professor Bartman's reasoning on these points. There is therefore a conflict of views as to applicable Curacao law on the affidavit evidence. While I am unable to make findings in relation to or definitively determine the issues in dispute (without cross-examination), I am satisfied that, for the purpose of deciding the Plaintiffs' application, Mr Cornegoor has failed to demonstrate that Professor Bartman's reasoning and conclusions are flawed, and satisfied that the Trustees have shown that it is at least arguable (and in my view there is a realistic prospect or real risk) that the payment of funds from the Pictet Account in the manner proposed by the Plaintiffs would be unlawful in the sense that it would involve a breach of duty to SFPF by SFPF's managing directors and might result in (or create a risk of) the Plaintiffs being liable to repay the sums received. I note that Professor Bartman is independent while Mr Cornegoor is not,

and it seems to me that I am entitled to and should therefore give Mr Cornegoor's views less weight.

(g). Mr Cornegoor accepted, as I have noted above, that under Curacao law SFPF's directors should refrain from making distributions if they knew or should know that making the distributions would result in SFPF becoming (would cause SFPF to become) unable to pay its debts (and that SFPF's board is required independently to assess the likelihood of an adverse outcome of the inquiry proceedings and, in the event of such outcome, the likelihood of a claim for refund of the dividend being awarded). Mr Cornegoor said it was insufficient that there was a "*mere possibility*" that the Curacao Court would subsequently set aside the issue of shares to SFPF (so that SFPF would be required to repay the dividend). It is Professor Bartman's evidence (not contradicted on this point by Mr Cornegoor) that the managing directors of SFPF have a duty to fulfil their tasks in a diligent and careful way and in performing his duty, each director must take into account the interests of all persons and entities involved with the corporation and ensure that these interests are not disproportionally or unnecessarily harmed when promoting the interests of the corporation. It seems to me that, on the facts as presented in the evidence, a managing director of SFPF acting diligently and carefully, and independently, would conclude that there is at least a real risk that the Curacao Court will find mismanagement and decide to annul the share issue and dividend payment to SFPF and of SFPF becoming liable to repay the dividend to Solid so that, even applying Mr Cornegoor's test, there is more than a mere possibility of such a liability accruing and the directors would be in breach of duty if they authorised the making of any distributions from the Pictet Account.

(h). Mr Cornegoor also challenged Professor Bartman's view that SFPF's board should, and is required to, take into account the interests of BGNIC and the Trustees and that BGNIC and the Trustees would be entitled to compensation if SFPF paid away the funds in the Pictet Account and the Curacao Court subsequently set aside and annulled the issue of shares to SFPF. But it seems to me that even if Mr Cornegoor is right on these points the core features of Professor Bartman's analysis remain sound. There is a real risk that SFPF will become liable to repay the dividend (in

connection with proceedings which are actively being pursued against Solid and in which there will shortly be an investigator's report followed, if there is a finding of mismanagement, by an application by BGNIC for final measures and a decision by the Curacao Court on such an application) and if the funds in the Pictet Account have been paid away it will be unable to do so. The managing directors are required at least to have regard to the interests of SFPF and Solid as the contingent or potential creditor so that there is no need to rely on or refer to the interests of, or separate claims to compensation by, BGNIC and the Trustees.

55. In my view, in these circumstances, it would not be right to permit the Plaintiffs to procure the withdrawal of funds from the Pictet Account up to the limits applicable to the freezing injunctions and then to discharge the freezing injunctions and release the Plaintiffs from their undertakings upon payment into Court (or into another deposit account approved by the Court) of the sums so withdrawn. In the first place, doing so would result in real prejudice to the Trustees. They would be required to accept in substitution for the freezing injunctions and the undertakings rights against a security deposit which had been created pursuant to potentially challengeable and arguably unlawful actions taken by SFPF in circumstances where there would be a risk that the Plaintiffs would become liable to repay the sums deposited. Putting the matter colloquially, the Trustees would be required to accept rights in respect of tainted funds. I do not consider that such prejudice and risk can be justified. In the second place, I do not consider that the Court should permit the discharge of its orders when the transactions which are said to justify the discharge and result in there no longer being a need for the relief previously granted are arguably unlawful and the result of a breach of duty by the directors of the paying party. The security offered in place of the injunctions is an inadequate and less reliable replacement and the Court should not condone, albeit only indirectly, conduct which, on the evidence before the Court, could reasonably be said to involve breaches of duty and of applicable foreign law.

56. The position would clearly be different if the Plaintiffs were proposing and able to deposit with the Court (or in another suitable account) the full amount covered by the freezing injunctions paid from an unimpeachable source, so there would be no risk of the sums

credited to the account being tainted or of the validity and funding of the account being challenged. But this is not what the Plaintiffs are proposing.

Applying the financial limit in the freezing injunctions to the Plaintiffs Undertakings and Further Undertakings

57. Accordingly, I shall dismiss the Plaintiffs' application for the discharge of the freezing injunctions and the release of the Plaintiffs' Undertakings and Further Undertakings (upon the payment into Court of US$20 million from the Pictet Account).

58. However, as I have already indicated, I accept that these undertakings should now be varied to make them subject to the same financial limit as the freezing injunctions. The issue that arises is how such a limit should be formulated and applied. It seems to me that there is no justification (in these proceedings) for restraining withdrawals from the Pictet accounts for the purpose of making properly authorised and lawful distributions to beneficiaries provided that (a) the first US$20 million is paid to the Plaintiffs (for the purpose of depositing that sum with the Court on terms approved by the Court) or (b) if distributions are paid to a beneficiary other than the Plaintiffs, following the making of such a distribution and withdrawal, (i) the Plaintiffs remain entitled to distributions, and there will be sufficient funds retained to allow distributions to be made to the Plaintiffs subsequently, in an amount of at least US$20 million and (ii) the distribution and withdrawal does not adversely affect or prejudice the Plaintiffs' rights to be paid distributions of at least US$20 million or prevent SFPF or Solid making, or make it less likely that SFPF or Solid will make, distributions to the Plaintiffs in such an amount.

59. Now I have already held that as matters currently stand, SFPF is to be treated (for the purpose of these proceedings) as not being entitled to make distributions to beneficiaries so that the first condition I have identified (the requirement that any distributions would have to be properly authorised and lawful) is not currently satisfied. Furthermore, it seems to me that during any period in which Solid is subject to a court order made by a competent court restraining it from making distributions the sums held by Solid in its account with Pictet would need to be ignored for the purpose of calculating the US$20 million sum. Accordingly, for so long as the Curacao Court's order restraining Solid from making any distributions or payments remains in force, withdrawals could only be

permitted by SFPF (assuming it became lawful for the SFPF managing directors to authorise distributions because for example the investigator and the Curacao Court decide that there was no mismanagement by Solid's directors) if the US$20 million requirement were satisfied taking into account and having regard only to the sums in the Pictet Account. As I have noted above, since the Plaintiffs are currently entitled to 60.86% of the funds in the Pictet Account, the balance will at least need to remain at a level such that 60.86% of the sum in the account is at least US$20 million and it must be clear that the remaining balance is and will be available and can and will be used to make distributions to the Plaintiffs in at least this amount.

60. I appreciate that an amendment to the Plaintiffs' Undertakings and Further Undertakings in the manner I have described does not provide immediate or practical assistance to the Plaintiffs or the Fifth Defendant since I have concluded that the amendment must be based on the assumption that SFPF cannot properly make distributions at present (and until the outcome of BGNIC's claim in relation to Solid is known and then, if the Curacao Court decides that there was mismanagement and to annul the issue of shares to SFPF, a claim by Solid in respect of the dividend has been resolved – or a material change in circumstances which justifies the SFPF managing directors forming a different view as to the risk of SFPF being liable to repay the dividend), and because distributions currently cannot be made by Solid in view of the order made by the Curacao Court. But if and when the position in the Curacao proceedings changes (for example if the Curacao Court finally decides that there has been no mismanagement or to discharge its order prohibiting Solid from making distributions) then the restrictions imposed by the Plaintiffs' Undertakings and Further Undertakings will operate only to provide proper protection to the Trustees in respect of the claim remaining in these proceedings, namely their claim under the cross-undertaking in damages. The Plaintiffs will be able to procure that the funds in the Pictet accounts be withdrawn to pay distributions if they (as they have now sought to do) ensure that they are paid US$20 million and pay that sum into Court (or another account) on terms approved by the Court or to facilitate and permit distributions and payments to be made to other beneficiaries provided that sufficient funds will be retained to ensure that the Plaintiffs will be paid at least US$20 million.

The Receivers

61. In these circumstances, since the Plaintiffs' Undertakings and Further Undertakings will continue albeit on a modified basis, I see no justification for removing the Receivers. Their role following the Judgment and the Order has been to ensure compliance with these undertakings and that role remains. However, the terms of their appointment will need to ensure that they be required to permit withdrawals from the Pictet accounts to the extent that such withdrawals are permitted by the Plaintiffs' Undertakings and Further Undertakings.

The limits in the two freezing injunctions

62. In the Judgment (see [27]) I said that each of the freezing injunctions would be subject to a requirement that the Plaintiff concerned retain and not deal with assets of a value of US$20 million and that I did not consider it appropriate to attach a limit of US$10 million to each injunction but that both Plaintiffs should have liberty to apply to amend and reduce their separate and independent limits of US$20 million if they could show that they together had assets subject to the freezing injunctions which have a value of at least US$20 million. The point being that until satisfactory evidence as to the free assets of each Plaintiff had been adduced it would be wrong to reduce the limit of each below the US$20 million figure (for example to limit each freezing injunction to US$10 million since it was possible that the First Plaintiff had assets of US$15 million while the Second Plaintiff had assets with a value of only US$5 million).

63. By [4] of each of the freezing injunctions, as I have already noted, each Plaintiff is restrained from exercising any rights she has (or claims or purports to have) in respect of the assets of SFPF and/or Solid in a manner that prevents such rights (or funds or assets derived from any such rights) being available to the Trustees to satisfy a judgment of this Court. This prohibition is and must be understood as being subject to the overall US$20 million limit established by [17] of the Order and by [2] of each of the freezing injunctions. By [5] of each of the freezing injunctions this prohibition is treated as including the sums credited to the Pictet Account and Solid's account with Pictet insofar

as they are under the direct or indirect control of the relevant Plaintiff. Once again, [5] is subject to that US$20 million.

64. At present, save for their rights as beneficiaries of SFPF (and possibly rights in respect of sums held by Solid in its account with Pictet) the Plaintiffs have not identified any assets which they own (or the value of any assets) so the Court cannot be satisfied that the limit applicable to the freezing injunction for one of the Plaintiffs can be reduced because the other Plaintiff has established that she owns particular assets of a defined and established value and location. To ensure, in the absence of verified details of each of the Plaintiffs' assets, that the freezing injunctions can bite on assets up to a value of US$20 million, it is necessary that each of the Plaintiffs be required to maintain assets with a value of US$20 million.

65. This is subject to two qualifications. First, if the Plaintiffs wish a proviso may be added to each injunction to state that the limit in each injunction will be reduced by any sum paid into Court (on terms approved by the Court) by either of the Plaintiffs to stand as security for the Plaintiffs' liabilities under their cross-undertaking in damages. Secondly, the freezing injunctions should stipulate that for the avoidance of doubt they do not prohibit the Plaintiffs from acting in a manner permitted by the Plaintiffs' Undertakings and Further Undertakings.

Preparation of a draft order and consequentials

66. I shall invite counsel for the parties to prepare and seek to agree a form of order and amendments to the freezing injunctions and the Plaintiffs' Undertakings and Further Undertakings to give effect to this judgment. If they are unable to reach agreement, they should file a form of order identifying which provisions are agreed and the points in dispute with brief submissions setting out their respective positions and I shall then settle the order on the papers. The draft order should also address the issue of costs and any other consequential matters.

Postscript

67. The draft of this judgment was distributed to the parties' attorneys on 21 November 2023. On 27 November 2023 the Plaintiffs' attorneys wrote to the Court and indicated that there were aspects of the judgment on which they would appreciate clarification and requested permission to file a note of such requests by 1 December 2023 and that the draft judgment not be handed down until these requests had been filed and considered. The Fifth Defendant made a similar request on 27 November 2023. I gave both the Plaintiffs and the Fifth Defendant permission to file such requests for clarification on the basis that the Trustees would have the opportunity to file submissions in response. The Plaintiffs and the Fifth Defendant filed on 1 December 2023 written notes setting out their respective requests and the Trustees filed their written response on 8 December 2023.

68. I have concluded that at least some of these requests for clarification merit a response and that the most appropriate way to do so is to provide a summary of my conclusions and reasoning and to provide some further guidance as to the manner in which the Plaintiffs' Undertakings and Further Undertakings (which I shall now just refer to as the ***Undertakings***) should be amended in order to give effect to those conclusions. I also deal with the issue of the adequacy of the Trustees' evidence concerning the financial resources available to back and support their cross-undertaking in respect of the freezing orders.

69. The summary of my conclusions and reasoning is as follows:

    (a). the Plaintiffs apply to have the freezing injunctions and their Undertakings varied (i) so as to be permitted to exercise their rights and powers as beneficiaries of (and such other rights and powers as they may have in relation to) SFPF in order to procure and arrange for the distribution to them by SFPF (out of the Pictet Account) of US$20 million (to be paid by them into Court or in another account in this jurisdiction approved by the Court to be held pending the outcome of the Trustees' claim, and to be available to discharge any liability the Plaintiffs are held to owe, under their cross-undertaking in damages) and (ii) so that upon the funds being so deposited and the terms of the deposit being agreed or ordered by the Court, the

Undertakings and freezing injunctions would be discharged and the appointment of the Receivers terminated.

(b). the Plaintiffs also and in any event seek an amendment to the Undertakings to align them with the ambit of the freezing injunctions.

(c). the Plaintiffs bear the burden of showing that the variations (and the discharge) they seek are, in all the circumstances, and having regard to the position, rights and interests of the parties, justified and appropriate (see [54(e)] above).

(d). in my view, the Plaintiffs have shown that a variation of the Undertakings to align them to the freezing injunctions is justified but have not shown that a variation to permit them to exercise their rights and powers to procure that SFPF makes the proposed distributions is currently justified and appropriate.

(e). the Undertakings are ancillary to the freezing injunctions. They were originally given by (and with the agreement of) the Plaintiffs in order to obtain the proprietary injunction and so as to protect the Trustees from the consequences of the granting of that injunction. I have held that they remain in place pending the outcome of the Trustees' claim under the cross-undertaking (having regard to their terms and purpose and in light of my decision that freezing injunctions were justified). They now protect the Trustees by restraining dealings by the Plaintiffs with their rights (their assets) relating to SFPF. The Undertakings require the Plaintiffs to exercise those rights to preserve the assets of SFPF which they are entitled (or may be entitled) to have distributed to them (or to direct be distributed to others). They thereby achieve the same effect as the freezing injunctions but only in relation to a sub-set of the Plaintiffs' assets.

(f). they also provide the Trustees with additional protection. The protection provided by the Undertakings is enhanced by the previous and continuing appointment of the Receivers. Their appointment was necessary to fortify the Undertakings and ensure that the Undertakings were complied with. The appointment was made on the basis that the Plaintiffs had a right to be paid out of, or could procure or direct

the payment to themselves or others of, the funds held by SFPF (and Solid). The Receivers' role was to police the Undertakings by ensuring that payments could only be made out of the Pictet Account (and Solid's account with Pictet) consistently with the Undertakings. The Plaintiffs have never applied to challenge the Court's jurisdiction to appoint the Receivers.

(g). the Undertakings only regulate and apply to the Plaintiffs' rights. They have agreed to exercise their rights to prevent any distributions or payments out of the Pictet Account (and Solid's account with Pictet) (see [47] above). There is no restraint on the rights or property of third parties. The freezing injunctions do not restrain and are not addressed to (nor have undertakings been given by or required from) any third party (NCAD) so that no issue arises as to whether the injunctions (or the Undertakings) are granted (or given) in accordance with the proper scope of the *Chabra* jurisdiction as explained by *Algosaibi*.

(h). I accept, however, that the appointment of the Receivers goes further since they have been appointed in respect of the Pictet Account (and Solid's account with Pictet). The Receivers have been added to the mandate of these accounts. This, I also accept, is unusual. They have become parties to the banking contract between Pictet and SFPF (and Solid) and to that extent they have rights that relate to an asset of SFPF (and Solid) and their appointment has the effect of qualifying the exercise of some of SFPF's (and Solid's) rights in respect of the Pictet accounts. But their appointment is only for the purpose of ensuring that the Plaintiffs comply with their Undertakings. As I have said, their role is to police and ensure compliance with the Undertakings.

(i). prior to the discharge of the proprietary injunction, the Undertakings were intended to ensure that the Plaintiffs exercised all their rights (direct and indirect, in circumstances where it was alleged and there was evidence to show that they controlled SFPF) with a view to procuring that the funds in the Pictet Account (and Solid's account with Pictet) were retained and that no withdrawals were made so as to protect the Trustees' rights (restrained by the proprietary injunction) to take action to challenge the Solid Dilution once it was established that they owned the

share in BH06. After the discharge of the proprietary injunction, while the juridical position has changed (the Receivers' appointment supports freezing injunctions and the interests of the Trustees as claimants rather than being necessary to avoid prejudice to the Trustees as defendants subject to a proprietary injunction), the Receivers' role remains to police and ensure compliance with the Undertakings, but the Undertakings now have a more limited role as they are only required to protect the Trustees' ability to enforce any judgment against the Plaintiffs in respect of the cross-undertaking.

(j). insofar as the Receivers' appointment affects the rights of SFPF (and Solid), it seems to me that it was and remains permissible to do so since, as I have said, it was and remains necessary (in unusual circumstances) to ensure compliance with the Plaintiffs' obligations and to protect the Trustees. While the Receivers have powers (effectively negative control) in relation to the Pictet accounts, the powers are to be exercised (under the supervision of the Court) by reference to and so as to ensure compliance with the Plaintiffs' obligations, which obligations in turn relate to the Plaintiffs' rights. The Receivers are only to exercise their powers in order to ensure that the Plaintiffs' rights to have assets distributed to them are preserved and protected.

(k). it seems to me that the relief granted to the Trustees by maintaining (and requiring the maintenance of) the Undertakings (and the appointment of the Receivers) is consistent with the scope of the Court's jurisdiction to grant interim freezing relief as explained by *Algosaibi* because a process of enforcement would be available to the Trustees (in respect of a judgment for sums owing under the cross-undertaking in damages) which would give the Trustees access to the funds in the Pictet Account (and Solid's account with Pictet). The Trustees could obtain an order from this Court requiring the Plaintiffs to exercise and enforce their right to a distribution from SFPF.

(l). it is well settled that a freezing injunction may be granted for the prevention of the unjustified dissipation of assets outside the jurisdiction and that special care must be taken to ensure that such an injunction does not infringe the jurisdiction of the

countries in which such assets are held and the position of non-parties to the proceedings are properly protected. I have, as the parties have noted, repeatedly expressed concerns about ensuring that comity and the jurisdiction of the Curacao Courts are respected. This is why the standard form of freezing injunction contains both a *Babanaft* (see *Babanaft v Bassatne* [1990] Ch 13) and a *Baltic* (see *Baltic Shipping v Translink* [1995] 1 Lloyd's Rep 673) proviso, and why the freezing injunctions in this case contain such provisos (see paragraphs 17-19). These provisos ensure that the position of the directors of SFPF are protected (and no application has been made to amend or extend the protections therein provided).

(m). in these circumstances and for the reasons I have given, the Undertakings should therefore reflect the terms of and be consistent with the freezing injunctions, in particular the term that provides that only assets with a monetary value of US$20 million are affected and must be preserved pending the outcome of the Trustees' claims (see [48] and [64] above). The freezing injunctions apply only to assets of the Plaintiffs up to that value because (as I have held) that is the limit of the protection to which the Trustees are entitled, having regard to the nature and likely outcome of their claim under the cross-undertaking. The scope of the Undertakings should be similarly limited.

(n). but the position is complicated because the funds in the Pictet Account are not held just for the Plaintiffs, there is no segregated part of those funds which are held for the Plaintiffs and importantly the Plaintiffs' entitlement to a distribution is not absolutely fixed and vested (because of the nature of the Plaintiffs' interest in relation to a Curacao foundation and because the Plaintiffs and the other beneficiaries have shown that they are able to and will amend the terms of SFPF's articles and the rights, and membership of the class, of beneficiaries when it suits them to do so).

(o). if the Plaintiffs were able to procure an immediate distribution from SFPF of US$20 million and if such a distribution could lawfully and properly be made by SFPF, as the Plaintiffs contemplate, then I accept that such sum could be placed on deposit in this jurisdiction (on terms that required the funds to be held and not

withdrawn until the Trustees' claims under the cross-undertaking had been determined) and there would no longer be any need or justification for the Undertakings or the freezing injunctions (paragraph 9(1) of the freezing injunctions already provides that the freezing injunctions cease to have effect if the Plaintiffs each pay US$20 million into Court).

(p). however, the evidence shows that the US$20 million cannot at this point lawfully be distributed and paid to the Plaintiffs. The Curacao law evidence indicates that (as a matter of Curacao law) it is at least arguable that currently SFPF's directors cannot properly authorise the making of distributions to the Plaintiffs in the sum of US$20 million (or distributions to other beneficiaries). This is because it is at least arguable that under applicable Curacao law authorising the making of distributions (and causing SFPF to make distributions) that would result in SFPF being unable to repay in full the dividend it received from Solid which would be a breach of duty by SFPF's directors. A distribution by SFPF of US$20 million to the Plaintiffs (out of the Pictet Account) would arguably involve such a breach of duty. Therefore, it cannot be said that such a distribution would be properly authorised.

(q). permitting the Plaintiffs to exercise their rights to procure such a distribution to themselves of US$20 million (and the distribution of the balance of the funds to the other beneficiaries) would in my view result in an unacceptable level of risk and prejudice to the Trustees. The Plaintiffs' only rights derived from the SFPF funds (against which the Trustees could enforce a judgment) would then relate to the funds deposited in a bank account pursuant to a payment which was (arguably) made in breach of duty by SFPF's directors. The Plaintiffs have not established that they (and the deposited funds) will be free of any claim under Curacao law by SFPF (or Solid) where the payment was made to them by SFPF when SFPF's directors were acting in breach of duty and where the Plaintiffs were fully aware of and procured the breach of duty. I accept that the Curacao law evidence does not spell out and deal with all the consequences of a payment made in breach of duty by SFPF's directors, but it at least leaves open the risk of a claim under Curacao law against the Plaintiffs which could require them to repay and put at risk the funds held on deposit. Furthermore, and it is at least arguable that SFPF (or Solid) might

have receipt-based claims governed by Cayman Islands law against the Plaintiffs (and in respect of the funds) in these circumstances. It seems to me that, balancing the risks of material prejudice to the Trustees and the Plaintiffs, it would not be justifiable in these circumstances to vary the Undertakings to permit the Plaintiffs to procure the withdrawal of the US$20 million, in the manner they contemplate.

(r). I accept that my ruling on the applicable Curacao law is qualified because the expert evidence is disputed and has not been tested by cross-examination. Indeed, the Plaintiffs have not even adduced evidence on Curacao law from an independent expert. But there has been no application for an order for the cross-examination of the experts and I have had to decide the application on the basis of the evidence before me.

(s). for the future, it seems to me that the Undertakings can and should be varied to add a proviso to the effect that (subject to any further order of the Court) the Plaintiffs may exercise their rights and powers (in relation to Solid and SFPF) to procure or permit the making of a distribution to themselves of US$20 million (for the sole purpose of paying the funds into Court, or into another account in this jurisdiction, on terms approved by the Court to be held pending the outcome of the Trustees' claim, and to be available to discharge any liability the Plaintiffs are held to owe, under their cross-undertaking in damages) and that upon the funds being so deposited the Undertakings and freezing injunctions would be discharged and the appointment of the Receivers terminated, subject to the Plaintiffs showing that the making of such a distribution would be lawful and properly authorised (and will not give rise to or involve under Curacao or any other applicable law a breach of duty to SFPF owed by its directors or by SFPF or the directors to any third party). It seems to me (subject to hearing any further submissions that the parties may wish to make on this, since I have not previously floated or suggested this mechanism before) that it might well be acceptable and appropriate to add that this condition could be satisfied by the Plaintiffs by their filing (at least 21 days before any distributions were made) an affidavit *by a suitably qualified and independent* person confirming that after making reasonable inquiries in their opinion the distribution would be properly authorised and not be unlawful (and not give rise to

or involve a breach of duty of the kind I have described). The Trustees (and any other party) could be given leave to apply for an order that despite the filing of such an affidavit the Plaintiffs not be permitted to procure or authorise the proposed distribution.

(t). the question then arises as to whether the Plaintiffs should also be permitted to procure or permit that before such a distribution of US$20 million was made to themselves, they should be allowed to procure or permit distributions to be made by SFPF to other beneficiaries provided that sufficient funds would be retained to ensure that at least US$20 million would be available for distribution to the Plaintiffs. It seems to me that before SFPF distributes sums to other beneficiaries it must be clear that the position of the Trustees will not be materially prejudiced. There would be clear prejudice if the Plaintiffs were able to exercise their rights to procure or permit the distribution of funds from the Pictet Account to other beneficiaries in a manner which would result in SFPF being unable (or materially less likely) to distribute US$20 million to the Plaintiffs or which would materially prejudice the Plaintiffs' rights to or prospects of obtaining a distribution of US$20 million from SFPF.

(u). if it was settled that the Plaintiffs had a fixed and unalterable (and vested) entitlement to 60.86% of the funds held by SFPF (and in the Pictet Account) it would be appropriate to vary the Undertakings to permit the Plaintiffs to exercise their rights to procure or permit distributions by SFPF provided that at least US$32,862,307 (being the sum of which 60.86% is US$20 million) was retained. But that does not appear currently to be the position. As I have said, whatever the current terms of SFPF's articles may be, the evidence shows that they can be and have been amended to improve the position of the Plaintiffs and the other beneficiaries to the prejudice of the Trustees. The position would, I think, be different, if the Plaintiffs also undertook not to agree to any variation of their rights and not to exercise their rights as beneficiaries to procure or permit that their share (and entitlement to a 60.86% share) was reduced or adversely affected (and probably if the other beneficiaries also agreed at least with the Plaintiffs, that the Plaintiffs' share would not be reduced or adversely affected).

(v). the proviso to the Undertakings that would permit such distributions to be made would also need to require that the Plaintiffs, once again, establish that any such distributions would be lawful and authorised (and not give rise to or involve a breach of duty of the kind I have identified). It seems to me, at least as presently advised, that a distribution to other beneficiaries which was made in breach of duty by the directors of SFPF (or otherwise unlawfully) would raise serious issues and concerns as to the effect and impact on the rights of the Plaintiffs (and thereby on the Trustees) of a subsequent challenge to the distributions (recognising of course that the Trustees do not have and that the Undertakings and the freezing injunctions are not intended to give them rights in or to the funds in the Pictet Account). For example, if substantial sums were distributed to other beneficiaries and paid away unlawfully or in breach of duty by SFPF's directors leaving only US$32,862,307 held in the Pictet Account, such that Solid would have a claim against SFPF and its directors (and possibly those who procured the distribution), if the funds could not be recovered from the beneficiaries who had received them, SFPF may cease to be able to distribute at least US$20 million to the Plaintiffs. I am not suggesting that the Court can or should determine the Plaintiffs' application based on or by reference to speculation as to the nature and extent of the potential prejudice to the Trustees flowing from such further and future distributions; rather that the evidence on Curacao law indicates that it is at least arguable that the Trustees would be put at risk, and their position worsened, if such distributions were unconditionally permitted when it was at least arguable that they were unlawful and made in breach of duty and that in order to protect the Trustees it will be necessary to include the lawful and authorised condition. Once again, subject to any further submissions that the parties may wish to make, it seems to me that it might well be acceptable and appropriate to add that this condition could be satisfied by the Plaintiffs by their filing of an affidavit by a suitably qualified and independent person on the same basis as I have already described in relation to proposed distributions to the Plaintiffs.

(w). I do not consider that the Undertakings (or the freezing injunctions) should prohibit the Plaintiffs from exercising their rights to procure or permit the payment by SFPF

(or Solid) of ordinary business expenses within reasonable limits (such expenses are obviously not distributions to beneficiaries). This would include the payment of fees of the Curacao investigator. This is already at least within the spirit of paragraph 8 of the freezing injunctions which stipulates that the freezing injunctions do not prohibit the Plaintiffs from dealing with or disposing of any of their assets in the ordinary and proper course of business subject to the requirement that before doing so they must tell the Trustees' attorneys.

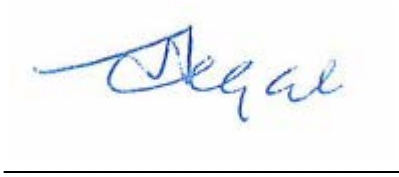
70. The Plaintiffs and the Fifth Defendant have reiterated their concerns regarding the scope of, and the adequacy of the Trustees' evidence of their financial resources available to back, the cross-undertaking in damages. The scope of the cross-undertaking appears to me to be satisfactory. It is unqualified. The First, Third and Ninth Plaintiffs (defined as the Trustees in the last recital to the Order) have unconditionally and without qualification undertaken that "*If the Court later finds that this order has caused loss to the [Plaintiffs] and decides that the [Plaintiffs] should be compensated for that loss, the Trustees will comply with any order the Court may make*." I can however see that some uncertainties remain regarding the evidence of the assets available to the Trustees to discharge their liability under the cross-undertaking. In Naeff 11, Mr Naeff had simply said (at [68]]) that "*Once the Proprietary Injunction has been discharged there will be assets in the Trust structure (even after the Funder has been paid the Resolution Amount under the LFA) to meet any liability that the Trustees might reasonably be found to have to the Plaintiffs or either of them in such regard*." The Fifth Defendant has noted that at the June hearing I had inquired as to the impact of the Swiss freezing order over the assets of BHO6 and BGNIC at the EFG Bank upon the Trustees' ability to give a cross-undertaking and that it had been suggested by the Trustees that the assets of the Ypresto Trust could be used to secure the cross-undertaking. However, the Fifth Defendant in her Twenty Second Affidavit at [19], sworn on 11 September 2023, said that as she understood it the trustees of the Ypresto Trusts had not resolved to assume any liability in respect of the cross-undertaking (and that the third trustee, Global, would not permit this to be done) and that it appeared that the Trustees as trustees of the Lake Cauma Trust and the Citizens Trust do not have access to assets to meet their liabilities under the cross-undertaking since they have said (to someone not identified) that they are unable to repay sums owing in respect of liabilities to the Ypresto Trust due to lack of resources.

71. It does seem to me that, while the Trustees are right that technically the issue of the adequacy of their cross-undertaking was not raised by the Summons, it was an issue raised at the June hearing and not finally resolved. The Trustees' evidence as to their assets and which trust and other assets they have available and will look to in order to meet and discharge any liability under the cross-undertaking is thin and limited and genuine questions have been raised as to the Trustees' available financial resources. In my view the Trustees' evidence as to this needs to be expanded so that the Plaintiffs in particular can understand, at least in general terms, what backing is available for the undertaking. However, the starting point seems to me that the Fifth Defendant needs to file a further affidavit explaining more precisely as to the nature and basis for her concerns and the issues she has raised. To date the description and explanation has been too cryptic. Thereafter the Trustees should file further evidence as to their financial means to show that they have resources available to meet what may reasonably be expected to be any liability under the cross-undertaking. I shall invite the parties to agree the timetable for the filing of this further evidence and if they are unable to do so within fourteen days of the handing down of this judgment, they should inform the Court of their respective positions and I shall give appropriate directions.

72. I hope that counsel are now able to comply with the request made at [66] above to discuss and prepare a draft of suitable form of order to give effect to this judgment and to make the requisite amendments to the Undertakings and freezing injunctions (and to deal with consequential matters such as costs). I have noted above that I would give the parties the opportunity to make further submissions on my suggested drafting of and mechanism for dealing with the satisfaction of the proposed condition to the exercise of the Plaintiffs' rights and powers to procure the making of distributions by SFPF (to the Plaintiffs to fund a deposit account in this jurisdiction of US$20 million or to other beneficiaries subject to a minimum sum being retained) and I suggest that this is done by the parties filing a form of draft order and amendments identifying the terms which are agreed and those not agreed and proposed by each party with a brief written explanation of the position of each party. I appreciate that the formulation and drafting of the necessary amendments is not straightforward and may take some consideration by and discussion among the parties. I would therefore propose that the draft order and amendments with

any necessary written submissions be filed within 21 days of the handing down of this judgment or on such later date as the parties may agree (or the Court may order).

73. I should make it clear that while I have proposed a mechanism that would allow the Plaintiffs in future to file and rely on affidavit evidence from a suitably independent and qualified person to show that a proposed distribution was lawful and properly authorised (subject to the Trustees and other parties having liberty to apply to challenge the sufficiency and correctness of that evidence), I do not regard that mechanism, even if agreed or ordered, to be available to be used for making the distributions which the Plaintiffs have sought permission to make pursuant to the Summons absent a relevant change of circumstances (the mechanism cannot be used to circumvent the dismissal of the Plaintiffs' application).



The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
19 January 2024