THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CV2013-01623

BETWEEN

EMILE PETER ELIAS
(personally and in his capacity as Legal Personal Representative of the Estate of Angela Elias, deceased)

CLAIMANT

AND

(1) JOSEPH ELIAS
(personally and in his capacity as trustee of the trusts of the will dated 8th April 1982 of Linda Elias, deceased, and also in his capacity as executor of the will dated 12th November 1983 of Nagib Elias, deceased)

(2) INEZ MATOUK

(3) GEORGE ELIAS

(4) LILY ABOUD

(5) ROBERT ELIAS

(6) MICHAEL ELIAS
(in his capacity as Legal Personal Representative of the Estate of Michel Elias, deceased)

DEFENDANTS

Before the Honourable Madame Justice Quinlan-Williams

Date of Delivery: Judgment delivered on the 12th day of March, 2019

Appearances: Mr. Alvin K. Fitzpatrick S.C. leading Mr. Jason K. Mootoo instructed by Mr. Adrian Byrne for the Claimant.
Ms. Deborah Peake S.C. leading Mr. Kerwyn Garcia instructed by Mr. Samuel Harrison for the Defendant.

JUDGMENT

1. This court was called upon to determine three broad issues. Firstly, whether the first defendant dishonestly or fraudulently breached his fiduciary duties as legal personal representative of Nagib Elias' estate in furtherance of the interest of his children, Barry and Melissa Elias, and is therefore liable for equitable or other damages. Secondly, whether the first defendant has conducted himself in a manner that is disqualifying and he should therefore be removed as Trustee of the Trust created by Linda Elias' Will and the Trust Fund distributed to some or all the beneficiaries. Thirdly, should the claimant's claim fail as a result of the general defences pleaded by the first defendant.

Evidence Relating to the Main Issues.

2. There is agreement between the claimant and the first defendant on the background to this claim. The instant claim was commenced 29 years after the deaths of the parents of the parties, Nagib Elias ("Nagib") and Linda Elias ("Linda"). Both Nagib and Linda died in 1984. This is the latest litigation that has beset this Elias family relating to Nagib's and Linda's estate. The length of this judgment is not necessarily a reflection of the complexity of the law, but rather the regurgitating of the history to contextualize the issues and the courts' findings.

3. Probate of Linda's Will was granted to the first defendant Joseph Elias ("Joseph") and one Robert Matouk (now deceased) on the 25th September 1984. By the residuary clause of Linda's last Will and Testament dated 8th

April 1982, she empowered Joseph to use his discretion in the distribution of the residue of her estate as follows:

> "I direct that all the rest and remainder or residue of my estate real and personal whatsoever and wheresoever be handed over to my son, Joseph Elias, who will use the same at his own discretion to assist those who are in need and for the sole purposes of family use as has been discussed between us."

4. By Originating Summons No. 2045 of 1990 the claimant Emile Elias ("Emile") sought the court's determination whether upon a true construction of the residuary clause in Linda's Will, a valid Trust was created with Joseph as the Trustee thereof. Mr. Justice Razack delivered the judgment dated 2nd February 1993. He held that the said residuary clause did in fact create a valid Trust comprising the residue of Linda's real and personal property ("the Trust Fund"), that Joseph is the Trustee of the Trust Fund, that the Trust Fund was to be handed over to Joseph as Trustee and he is required to use the same at his discretion to assist those children of Linda who are in need.

5. On the 4th March 1993, Emile filed Civil Appeal No. 31 of 1993 against the aforementioned judgment to the Court of Appeal, but to date that appeal has not been pursued or withdrawn.

6. By High Court Action CV2012-02873 *Emile Elias and Inez Matouk v Joseph Elias*, Emile and Inez sought certain reliefs against Joseph including an inquiry as to the property comprising the Trust Fund, an account of the Trust Fund and Joseph's dealing thereof and disclosure of all bank documents which related to any money included in the Trust Fund.

7. Subsequently, Joseph issued High Court Action CV2012-04286 *Joseph Elias v Emile Elias, Inez Matouk, Lilly Aboud and Robert Elias* seeking the court's assistance in the determination of certain questions that had arisen in the

administration of the Trust Fund. Judgment was delivered on the 17th February 2014, in both CV2012-02873 and CV2012-04286. Justice des Vignes (as he then was) ruled that Linda's residuary estate would remain in the hands and under the control of Joseph as Trustee of the Trust Fund, entitled to exercise his discretion to assist those in need, until the Trust came to an end. Upon the Trust coming to an end, the court instructed that the Trust property would be distributed among all Linda's children including the personal representatives of any child who died prior to the Trust coming to an end.

8. Justice des Vignes also ordered that Joseph render accounts to all the beneficiaries in relation to the Trust Fund from the date of the Grant of Probate, the 25th September 1984, to the date of the order. The order included that there be disclosure to the court for inspection of all the Trust documents in Joseph's possession.

9. In relation to Nagib's estate, at the time of his death he was seised and possessed of property in various parts of Lebanon including sixteen (16) properties in Amioun, one (1) property in El Mina and two (2) properties in Tripoli. Nagib also had cash in banks and/or financial institutions in Lebanon including the Bank of Nova Scotia, Beirut, Lebanon. Together all these assets will be referred to as "the Lebanese Assets". None of the Lebanese Assets were the subject of specific bequests in Nagib's Will and consequently fell into the residue of Nagib's estate. There has been no challenge to the composition of the residue of Nagib's estate in the courts in Trinidad and Tobago.

10. Probate of Nagib's Will was granted to Joseph and Robert Elias ("Robert"). By the residuary clause of Nagib's last Will and Testament dated 12th

November 1983, the residue of his estate was to be distributed between Joseph's two children as follows:

> "As to all the rest remainder or residue of my estate real and personal whatsoever and wheresoever I give devise and bequeath as follows:
>
> i. Unto BARRY JOSEPH ELIAS (son of Joseph Elias), seventy-five per cent (75%), absolutely and
>
> ii. Unto MELISSA ELIAS (daughter of Joseph Elias), the remaining twenty-five per cent (25%), absolutely."

11. In order to obtain the Grant of Probate for Nagib's Will, Joseph and Robert filed High Court Proceedings No. 5234 of 1985 for the pronouncement of the form and validity of the said Will. This followed the filing of a caveat by Michel Elias (now deceased) raising issues of forgery, lack of testamentary capacity, want of due execution, lack of knowledge and approval. On the 31st October 1989 Michel Elias and the third defendant among others entered into a Deed of Compromise and Settlement with the first and fifth defendants whereby the former parties agreed and declared Nagib's Will valid and genuine. On the 31st July 1995 Mr. Justice Crane in his judgment held that the Will was valid. By Civil Appeal No. 138 of 1995 Emile appealed the judgment of Mr. Justice Crane. This appeal was subsequently dismissed on the 2nd November 1998.

12. After receiving advice from his local attorneys, in or about May 1996, Joseph retained Mr. Maroun Tabet as his lawyer to advise him on the resealing of the Grant of Probate in Lebanon. In light of the High Court proceedings and pending appeal in Trinidad, Mr. Tabet asked if each child of Nagib would be prepared to sign a document accepting Nagib's Will as genuine. After Joseph's discussions with his siblings, in or around the year 1997, Angela Elias ("Angela"), Joseph, George Elias ("George"), Lily Elias ("Lily") and Robert all signed documents appointing Joseph and Robert to

be their representatives in Lebanon in any legal dispute or objection regarding Nagib's Will, to appoint lawyers in Lebanon and to sign all that is requested and required by Lebanese Law in matters relating to Nagib's Will ("the Authorisation"). The claimant and Inez did not sign the Authorisation.

13. By Power of Attorney made on the 3rd December 1998, Joseph and the fifth defendant acting in their capacities as executors and trustees of Nagib's Will and pursuant to the Authorisations given to them appointed Maroun Tabet, Nehme Harb, Kamil Diyab and Fadi P. Kassini ("the Agents") as joint and several attorneys. The Power of Attorney empowered the Agents inter alia, to appear and represent Nagib's estate before all Lebanese authorities, agencies and in any courts whatsoever having competent jurisdiction over Nagib's real estate forming part of the Lebanese Assets.

14. Accordingly, in or around September 1999 Maron Tabet upon the instructions of Joseph commenced legal proceedings bearing action number 1672 ("the Proceedings") in the names of the Joseph, George, Lily and Robert as plaintiffs against Emile, Inez and Michel Elias. The purpose of the Proceedings was to vest the Lebanese Assets in the names of Joseph's children. The same was done on the 25th January 2000 in accordance with the order of the Court in Lebanon.

Law and Analysis

ISSUE ONE: DID THE FIRST DEFENDANT DISHONESTLY OR FRAUDULENTLY BREACHED HIS FIDUCIARY DUTIES AS LEGAL PERSONAL REPRESENTATIVE OF NAGIB'S ESTATE IN FURTHERANCE OF THE INTEREST OF HIS CHILDREN, BARRY AND MELISSA ELIAS, AND IS THEREFORE LIABLE FOR EQUITABLE OR OTHER DAMAGES?

15. In deciding this issue the court considered the authorities cited by the claimant and the first defendant. The claimant relied on and the court accepted the principle of law espoused in Halsbury's Laws of England[1], which states:

> "It is the duty of personal representatives to hold an even hand between all the beneficiaries of the estate. On the other hand they must not unduly delay the payment or provision of any of the legacies, …they ought not to sacrifice the interest of persons entitled in remainder by realizing the estate for the benefit of a pecuniary legatee at an inopportune time…"

16. Further, the claimant relied on and the court also accepted the principles in *Abacus Trust Co (Isle of Man) and another v Barr and others* [2003] EWHC 114[2], where Lightman J described how a Trustee should exercise his duties:

> "16 The existence of the fiduciary duty on the part of trustees governing the exercise of their fiduciary powers requires trustees to inform themselves of the matters which are relevant to the decision (see Scott v National Trust for Places of Historic Interest or Natural Beauty [1998] 2 All ER 705, 717), and in arriving at their decisions whether and how to exercise their discretionary powers to take into account all relevant but no irrelevant factors: see Edge v Pensions Ombudsman [2000] Ch 602, 627-628. The fiduciary duty requires trustees to follow a correct procedure in the decision-making process: see Etherton J in Hearn v Younger [2002] EWHC 963 (Ch) at [91] citing Staughton LJ in Stannard v Fisons Pension Trust Ltd [1991] PLR 225, 237, para 65. This duty lies at the heart of the rule, which is directed at ensuring for the protection of the beneficiaries under the trust that they are not prejudiced by any breach of such duty."

17. The court agreed with the submission that it is trite law that fraud or impropriety must be distinctly alleged and also distinctly proved. Such allegations of fraud must be established to the appropriate standard of proof. The more serious the allegation, the more cogent the evidence

[1] Fourth Edition Reissue. Volume 17(2), Paragraph 439.
[2] Page 119, paragraph 16.

required to prove what is alleged: per Narine J (as he then was) in *Singh v Tai Chew* HCA No. 538 of 1991 at page 21. Additionally, an allegation of dishonesty embraces fraud. Further allegations of dishonesty include recklessness. These points, which this court accepted, were made clear, in *Armitage v Nurse* (1997) 2 All ER 705 where the court:

i. Recognized that fraud was adequately pleaded when an allegation of dishonesty was made[3]; and

ii. Confirmed that dishonesty was established by an intention on the part of a Trustee to pursue a particular cause of action either knowing that it was contrary to the interests of the beneficiaries or being recklessly indifferent whether it was contrary to their interests or not[4].

18. The claimant claims that the first defendant as Executor/Trustee of Nagib's Will, breached his broad duties of loyalty, good faith and trust by dishonestly causing the Lebanese Assets to be vested in Melissa and Barry in breach of his fiduciary duties to Emile.

19. Lord Millet in *Armitage* [supra] stated that there is an irreducible core of obligations owed by a Trustee to beneficiaries; being a duty of the Trustee to perform the Trusts honestly and in good faith for the benefit of the beneficiaries. This overarching duty governs the Executor's subsidiary obligation to act even handedly between and among all beneficiaries of the estate[5].

20. In relying on *Re Stewart: Smith and Anor v Price and Others* 5 ITELR 622 the claimant noted that the court of New Zealand accepted that the duty of

[3] At page 715 letter f to page 716 letter d
[4] At page 711 at letter b
[5] Halsbury's Laws of England 4th Edition Volume 17(2) paragraph 439

even handedness extended to potential claimants against an estate who although might not have been entitled to any property at the relevant time, had nevertheless indicated the possibility of making a claim[6] ought not to be thwarted by an executor providing misleading information[7]. In that case one of the beneficiaries of the testatrix Will stated that the testatrix instructed her not to tell her children of her death, publish a death notice or advertise for persons with an interest in the estate. The executor did what the beneficiary indicated was the directions of the testatrix, including not advertising for beneficiaries. The court stated, inter alia:

> "The thought that an estate can be distributed behind the backs of persons unaware of their right to claim seems to be abhorrent and quite contrary to justice"

21. The English case of *National Westminster Bank plc v Luke Lucas and Ors* (2014) EWHC 653 (*National Westminster Bank*) adopted the guidance and position taken by *Re Stewart* [supra]. Under his Will, Mr. Savile named a number of beneficiaries with a residuary gift in favour of the Jimmy Savile Charitable Trust. Following his death, 139 people came forward to make claims that they were the subject of sexual abuse by the deceased and were claiming against his estate. If substantiated by judicial determination, the beneficiaries feared that the Charitable Trust would be left with nothing.

22. The Charitable Trust along with the individual beneficiaries sought to have the Bank removed as executor believing that the Bank was not acting to distribute the estate before the resolution of all the potential claims. In giving the judgment, Mr. Justice Sales concluded that a person

[6] At paragraph 29 and 30
[7] At paragraph 32

administering an estate had a duty to be fair to those persons who may have good claims against the estate. He held[8]:

> "The interests of the beneficiaries under the will cannot automatically be promoted above those of the various personal injury claimants … who may have good claims against the estate. I reject the submission … that the Bank was obliged to treat the interests of the beneficiaries under the will as superior to those of the claimants against the estate.
>
> In light of the claims against the estate, and the real risk that it may prove to be insolvent because of them, the Bank is obliged to have regard to the interest of the class of claimants against the estate as well as to the interest of the beneficiaries under the will."

23. The claimant, relied on *National Westminster Bank* [supra] to support his claim that the first defendant who appointed agents to act on his behalf in the foreign jurisdiction must do so in keeping with the laws of that jurisdiction and distribute the estate accordingly. That duty, the claimant alleges included not thwarting potential claims by providing misleading information.

24. The executor must positively ensure that he provides any attorney acting on his behalf with the correct address for service of the beneficiaries or potential beneficiaries. In *Abacus Trust Company (Isle of Man) and Colyb Limited v Andrew Barr, Brian J. Barr and Russell Barr* (2003) EWHC 114 the agent of a Trustee miscommunicated to the trustee the instructions of the beneficiary. The Trustee acted on the miscommunicated and erroneous information. The court held that the Trustee's fiduciary duty required him to inform himself of the matters which are relevant to the decision-making and to follow correct procedure.

[8] At paragraphs 70 and 71

25. The claimant claims that an executor who appoints an agent is bound to supervise him and ensure that he is performing the functions delegated to him fairly and in accordance with the executor's own obligations to the beneficiary or potential beneficiary.

26. In *Rowlands v Witherden* (1851) 3 Mac & G 568 the court considered what was required of a Trustee to supervise its agent. In that case the Trustees of stock who sold it out and committed the proceeds to their solicitor/agent for investment. The solicitor/agent misapplied the proceeds and the fund was lost. In finding the Trustee liable, the court held that the Trustee was bound to satisfy himself of the actions taken by the solicitor/agent, and not rely on mere assurances and perceived integrity of the solicitor/agent. They ought to have required some proof of the investment. Both the Trustee and the solicitor were held to be liable.

27. An executor is liable for the acts of his agents where those acts result in the executor breaching his duties to beneficiaries or potential beneficiaries. This was made clear in *Abacus* [supra] by Mr. Justice Lightman in his judgment which explained at paragraph 21 in the decision of *Burrell and Anor v Burrell and others* (2005) EWHC 245:

> "[The Trustee] had addressed its mind to a relevant factor [the wishes of the settlor] and accurately took into account what it believed those wishes to be. The fact that it was wrong in it's understanding of those wishes was not down to any personal breach of duty by it. However, Lightman J. found that the trustee's mistake was caused by the trustee's representative … failing to transmit the settlor's wishes accurately. That was a default on the part of the trustee sufficient to bring the principle into play."

28. The evidence from the first defendant, is that in 1996 while awaiting the determination of the executors' claim to have Nagib's will propounded in Trinidad and Tobago, he sought advice from his local attorneys. Following this he requested and received from the Lebanese Embassy in Washington

D.C. a list of the names of lawyers who practised in Lebanon with offices in D.C. The first defendant selected Mr. Maroun Tabet. Later, he met with Lebanese Attorney at Law, Mr. Tabet.

29. Mr. Tabet agreed to handle the claim in Lebanon. In preparation for that eventuality, Joseph provided Mr. Tabet with the information requested. The information included, the names of all of Nagib's children and confirmation that apart from Emile, and as far as he knew all of Nagib's children had accepted Nagib's Will as genuine.

30. Joseph also provided Mr. Tabet with the Authorisations obtained from Angela, George, Lily, Robert and himself recognizing Nagib's Will as valid and empowering the executors to represent the donors in any legal dispute that might arise in relation to Nagib's Will or the Lebanese Assets. Of course, the court in Trinidad and Tobago had by then recognized Nagib's Will as valid.

31. The executors of Nagib's estate granted the Agents a Power of Attorney on the 3rd December 1998. It is the claimant's case that based on the language used in the Power of Attorney, it empowered the Agents inter alia, to obtain a legal ruling with respect to the inheritance and succession of the Lebanese properties in accordance with Nagib's Will.

32. Based on the evidence adduced in cross-examination, Emile claims that at the time the Power of Attorney was given, Joseph was aware of Articles 58 and 59 of the 1959 Inheritance law for non-Muslims ("the Inheritance Laws") in Lebanon which provided:

> "58. The will shall be reduced by as much as it is in excess of the portion set aside for descendants, father, mother and spouse.

> 59. The portion set aside for descendants shall be fixed at fifty percent of total movables and immovables. In case all the children are alive, they still share in the portion in equal parts, irrespective of their number and without distinction of sex. In case one of them is deceased, his descendants shall represent him for that share that would have devolved to him had he been alive and shall partake of that share in equal parts."

33. On the 6th April 1999, Joseph and Robert filed a request for an order designating Nagib's heirs in accordance with the applicable Lebanese succession law. This request led to the issue of a Certificate of Inheritance confirming the death of Nagib and the designation of Michel, George, Lily Inez, Emile, Joseph, Robert and Angela as his heirs.

34. On the 15th September 1999 the Agents acting under the Power of Attorney, filed the Proceedings in the form of a request to execute Nagib's Will in Lebanon. The Proceedings were brought in the names of Joseph, George, Lily, Robert and Angela who provided Authorisations against the defendants being those children of Nagib named in the Certificate of Inheritance who had not consented to Nagib's Will namely, Emile, Inez and Michel. The Proceedings were necessary, in the first defendant's opinion to transfer the Lebanese Assets to Barry and Melissa.

35. The claimant avers that the executors' acceptance of the Authorisations, caused them to be exposed to a charge of acting contrary to their obligation of evenhandedness imposed as a result of their office. This is because the executors owed, the potential beneficiaries under the laws of Lebanon who did not consent to Nagib's Will, a duty to act fairly. By accepting the Authorisations, Joseph favoured the beneficiaries under Nagib's Will namely Barry and Melissa over those who had a potential claim under the Inheritance Laws to the Lebanese properties namely,

Emile, Inez and the estate of Michel. In reliance, the claimant cited *Irvine v Public Trustee* referred to at paragraph 27 of *Re Stewart*:

> "But the duty [of evenhandedness] is not complied with but broken if the personal representative favours one beneficiary or potential beneficiary against another. In consequence, it must be wrong for him to bring or lend is name to litigation which may reasonably be seen to indicate that his is not impartial."

36. The court disagrees with this submission. The duties of the executors of the Will propounded in Trinidad and Tobago were to do what was required to distribute the estate and to get the residue into the hands of the persons named. The litigation in Lebanon was not, nor did it seem to be partial. The heirs of Nagib were declared as a result of action taken by the first defendant.

37. As defendants to the Proceedings in Lebanon: Emile, Inez and Michel had ten days to object to the execution of Nagib's Will and to request that it disposed of assets according to the share reserved for them by Articles 58 and 59 of the Inheritance Laws. But even before that, the claimant had the option of pursuing a claim in Lebanon especially as it is his contention that Nagib's Will was inconclusive or of no effect on the inheritance of non-Muslims. This is distinct from the situation in *National Westminister Bank* [supra], where the persons affected by the behaviour of the deceased were pursuing their claims in a court of law.

38. Mr. Tabet explained that pursuant to Article 399 of the Lebanese Civil Procedure Law the children of a deceased must be served at his/her domicile or residence or work location or any other place he/she may be present, with any application to execute a Will in Lebanon, unless they consented, since service allows them to object. It is only where a person

has no known residence that substituted service is permitted in line with Article 408 of the Lebanese Civil Procedure Law.

39. The claimant contends that since Mr. Tabet's evidence at trial was that he kept Joseph informed of the Proceedings from time to time, the easy and obvious inference is that Joseph knew that Emile, Inez and Michel were defendants to them. Nevertheless, Joseph failed to provide the Agents with Emile's address or place of residence in Trinidad and did not advise them that Michel had died. Accordingly, the Agents did not know where Emile lived and gave Azmi Street, Nagib Issa Building, Tripoli, Lebanon as the address for service of the Proceedings on the basis that that address was previously owned by Nagib.

40. After failed attempts to locate the defendants to the Proceedings at Azmi Street, the court in Lebanon consequently ordered an investigation to be carried out on their whereabouts. Mr. Tabet confirmed that the investigations revealed that the residents of the building had migrated to South America years ago. The informant providing this information may have, unwittingly been referring to Nagib himself. Thereafter, the Lebanese courts directed that notification of the Proceedings be given to the defendants by way of registered mail. Upon the return of the registered mail as undelivered, the Agents obtained an order from the Lebanese court that service on Emile, Inez and Michel be effected by way of publication of the Proceedings in two newspapers in Lebanon and by posting same on the publication board of the court in Beirut for a period of 20 days.

41. The claimant states that no Authorisation was requested from him no doubt because the executors knew that none would be forthcoming. As a

result, he was unaware of the Proceedings and was denied an opportunity to object to the vesting of the Lebanese properties in the names of Barry and Melissa. Emile avers that he first became aware of the Proceedings of September 1991 in December 2006. It is the claimant's case that since Joseph was kept informed of the Proceedings he must have known that Emile was a defendant thereto with a possible claim against Nagib's estate in accordance with the Inheritance Laws. Notwithstanding, Joseph failed to provide the Agents with Emile's address in Trinidad as he must have known Emile would remain ignorant of the Proceedings until and after an order had been made vesting the Lebanese properties in Barry and Melissa.

42. Emile takes major issue with the manner in which the Agents effected service of the Proceedings. He questions the competence of Joseph's attorneys who instituted the Proceedings against Joseph's siblings in Lebanon without enquiring of him their whereabouts for service. Instead of taking this simple step to access readily available information, they chose to undertake an investigation in Lebanon to locate defendants who they had no reason to believe lived there especially since the Authorisations obtained showed a Trinidad address for Joseph's remaining siblings. Furthermore, the Agents were aware that Emile had just completed unsuccessful litigation against Joseph in Trinidad.

43. The claimant also contends that if Joseph was not indeed the source of the information, how else did the Agents become aware of the Azmi Street address used in the Proceeding as the address for Emile, Inez and Michel? Emile submits that the inescapable inference is that such address, which is the address of a building previously owned by Nagib, was ultimately provided by Joseph. In so doing, Joseph would have known that it was an

address at which Emile could not have been served by reason of the fact the Emile permanently resided in Trinidad. He further states that the inference is even stronger as:

i. There was no allegation of professional misconduct being levelled against the Agents by Joseph. Thus, it ought to be inferred either that the Proceedings contained information which were provided to them by Joseph or information which the Agents provided Joseph, but which he did not dispute. Furthermore, there was no evidence that the Agents acted contrary to instructions provided by Joseph nor are there any allegations by Joseph that the documents of the Proceedings contained details inconsistent to his instructions;

ii. The lawyer who inserted the Azmi Street address in the Proceedings, Kamil Harb, was not called as a witness and no explanation was given for his absence; and

iii. Joseph through his Counsel, objected to questions concerning communications between the Agents and Joseph in connection with the Proceedings and in particular whether Joseph was provided with a copy of the Proceedings on the grounds of attorney/client privilege.

44. In these circumstances, it is the claimant's case that the inescapable conclusion is and it must be inferred that Joseph's conduct had as its objective the deliberate concealment of the Proceedings from Emile. In acting as he did, Joseph was in breach of his overriding duty of good faith to Emile and of his obligation to act fairly towards him so as not to promote the interests of Barry and Melissa over his potential claim under the Inheritance Laws thereby fraudulently vesting the Lebanese properties.

45. In any event, Emile submits that even if Joseph did not deliberately act so as to conceal the Proceedings from him, then is conduct at the very least amounted to a reckless disregard of the interest of Emile and of the duties owed by the executors to beneficiaries, including potential beneficiaries. It was therefore dishonest in the sense discussed in *Armitage* [supra] and Joseph is not entitled to allege or contend that his actions were not deliberate by way of defence (*Belmont Finance Corporation Limited v Williams Furniture Limited and Anor* (1979) Ch. 250 at page 267).

46. In support of his case, Emile avers that based on Joseph's conduct as executor, Joseph considered that he had no obligation to keep himself informed of the steps taken in the Proceedings. He therefore took no steps to supervise the Agents or to request a copy of the Proceedings. In addition, Joseph did not give clear instructions to the Agents acting on his behalf, and if he did not know, he did not enquire and was not in possession of all the relevant facts relating to the nature and effect of the Proceedings and the service thereof. Instead he relied totally on the Agents.

47. The claimant affirms that Joseph did not provide the Agents with Emile's residential address in Trinidad and therefore permitted the Proceedings to continue on a false footing without correcting the Agent's failure to take proper steps to serve Emile. In this regard, Emile relied on the finding of Narine J (as he then was) in the judgment of *Harnam Niranjan Singh and Anor v Dassie Dharam Singh and Anor.*[9] In that case the defendant obtained a Certificate of Title on the footing of a false statement as to the second plaintiff's whereabouts:

[9] HCA No. 538 of 1991

> "Of course the usual practice in applications for vesting orders is that the Court orders that notice of the application and copies thereof should be served on all persons who have an interest in the land. The statements made by the Defendant in paragraph 7 of her affidavit in support of the application [that she did not know where the Second Plaintiff was living], were designed to pre-empt such an order. Of course, if the Plaintiffs had been served with notice of the application, I have little doubt that they would have taken steps to oppose the application. They were deprived of the opportunity to do so due to the [Defendant's] deliberate and fraudulent statements."

48. Consequently, Joseph as executor is liable for the actions of the Agents by virtue of the Power of Attorney, both in accordance with the principle laid down in *Abacus* [supra] and because he himself was recklessly indifferent whether or not the Proceedings were being conducted in a manner adverse to the interests of a possible beneficiary.

49. The first defendant submits that the abovementioned evidence relied on by the claimant falls woefully short of what is required to prove fraud. The claimant fails to prove a lack of honest belief on the first defendant's part in the propriety of the actions he or the Agent's took in managing the administration of Nagib's estate in Lebanon. He highlighted the case of *Emile Elias v Joseph Elias and Robert Elias* Civil Appeal No 138 of 1995 where Mr. Justice of Appeal Sharma pointed out that to allege fraud against decent and upright citizens and smear them in public documents is not a matter that must be treated lightly, if no evidence is brought to support the plea.

50. Apart from the deficiencies of the evidence led by the claimant, the first defendant takes issue with the authorities cited in establishing its case. With respect to the cases submitted by the claimant referencing and explaining the executor's fiduciary duties owed to Emile as a potential

beneficiary, the first defendant stated that upon Emile's receipt of his $100.00 inheritance pursuant to Nagib's Will, no further fiduciary duty was owed to Emile.

51. As it relates to the case of *Re Stewart* [supra] it was submitted that the facts of that case are wholly different to the instant matter. The court found on the facts of that case that the executors who were solicitors, knew that [the plaintiffs] came within a class of persons entitled to claim under the Act and the executors also knew the plaintiffs were not aware of their right to claim under the Act. Those of course are not the facts of this case. Joseph is not a solicitor and was not required to act as a solicitor knowledgeable of the law and procedural rules of Lebanon. Rather his duty was to engage persons with the requisite knowledge and expertise in those matters to advise him on and to deal with the administration of Nagib's estate in Lebanon. The evidence reflects that this is precisely what Joseph did.

52. Moreover, the first defendant avers that the court in *Re Stewart* [supra] also observed that there is no statutory requirement that an executor must inform adult persons who are not under a disability and who were born in wedlock that a relative has died and that they are in one of the classes who might have a right to claim under the Act. This is not a case where the estate is being distributed behind the backs of persons unaware of their right to claim. It is a case of an adult person, Emile, who is not under any disability whatsoever, seeking to rewrite the testator's directions a little nearer to his heart's desire.

53. Likewise, the first defendant asserts that the facts of *National Westminster Bank* [supra] are as far removed from the facts in the present case as can

possibly be imagined. *National Westminster Bank* [supra] dealt with the duty of executors in a situation in which there were legal claims by members of the public in unascertainable numbers against the estate of a deceased who had been accused of having been a serial child abuser and sex offender. What's more is that the passages from that judgment relied on by the claimant are significantly all obiter dicta.

54. In contradistinction to the facts in those cases, Joseph's evidence was that Mr. Tabet explained that since Nagib wrote his Will in Trinidad and not in Lebanon or at a Lebanese Consulate, it was not subject to the Lebanese Inheritance Laws although part of it involved properties in Lebanon. Further since the subject of the pending appeal, the validity of the whole Will, had been pronounced upon in accordance with the laws of Trinidad and Tobago the courts in Lebanon would distribute the Lebanese Assets according to the wishes of the testator.

55. After Emile's appeal was lost Joseph informed Mr. Tabet of same and it was only then the Proceedings were commenced. Joseph asserts that it was pursuant to legal advice received from a senior legal practitioner in Lebanon that Emile was not entitled to a share of the Lebanese Assets. Therefore, the first defendant submits that any allegation of dishonesty or dishonest breach of fiduciary duty is denied and must fail. There is no evidence to satisfy the court that the first defendant knew or ought to have known, as the claimant alleged, the claimant was entitled to a share of the Lebanese Assets. This was the complete opposite of the independent and professional advice given to the first defendant.

56. Joseph emphasizes that this is not a case where based upon legal advice he knew that Emile was entitled to a share in the Lebanese Assets and

deliberately or recklessly tried to deprive him of his entitlement. At all times Joseph relied on the advice of Mr. Tabet who under cross-examination admitted that he is an attorney at law with 45 years' experience who has practised in Europe, the United States of America and the Middle East, mainly in Lebanon. Mr. Tabet was selected by Joseph to render legal advice on the administration of Nagib's will in Lebanon based on a list given to him by the Lebanese Embassy in Washington D.C. Mr. Tabet's name appeared first on that list.

57. With regard to the case of *Abacus* [supra] relied on by the claimant to support the proposition that the executor must positively ensure that he provides an attorney acting on his behalf with the correct address for service of the beneficiary or potential beneficiary; and that the executor is liable for the acts of his agents where those acts result in the executor breaching his duties to the beneficiaries or potential beneficiary's is not on analogous footing with the evidence in this case. The first defendant submits that the rule in *Abacus* [supra] deals with the existence of the fiduciary duty on the part of trustees to inform themselves of the matters which are relevant to decision-making in the exercise of their powers; and in arriving at their decisions under their discretionary powers they ought to consider all relevant but no irrelevant factors.

58. The first defendant affirms that in relation to his duty of supervision over appointed agents ensuring that they performed the functions delegated fairly and in accordance with the executor's own obligations to the beneficiaries or potential beneficiaries according to the learnings of Lewin on Trusts, Joseph confirms that that is exactly what he did. Joseph maintains that he kept in contact with Mr. Tabet and sought and obtained assurances from him that he, Mr. Tabet, was performing the functions

delegated to him fairly and in accordance with the executor's own obligations. It is Joseph's case that there was nothing more that could have been done by him in the circumstances as he is a businessman unaware of what the laws and procedures are in Lebanon. He was relying on Mr. Tabet for his expertise in relation to same. This case and the issues around which the first defendant were expected to supervise are obviously distinguishable from the facts in *Rowlands* [supra]. The first defendant wasn't dealing with property but rather a legal issue in a foreign jurisdiction where his only option was to rely on the advice of competent Attorneys. Neither the evidence nor the claim suggest that the first defendant did not fulfil his obligations in the selection of the Attorneys.

59. As it relates to the claimant's authority of *Rowlands* [supra] the Trustees in that case were criticized by the court for not requiring sight of the mortgage deed. The first defendant asserts and the court agrees with that submission, that this in not comparable to his position. There is nothing to suggest that he had requested to have sight of the Proceedings he would have known that there was any defect or non-compliance with the Lebanese law, which in any event is not the case.

60. The first defendant submits that the claimant's evidence falls short of establishing fraud on his behalf because nowhere in his evidence does the claimant assert that Joseph knew or deliberately put or provided the incorrect address for service. There is no evidence to suggest that Joseph knew that Emile was a defendant to the Proceedings and the claimant's reliance on an inference or a "must have known" is a clear indication of the evidential gap.

61. Under cross-examination, the claimant accepted that he adduced no evidence that the first defendant was personally involved in any of the filing of documents in the courts or registries in Lebanon. He also accepted that none of the documents relating to the Proceedings were signed by the first defendant and that Joseph was entitled to act on the advice of his attorneys at law. Furthermore, there is no evidence that the Lebanese Attorney at Law (Camille Harb) who prepared the execution documents with the addresses for service knew that Emile resided in Trinidad.

62. The first defendant also relies on the evidence of both experts that even if Emile had been given notice and objected to the Proceedings, the Lebanese properties would have nevertheless been vested in Barry and Melissa. Expert witness, Mr. Sarkis confirmed that Nagib's Will was executed in accordance with the law and procedural rules of Lebanon. The expert evidence of Mr. El Hajj was that Emile was not entitled to a share in the Lebanese Assets because of the connecting factors, the inheritance law of Trinidad and Tobago governed the Will. The first defendant submits that in any event, had Emile receive personal service, it would not have made one iota of difference as he had nothing to get. Service would have been no more than a formality and would not have nullified the execution.

63. The first defendant was subsequently informed by his Agents that the Proceedings had resulted in the Lebanese Assets being vested in accordance with the terms of Nagib's Will. The claimant failed to establish that the first defendant did not hold an honest belief in the propriety of the procedure adopted by his Agents.

64. The claimant also submitted that notwithstanding proof of fraud may come from direct evidence of wrong doing, the drawing of inferences based

upon the evidence before the court is an equally compelling route by which wrongdoing can be established to the relevant civil standard of proof. Steyn LJ in the Court of Appeal decision *Creditcorp Limited v King, Kingston & Ors* [1992] Lexis Citation 1881 alludes that most fraud cases are proved this way:

> "It is not correct to say that a fraud case cannot properly be pleaded on inferences. On the contrary, it is by the drawing of legitimate inferences from circumstantial evidence that most fraud cases are pleaded. That is also the way in which most fraud cases are proved at trial."

65. Further, as can be seen from the judgment of Mr. Justice Flaux in *JSC Bank of Moscow v Vladimir Abramovich Kekhman & Ors* [2015] EWHC 3077 (Comm)[10] that a court will be prepared to draw inferences that a person has directed fraudulent acts be undertaken or that, at the very least they were carried out with that person's knowledge and approval.

66. The advice of Lord Ackner in the case of *Attorney General v Samlal* (1987) 36 WIR 382 at page 387, relied on by the first defendant, is noted and applied to the facts of this case. Lord Ackner stated that the impression of the claimant's demeanor must be checked by a critical examination of the whole of the evidence and in weighing the credibility of the claimant and other witnesses to put correctly into the scales the important contemporaneous documents and the inherent improbability of one or more of his contentions. A critical examination has left the court with the impression that the claimant's case is woeful short of the standard required to satisfy the court.

[10] At paragraphs 43, 60 and 64

67. What happened in Lebanon is analytically important. It is quite significant that the first steps taken were to have Nagib's death certified and Nagib's heirs ascertained and named. This was done on the 6th April 1999. There was a request to designate Nagib's heirs in accordance with the applicable Lebanese succession law. A Certificate of Inheritance was issued confirming Nagib's death and designating Michel, George, Lily, Inez, Emile, Joseph, Robert and Angela as his heirs. This action is inconsistent with the allegation that the first defendant acted in a manner to favour the beneficiaries named in Nagib's proven Will. The first defendant did not withhold the claimant's name as a child of Nagib nor did he include his children names as heirs.

68. The court in Lebanon was fully aware of the claimant as well as all Nagib's other children. If the law is as certain as the claimant alleged the court in Lebanon would, it seems to the court, have applied Articles 58 and 59 of the Inheritance Laws. It seems more likely, and the court is satisfied, that the Will not having been made in Lebanon or on Lebanese territory and having been proven in Trinidad and Tobago where Nagib lived for most of his life, caused the court in Lebanon to reseal the probate according to the Laws of Trinidad and Tobago.

69. The undisputed evidence is that the resealing of the Probate of Nagib's Will was completed in the Execution Department by an Execution Order dated 13th January 2000. The Lebanese Assets were vested in keeping with the provisions of Nagib's Will as propounded in Trinidad and Tobago. Thereafter, the events as shown in Table 1. below, followed:

Table 1. Proceedings Filed in Lebanon and Outcomes.

Proceedings filed in Lebanon	**Outcomes**
13 February 2006 Salam Mansour (Salam), widow of Michel Elias filed a Civil Claim. Emile intervened on 28 April 2007.	20 March 2008 Salam withdrew her claim to annul the execution of Nagib's Will and the Will itself. This was done by a Deed of Compromise and Settlement. 23 June 2008 Emile filed a claim to renounce his request for intervention – the claim for renunciation was accepted.
1 March 2006, Salam instituted criminal proceedings in Lebanon against Mr. Tabot, Mr. Camille Hard and Mr. Fadi Bkassimi for forgery in the course of securing the execution of Nagib's Will.	28 March 2006 the claims made by Salam to the Bar Association were dismissed. It was found that the allegations that "…Emile Elias [is] living in Tripoli – Azmi Street – Nagib Issa Bldg, and Mr Tabet did invent such address knowingly that the wanted to be served did not come absolutely to Lebanon, and one among them Michel is deceased"[11]. The Lebanese Bar Association found the procedures of the executive bureau were duly done and it cannot be attributed to the lawyer that he neglected the addresses or intended same. Lebanese Bar Association ruled that "the Lawyer Attorney is not the responsible about the procedures of trials; and any protest or cassation sent against the procedures should be done against the principals, and not the attorney"[12].
27 January 2007 and on 2 July 2007, Salam and Emile lodged penal cases for criminal fraud in Lebanon against the	30 November 2012 a judgment was issued, by the Republic of Lebanon Investigation Department on the claims made by Salam and Emile. These claims related to the allegations purported to amount to penal forgery. The claims related to the giving of incorrect information about the place of domicile of Emile and the death of Michel. The court decided that the

[11] Lebanese Bar Association Decision dated 28 March 2006. Page 689 of Trial Bundle 1.
[12] Lebanese Bar Association Decision dated 28 March 2006. Page 695 of Trial Bundle 1.

first defendant and others.	elements to establish the criminal offence of penal forgery were not present.
15 June 2006, Mr. Tabet and Mr. Fadi Bkassini initiated a claim in Lebanon against Salam for defamation.	The claim was based on Salam's allegations of forgery in the execution of Nagib's Will in Lebanon. Judgment was entered against Salam and it was found that she committed defamation. on 11 March 2008, a decision was entered, on appeal, regarding the criminal charge of defamation. Salam was found to be liable to a penal servitude sanction for a period of five years and obliged, to pay equally, the sum of 3 million Lebanese pounds to the Attorneys Mr. Tabet and Mr. Bkassini.

70. The effects of the various proceedings and their outcomes, in Lebanon are that there were no findings of impropriety by either the lawful attorney or any Attorney at Law acting for the first defendant. The claimant's pleaded case also does not include any allegation of dishonesty or fraud on their part. Therefore, the claimant must prove that the fault lies solely with the first defendant.

71. The evidence in support of this comes from the claimant. The important part of the claimant's evidence is found at paragraphs 28, 29, 30, 31 and 32 of the claimant's witness statement. The claimant has adduced no evidence to show where the information used in the Lebanon Proceedings originated. The claimant is therefore asking the court to infer, that as Trustee, the first defendant either provided it or was reckless as to where it came from. The claimant contends that in either case, the first defendant is responsible for the misrepresentation and the fraud.

72. Under cross-examination, the claimant's evidence is that the first defendant was entitled to rely on the evidence of his attorney in Lebanon. He also admitted that there was nothing he could point to that shows a personal and direct involvement by the first defendant.

73. The lawful Attorney for the first defendant, Mr. Tabet, gave evidence. Mr. Tabet's evidence is that he advised the first defendant that it was necessary to await the execution of the Will, including any appeals in Trinidad and Tobago. Mr. Tabet's opinion was that the property in Lebanon would form part of the residue of Nagib's Will and would be distributed accordingly.

74. Mr. Tabet's evidence is that what was required for the execution of Nagib's Will, in Lebanon, was done by his office. At paragraph 18 of Mr. Tabet's evidence in chief, he states:

> "In due course, one of the lawyers working with me at my Law Office, Mr. Kamil Harb filed an application to execute the Will at the Department of Execution of Beirut. This application was a legal request to execute the Will of Lebanon so that we could deal with the assets of Nagib located in Lebanon. The application process entails the use of documents related to the inheritance such as death certificate, Inheritance Ruling, name of heirs, the will (where there is one) and the power of attorney (where there is one)"

75. Mr. Tabet was cross-examined, specifically on the issue of the claimant's address for service. He admitted that the claimant had to be served or notified to allow him an opportunity to object to the execution of the Will in Lebanon. Mr. Tabet also admitted that he knew the claimant lived in Trinidad. Later, Mr. Tabet went on to say that he didn't know if the claimant came to Lebanon or if he lived in Lebanon. Mr. Tabet admitted that it was the petitioner's responsibility, under Lebanese law, to notify

the defendant of the Proceedings and that he (Mr. Tabet) was acting as the petitioner.

76. On the issue of the relationship between himself and the first defendant, Mr. Tabet agreed that it was his responsibility to keep the first defendant updated about what was being done in Lebanon. Mr. Tabet gave no evidence where either he or his associate got the addresses for service. Mr. Tabet was not asked, in cross-examination who gave the information or where it came from. It is also worth noting that none of the proceedings in Lebanon shed any light on the source of that information.

77. It is appropriate, at this time, to return to the claim and the actual allegations made by the claimant. In relation to the estate of Nagib, the claimant claimed "equitable compensation…for breach of fiduciary duty and/or breach of trust and/or equitable fraud in relation to first Defendant's distribution of and/or dealings with properties and cash standing in the name of Nagib Elias in Lebanon at the date of his death"[13]

78. Particulars of the Breach of Duty of Loyalty, Breach of Duty of Good Faith and Breach of Trust alleged by the claimant against the first defendant are detailed at pages 10 to 15 of the Statement of Case. Of the myriad allegations made by the claimant with respect to Nagib's Will, it can be said that they fall, generally in four groups: (i) the failure to provide information about the Proceedings to the claimant; (ii) the misinformation about Michel's death; (iii) no service or proper service of the Proceedings on the claimant; and (iv) the intention to benefit the first defendant's children to the detriment of other beneficiaries or other potential beneficiaries. These

[13] Claim Form filed 17 April 2013. Paragraph (e)

are thus demonstrated in the claimant's allegations that the first defendant:

i. "deliberately failed to notify his attorneys in Lebanon…of the death of Michel Elias"[14].

ii. "the first defendant deliberately failed to notify his attorneys in Lebanon of matters at xi. [that the claimant had been born in Trinidad and in Trinidad and that the first defendant was aware of his address] and xii [that the claimant never lived in Lebanon and did not maintain residences there]"[15]

iii. "at all material times the first Defendant deliberately concealed the existence of the Proceedings from the Claimant…"[16]

79. The Court finds that if there are any allegations of fraud, they are to be found, in the pleadings outlined in the paragraphs above. These allegations are all said to be "deliberately" done. In two instances, it is alleged that the first defendant deliberately failed to notify and in one instance, deliberately concealed. The claimant relied on *Armitage* [supra]. The court notes that *Armitage* [supra] dealt with the interpretation of a specific written clause "actual fraud". Millett LJ in his judgment referred to fraud (not the term actual fraud) as either, a false representation made knowingly, that is without honest belief or, recklessly made, that is not caring whether it was true or false[17].

80. On the first and third limbs– there is no evidence to establish that element of fraud. The claimant has adduced no evidence that the first defendant failed to notify the attorney in Lebanon of the claimant's address. The first

[14] Statement of Case, page 11 paragraph vi.
[15] Statement of Case, page 12 paragraph xiii.
[16] Statement of Case, page 13 paragraph xix.
[17] Armitage [supra] page 710 paragraph g.

defendant's evidence is that he left the matter in the hands of the professionals and he provided the information that was required of him. The fact that all the children of Nagib were named in the Declaration of heirs makes it illogical to think that the first defendant would not provide an appropriate address for the claimant. There is also the evidence from Mr. Tabet that the processing of the information was done by an Attorney in his chambers.

81. The claimant has also adduced no evidence that the first defendant deliberately concealed the Proceedings from him. In *Armitage* [supra] Millett LJ states that if the Trustee acts in good faith and in the honest belief that they are acting in the interest of the beneficiaries his conduct is not fraudulent – a deliberate breach of Trust in not necessarily fraudulent.

82. The second limb that the first defendant was reckless; not caring whether it was true or not. The claimant is asking the court to infer that the only reasonable inference from the evidence, is that the first defendant did not care if the claimant was served or that Michel had died. Based on what is known, the claimant suggests, the first defendant was reckless as to whether information about Michel's death was provided. The claimant must also fail on this ground as well.

83. In *Armitage* [supra] Millett LJ states that the honest belief by the Trustee that he is acting in the best interest of the beneficiaries will exempt him from a breach of trust. The first defendant cannot be said to have acted any way other than honestly. He awaited the outcome of the probate of Nagib's Will and the appeal of that probate. The first defendant sought advice from a qualified independent expert on Lebanese law and procedure. He appointed a lawful Power of Attorney to act on his behalf

as he could not be in Lebanon to personally follow the Proceedings. The Proceedings commenced with the important declarations about Nagib's children. The only finding this court could make is that the first defendant acted in the interest of the beneficiaries, according to the Will that had been propounded in Trinidad and Tobago. Nagib's Will bequeathed the remainder of his estate both real and personal whatsoever and wheresoever, to Barry and Melissa Elias.

84. The first defendant's duty was to be evenhanded and fair to the beneficiaries – not to be evenhanded and fair to the claimant only. As it relates to the claim that the first defendant was reckless whether the Proceedings in Lebanon were kept secret from the claimant, the history belies this assertion. In 1997 Joseph, Angela, George, Lily and Robert accepted the terms of Nagib's Will. They appointed Joseph and Robert Elias to represent them in Lebanon in any legal dispute or objection that may arise in regard to Nagib's Will. The issues of the acceptance of Nagib's Will and the signing of the documents to proceed in Lebanon were all, according to the evidence, openly discussed in the family. Lily's evidence is that she was present with Angela and Inez when both she and Angela signed the documents, in the presence of an attorney at law. Inez did not sign.

85. The history of attempts to thwart the wishes of the testator, no doubt caused the claimant to make an informed decision as how to proceed. Bearing in mind his duties were to all the beneficiaries and potential beneficiaries, the first defendant acted evenhandedly. Most of the beneficiaries, did not object to the course of action proposed by the first defendant. The claimant was well aware of the proven Will including the remainder and residue clause. At no time did he assert in a court in

Lebanon or to the legal personal representatives, following the Grant of Probate, that he believed he had an interest in the Lebanese Assets. This is unlike the persons with the alleged or projected interest in the estate in *National Westminster Bank* [supra].

86. The claimant's evidence is that he always knew his father had properties and cash in Lebanon. The claimant also knew when Nagib's Will was probated in Trinidad and that these assets fell to be distributed as part of the residual provisions of Nagib's Will. According to the Will, the claimant was not entitled to the benefit of the residue. The claimant received his inheritance. The first defendant did what was required of him. He got legal advice about administering the remainder of Nagib's estate in England, Barbados and in Lebanon. He then went about, with due diligence, administering the estate to ensure that the beneficiaries and potential beneficiaries benefited.

87. According to the outcomes of the Proceedings in Lebanon, the process and procedures were properly followed for the resealing of the Probate of Nagib's Will. This court is unable to make any findings that are contrary to those.

88. In any event, the court is in agreement with the first defendant that effecting service was just a formality. This is especially so since Joseph and the Agents genuinely and honestly believed that Emile had no entitlement to the Lebanese Assets. Accordingly, based on the evidence, there was no deliberate concealment of Emile's address nor was there a reckless disregard to the interests of Emile by Joseph amounting to fraud. The first defendant proceeded, honestly, to do what was necessary to carry out the intentions of Nagib.

89. The claimant asserts that by not being served with the Proceedings he lost the right to pursue the share of the reserved portion for his benefit in accordance with the Inheritance Law, however, the court disagrees.

90. The claimant's witness, Mr. Sarkis, opined[18] that at the date of Nagib's death in 1984 the traditional position in relation to the applicable law would have been applied by the Lebanese courts. The traditional position was that where a person holds two nationalities (such as Nagib), the Lebanese courts would retain the Lebanese nationality and apply the Lebanese succession law even if the person spent all of their life outside of Lebanon with their family.

91. However, in Mr. Sarkis report dated the 5th October 2015[19] and under cross-examination he referred to two cases from the Court of Cassation (the highest court of Lebanon) in 1993 and 2008. In his opinion, those two cased departed from the traditional approach to succession whereby the foreign law was applied instead of the Lebanese law. This was referred to as the functional approach. The approach suggests that a judge should not be bound by a fixed principle when choosing between two nationalities but should take into account the nationality that is most appropriate to give a positive solution to the matter. In order to do so, he should take into consideration all the circumstances of the matter. Although he acknowledged the validity of the functional approach he nevertheless stated that in his opinion having regard to the fact that the foreign law did not provide the same protection to the children of the deceased as the Inheritance Laws, the Lebanese courts would have elected the Lebanese

[18] Opinions of Mr. Sarkis and Mr. El Hajj respectively, pursuant to orders of the Honourable Mr. Justice des Vignes (as he then was) dated the 22nd July 2015 and 15th March 2016
[19] Trial Bundle IV page 33

Law. Therefore, in the same breath, Mr. Sarkis declared the functional approach nugatory.

92. Yet, Mr. Sarkis acknowledged in his expert report and evidence under cross-examination that Judge Jamal El Khoury in his decision to vest the properties in Barry and Melissa was done in accordance with the law and procedural rules of Lebanon.

93. Mr. El Hajj's evidence was that Emile was not entitled to a share as the inheritance law of Trinidad and Tobago governed the Will based on the Court of Appeal decision in Trinidad and Tobago pronouncing Nagib's Will valid. This was in line with the advice Mr. Tabet provided and which Joseph relied on.

94. If the court had to choose an opinion that seem more reasonable it would be one where a Will not made in Lebanon or on Lebanese territory should be resealed according to the law that applies where the Will was made and proved.

95. There was also the evidence of the limitation period, in Lebanon as raised by the experts. Both the claimant's and first defendant's experts, Mr. Sarkis and Mr. El Hajj respectively, agreed that a claim in relation to the reserved portion must be made within a prescribed time, that being ten years from the date of death. By any measure when the Proceedings were filed in Lebanon any objecting party would have been out of time – since Nagib died in 1984 and the action was commenced in Lebanon in 1999 (if one counts at the earliest, from the Declaration of beneficiaries).

96. At trial however, there was some divergence between the experts on how the ten-year period is to be counted. For the first time in cross-examination, Mr. Sarkis' evidence was that there is an interruption of prescription. The institution of legal proceedings would interrupt the ten-year period and start a new ten-year period after the proceedings are completed. He however conceded that according to the decision of the highest court in Lebanon, the period of prescription is ten years and it runs from the date of death. This opinion concurred with that of Mr. El Hajj. Even is Mr Sarkis is correct about the interruption of the prescription period, there were no legal proceedings in Lebanon that would have interrupted the period of prescription.

97. Therefore, based on the abovementioned it was open to the claimant, for ten years after Nagib's death in 1984 to claim his alleged interest in the courts of Lebanon. In so doing, based on the expert opinion of Mr. Sarkis, the courts of Lebanon would have elected Lebanese law thereby vesting the reserved portion due to Emile under the Articles 58 and 59 of the Inheritance Laws. However, this was not pursued. Instead, what Emile did was litigate issues around Nagib's Will in the courts of Trinidad and Tobago for decades after his death.

98. It was in 2007, seven years after the Lebanese properties had already been vested in Barry and Melissa the claimant first took steps to assert his alleged interest in the courts of Lebanon, seeking to set aside the transfers. Subsequently, in 2008 he withdrew his claim. There is no evidence why he withdrew his claim but the court notes the issue of the ten-year prescription. Six years later he filed the instant claim seeking compensation from Joseph based on the values of the properties transferred.

99. Based on these facts the court is not satisfied that the claimant was prevented or estopped from pursuing his entitlement to the reserved portion in the courts of Lebanon.

100. Having regard to the evidence and the credibility of the claimant as a witness, the court is not satisfied that the first defendant acted any way other than a honest and reasonable man would. It would be oppressive to expect a Trustee to run down every possibility – however remote. There is no evidence that satisfies the court that the claimant would have been in any better position as it relates to the Lebanese Assets.

101. There is also no evidence to satisfy the court of the fourth limb; that the first defendant deliberately acted in a way to benefit his children to the detriment of other beneficiaries. The fact that the first defendant's children were the persons entitled to benefit from the residue according to Nagib's proven Will, does not by itself mean that the legal personal representative acted dishonestly or fraudulently in ensuring that the Lebanese Assets were vested in them. The claimant did not adduce any evidence that satisfied the court that the first defendant acted dishonestly or fraudulently with the deliberate intention to benefit his children.

102. In these circumstances the first defendant did not breach his duties of loyalty, good faith and trust. He did not commit a fraud against the claimant in relation to the administration of the Lebanese properties as contained in the estate of Nagib Elias as alleged by the claimant. As a result, the issue of damages does not arise for the court's consideration.

103. The claimant's case, as a whole lacked credibility. To begin with the claimant was the only witness appearing in this matter attempting to discharge the evidential burden of proving his allegations of fraud. That alone would not be decisive. Interestingly, none of his siblings appeared as witnesses on his behalf. Those very siblings who would be entitled to benefit from the Lebanese Assets. Further, his Attorney at Law, Joseph Nehmeh who acted in the civil and criminal proceedings in Lebanon was not called as a witness to support and explain the claimant's claim and the outcomes of the Proceedings.

104. The claimant was also a very poor witness when cross-examined. He maintained some absurd propositions. One such proposition related to the mental competence of his sister Angela. The claimant, incidentally, is the legal personal representative of Angela's estate. In his Statement of Case the claimant described Angela as mentally incapable of understanding the effect and purpose of the Authorisation which she signed and gave to the first defendant. He supported this allegation in his witness statement by confirming that he knew Angela all her life and they had a close relationship. He therefore claimed that since Angela never completed her primary school education and never attended secondary school she was all but illiterate.

105. The claimant's sister Lily forcefully and convincingly countered the assertions about Angela. Angela lived with Lily after their parents passed away. Lily asserted that Angela was quite a prolific reader, inclusive of the bible. Lily's evidence was that Angela worked for years in the family business, holding responsible positions. Lily highlighted that she was present when Angela signed the said Authorisation in the presence of an

attorney at law and another sister. Lily stated that Angela seemed to understand perfectly and clearly what she was doing.

106. Florence Abraham, former General Manager of Nagib Elias and Sons Limited also gave evidence about Angela. Ms. Abraham's evidence was that she worked closely with her for many years. She described Angela as mentally competent, with good skills as an employee including her reading acumen. The claimant elected not to cross-examine Ms. Abraham. Therefore, that evidence remained unchallenged, but the credibility of the claimant's case as a whole was shaken.

107. On the issue of the failure of a witness to adduce evidence at a trial, save his own, to substantiate his serious plea Sharma JA[20] said:

> "To allege fraud against decent upright citizens and smear them in public documents, is not a matter to be treated lightly, if no evidence is brought to support the plea…The disinheritance alluded to were from a man who was deeply wounded.
>
> All in all, in my judgment there was absolutely no justification for the…relentless pursuit to have the [residuary clause in the will] declared invalid. The reasons were vacuous. Perhaps idiosyncratic, but certainly flimsy.
>
> The inference is irresistible that this was a shot in the dark by the [Claimant] for reasons best known to himself. It may not be because he was left out, as it conceded that he is a man of substantial means. Whatever the reasons, there were no circumstances or justification for his actions."

108. The fact that the claimant is the person referred to in the judgment of Sharma JA is not the issue rather the substance of the statement and its applicability to the present case.

[20] Joseph Elias and Robert Elias v Emile Elias Civil Appeal No. 5234 of 1985 at page 30

ISSUE TWO: REMOVAL OF THE FIRST DEFENDANT AS TRUSTEE OF THE TRUST CREATED UNDER LINDA'S WILL

109. The claimant's second substantive claim for relief is for the removal of Joseph as Trustee of the Trust Fund which was created as a result of the residuary clause in Linda's Will. The inherent jurisdiction of the court to remove and replace Trustees was discussed and confirmed in the Privy Council case of *Letterstedt v Broers* (1884) 9 App. Cas. 371. Lord Blackburn (as was cited with approval in *Savile* [supra]) said as follows:

> "But in cases of positive misconduct, courts of equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty; or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."
>
> It seems to their Lordships that the jurisdiction which a court of equity has no difficulty in exercising… is merely ancillary to its principal duty - to see that the trusts are properly executed… Therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them… yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.
>
> …In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries."

110. The claimant relied on a number of Australian decisions that applied *Letterstedt* [supra]. In the leading case *Miller v Cameron* (1936) 54 CLR 572 the court observed at page 580:

> "The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised."

111. Based on the abovementioned, the removal of a Trustee is not only premised on the basis of bad faith, misconduct or breach of trust. The court can exercise its jurisdiction to remove a Trustee whenever it is expedient to do so (*Elovalis v Elovalis* (2008) WASCA 14 at paragraph 40).

112. There are four categories of conduct upon which the claimant relies in support of his application to remove the first defendant as Trustee of the Trust Fund. The first relates to the first defendant's conduct of the Proceedings in Lebanon as discussed above. The court has already decided this issue; the first defendant did not breach his duties of fidelity and loyalty to the beneficiaries.

113. The second category of conduct relied on by the claimant relates to Joseph's misapplication of assets in the Trust Fund. In the instant matter Joseph stated that pursuant to two requests made by his mother Linda prior to her death, he made a payment of either $20,000.00 or $25,000.00 ("the Sum") to her niece, Janet Karam and transferred 230 shares in Nagib Elias and Sons Limited to Robert out of the assets comprising her estate.

The claimant avers that these dispositions were not made in satisfaction of specific bequests by Linda or under the terms of her Will but rather as a result of verbal wishes expressed by her.

114. Mr. Justice des Vignes (as he then was) considered at paragraphs 67 and 83 of his judgment dated the 17th February 2014 the effect and meaning of the wording in Linda's residuary estate and concluded:

> "It is clear from the language of the clause that the Deceased did not intend to provide a benefit for the general public or some section of the public but for her children. She expressly directed her executors to hand over her residuary estate to [Joseph] and he was given a discretion to use same to assist those of her children who are in need as discussed between them.
> To my mind, therefore, this clause should not be construed to mean that the Deceased intended to provide relief for her children from poverty but rather to mean that she intended to give [Joseph] a discretion, to be exercised fairly and honestly to provide assistance, financial and otherwise, to any child whose circumstances were such as to require assistance, as opposed to a mere desire or wish for assistance. (paragraph 67)
>
> Accordingly, I am of the view that … [Joseph] is entitled to exercise the power conferred by the residuary clause in favour of the children of the Deceased, including himself. In exercising his power, [Joseph] must, just as he must in relation to any other child of the Deceased, form a fair and honest opinion that he requires financial assistance and must take into account the factors hereinafter set out in answer to questions 2 and 3" (paragraph 83)

115. The claimant therefore contends that payment of the Sum and the transfer of the 230 shares were therefore not made pursuant to his discretionary powers under the trust and Joseph knew that the recipients of these assets were not receiving them as beneficiaries of the Trust Fund. Furthermore, in relation to the 230 shares, the claimant states that there was no urgency as the transfer of the shares to Robert was not effected until after 1992 (since no dividends were declared prior to that date) and

at the time of transfer, Robert was not in need so Joseph never exercised his discretion in accordance with the residuary clause.

116. The claimant also highlighted that in his statement of accounts of the Trust Fund, Joseph failed to account for the 230 shares transferred to Robert. Joseph admitted in cross-examination that the explanation relating to the delay in transferring the shares to Robert was not true as dividends were in fact declared in 1984 (twice) and 1986. Joseph failed to account for these dividends which were not referred to in the said statement of accounts and were not paid over to Robert.

117. The claimant therefore asserts, that as executor the first defendant would not have reasonably believed that the Sum and 230 shares did fall within the residuary estate of Linda[21]. Therefore, when he made the dispositions to Janet Karam and Robert he ought to have known or was reckless as to the true position that he was dealing with assets forming part of Linda's residuary estate. As a result, he must be taken as having intentionally disposing of the Sum and 230 shares at the expense of the financial interests of the beneficiaries.

118. The claimant relies on the case of *Armitage* [supra][22] supported by *Walker* [supra][23] on the consequence of a Trustee intentionally benefitting persons not the objects of the Trust:

> "A trustee who acts with the intention of benefitting persons who are not the objects of the trust is not the less dishonest because he does not intend to benefit himself."

[21] *Walker and Ors. v Stones and Anor.* (2001) QB 902 at page 943 letters G-H
[22] At page 711 letter C
[23] At page 943 letter F

119.The claimant submits, therefore, that the Joseph's motives may have been pure and honest when he gave effect to Linda's wishes. However, his actions benefitted persons whom he knew were not objects of the Trust at the expense of the financial interests of the beneficiaries. Joseph he was therefore still dishonest and in breach of his fiduciary duties to the beneficiaries.

120.The first defendant denies that there was a misapplication of Trust Funds as alleged by the claimant. While it is admitted that the abovementioned dispositions were made by Joseph, at that time, he was giving effect to his mother's wishes. Joseph's evidence under cross-examination was that he made the disposition in accordance with his mother's last wishes to him in person not as declared in her Will.

121. It is the court's opinion that these dispositions would have been material if they have now, for the first time, during the trial come to the claimant's knowledge. If they were known to the claimant before or if they ought to have been known to the claimant before, they would be of no relevance. The history around Nagib's and Linda's estate is such that, the court can confidently assert that those issues were or ought to have been the subject of previous adjudication.

122.The court accepts the first defendant's submission that the claimant knew of these two issues before. Justice Razack's decision delivered on 2 February 1993, settled the meaning of the residual clause; its legitimacy, breath and Joseph's powers and authority. The court is also satisfied the issue around Janet Karam were addressed in the trial and judgment delivered by Justice Razack in 1993. In the judgment, Justice Razack said[24]:

[24] H.C.A. No. 2045 of 1990 Emile Elias v Robert Matouk and Joseph Elias. Page 7, lines 20 - 25

> "The Trustee said that the deceased expressed faith in him and would rely on him to act as a second father to those members of the family who might need assistance financially or otherwise. He admitted that the deceased did have brief discussions with him about Nain Karam and his children and Naim's sister Jabel Karam"

123. There was no submission to counter that made by the first defendant that the "Jabel Karam" named by Justice Razack is in fact Janet Karam.

124. With respect to the transfer of 230 shares to Robert, there is no dispute that the claimant did know of this transfer or ought to have known of this transfer if not when it was completed, certainly shortly after. The claimant should have known this by virtue of his access to the accounting and other information in the family business; Nagib Elias and Sons Limited. As with the issue relating to Janet Karam, this issue should have been litigated before this trial. The claimant made those gifts at a time when he believed he was able to do so to fulfil the wishes expressed by his mother. Since the court's decision on the Trust, there have been no allegations about gifts distributed from the Trust Fund which do not meet its purpose.

125. The third category of conduct relied on by the claimant to remove the first defendant as Trustee of Linda's Trust, is the failure of Joseph to provide accounts of his trusteeship to beneficiaries of the Trust Fund. In the judgment of Mr. Justice des Vignes (as he then was) dated 17th February 2014 at paragraph 89, he discussed the duty of a Trustee to keep and provide accounts of the trust:

> "… I am of the opinion that [Joseph] has a duty to keep accounts of the Trust and that a beneficiary is entitled to invoke the Court's jurisdiction to call upon [him] to provide such accounts… the fact remains that [Joseph] has not provided any accounts since the death of [Linda] and [Emile and Inez] have been requesting accounts since 2011 and 2012… in all the circumstances of this case and especially having regard to the passage of time since death of

> [Linda], I consider it timely and appropriate for [Joseph] to provide accounts… Accordingly, I… direct and order [Joseph] to render accounts to all the Defendants, in relation to the Trust from the date of the grant of probate on the 25th September 1984 to date…"

126. Furthermore, in a judgment delivered on the 22nd July 2015[25], the judge stressed the Trustee's obligation to disclose to the defendants in CV2012-04286 *Joseph Elias v Emile Elias and Ors* the Trust documents in his possession:

> "The Defendants entitlement to disclosure is founded upon [Joseph's] duty to keep the beneficiaries informed and to render accounts. The court's discretion should be exercised to give effect to the trustee's fundamental duty of accountability and not to thwart it. This duty of accountability is fundamental to the concept of a trust and forms part of the "irreducible core of obligations" owed by the trustee to beneficiaries."

127. In the premises, Joseph was ordered to disclose to the defendants the trust documents in his possession conditional upon him first receiving from all the beneficiaries an undertaking to hold all disclosed documents and information in confidence and not to disclose them to third parties. On the 17th April 2014 in purported compliance with the order of Mr. Justice des Vignes the first defendant provided a statement of accounts of the residue of Linda's estate.

128. However, the claimant avers that the statement included no supporting documents and was inaccurate as it did not account for the dispositions made to Janet Karam and Robert. Accordingly, the claimant contends that in the circumstances Joseph has failed to discharge the fundamental duty of accountability owed by him to the beneficiaries of the trust.

[25] At paragraph 18 (c)

129. The first defendant affirms that he complied with the order of Mr. Justice des Vignes in the provision of a statement of accounts in relation to the Trust Fund. He avers however that the claimant's complaint in substance is that Emile has not received backup or supporting documents to substantiate the accounts already provided. In the judgment of CV2012-04286 *Joseph Elias v Emile Elias and Ors* Mr. Justice des Vignes made clear that while the beneficiaries are entitled to invoke the court's inherent jurisdiction to exercise its discretion to order disclosure, they were not and are not entitled to demand that the Trustee provide them with accounts and documentation as to his dealings with the Trust since 1984.

130. With respect to the beneficiaries' undertakings to hold all disclosed documentation in confidence, Emile under cross-examination accepted that he has not seen the backup documents because not all the beneficiaries provided the undertaking. The first defendant therefore submits that not only is it disingenuous for it to be asserted in the Statement of Case that Joseph failed and/or refused to provide accounts of the Trust Fund to Linda's children or any of them, but it is an abuse of process for the issue of disclosure of backup or supporting documents to be raised again as a basis for the first defendant's removal as trustee of the Trust Fund.

131. The court is not satisfied that the claimant has proved that which he has alleged "To date the first Defendant has failed and/or refused to provide accounts of the Trust Fund to the children of Linda or any of them"[26].

132. The fourth category of conduct the claimant asserts, relates to the cash held in the Bank of Nova Scotia in Lebanon. The cash fell into the residue

[26] Statement of Case filed on 17 April 2013. Paragraph 11.

of Nagib's estate. The claimant accepts that the sum of 6,135,628.30 Lebanese pounds was transferred by the executors in January 1986 to the Bank of Nova Scotia in London. However, he points to the evidence that confirms that in November 1994 the Bank of Nova Scotia in London endorsed that the deposit received by it in January 1986 had almost trebled in value. Emile states that despite Joseph's explanation that its sterling equivalent amounting to 15,273.83 British pounds was repatriated to Trinidad in October 1999 and applied toward the payment of outstanding taxes and penalties in relation to the litigation of Nagib's estate and the inheritance tax associated with the transfer to Barry and Melissa, Joseph never provided him with an account of Nagib's assets in Lebanon.

133. In addition, under cross-examination Joseph confirmed that he had in his possession documents from the Bank of Nova Scotia in London which related to the monies received from Lebanon in 1986. The claimant asserts that these documents would have been highly relevant in ascertaining the value of Nagib's Lebanese cash holdings prior to the conversion to sterling pounds and transfer to Trinidad in 1999. However, these were not disclosed by the first defendant and their non-disclosure has not been adequately explained. Therefore, it is the claimant's case that Joseph's failure to produce relevant documentation readily available to him, raises the fair presumption that these documents do not support his position with respect to the cash included in the residuary estate of Nagib (*Masquerade Music Ltd & Ors. v Mr. Bruce Springsteen* (2001) EWCA Civ 563).

134. The first defendant contends that these allegations go as far back as the 1990's during the trial before Crane J. In that case, Emile made an

application to reopen the trial to lead evidence relating to the transfer of monies from the Bank of Nova Scotia Lebanon to the Bank of Nova Scotia London. However, this application was denied as Crane J stated that there was no real admissible evidence as to this. The first defendant submits that Emile has again resurrected the same allegations, still without evidence in support and as a result it cannot be a ground to remove Joseph as a Trustee.

135. This claim is inextricably connected to the claimant's allegations about the first defendant's breach of trust relating to the Lebanese Assets and the resealing of the probate of Nagib's Will. The cash is indivisible from the rest of Nagib's estate in Lebanon. The court has already decided that the first defendant did not breach his fiduciaries duties, behaved fraudulently or dishonestly. The claimant was not entitled to the cash. Nor was the first defendant obliged to account to the claimant about the cash or any currency equivalent. There is no relation or relevancy of this issue of the first defendant's handing of the cash in Lebanon to the performance of his duties as Trustee of the Trust Fund created by Linda's Will.

136. The court is satisfied that Linda's display of trust and confidence in Joseph as demonstrated through the residuary clause in her will has not been tarnished by anything done or not done by the first defendant. Linda had faith in the first defendant's judgment to decide how the Trust Fund should be administered among the family. No evidence was adduced that satisfies this court that Linda's trust should be displaced. The first defendant shall remain the Trustee of the Trust Fund created by Linda's Will.

ISSUE THREE: DEFENCES RAISED BY THE FIRST DEFENDANT

137. The first defendant raised three defences in the Amended Defence filed on the 16th May 2014. These defences are limitation, laches and abuse of process. These shall now be considered.

LIMITATION

138. Section 66(1) and (2) of the Trustee Ordinance Ch. 8 No. 3 provides:

> "(1) No period of limitation prescribed by any enactment relating to the limitation of actions shall apply to an action by a beneficiary under a trust being an action-
>
> (a) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy…
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any enactment relating to the limitation of actions, shall not be brought after the expiration of four years from the date on which the right of action accrued: Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession."

139. Section 2 of the Trustee Ordinance describes that "trust" and "trustee" extends to the duties incidental to the office of a personal representative. The claimant submitted and the court accepts that since: (a) the core duty of a Trustee incidental to his office as personal representative is a duty to administer the Trusts honestly and in good faith for the benefit of the beneficiaries; and (b) this duty extends to potential beneficiaries as well as to claims against the estate with good, but not necessarily winning claims, it follows that the term "beneficiary" in section 66(1) of the Trustee Ordinance must be construed as including the persons described in (b). For these reasons the claimant asserts that due to the allegations of fraudulent

breach of trust by the first defendant the limitation period does not apply to this action.

140. However, in the first defendant's oral submissions to the court they raised the argument that the claim was statute barred by virtue of sub-section 66(2) of the Trustee Ordinance. In support, the first defendant relied on the ruling of the Honourable Mr. Justice Boodoosingh in CV2015-04342 *Atlantic Bay Limited v Elaine Monica Davis et al* where he interpreted that sub-section as follows:

> "Section 66 (2) provides an action must not be brought after the expiration of four years from the date the right of action accrued. This date must be from the date of discovery of the fraud."

141. The claimant, alternatively avers that this decision was wrongly decided and should not be followed. They also relied on *Armitage* [supra][27] where the Court of Appeal of England and Wales held that under sub-sections 21(1) and 21(3) of the UK Limitation Act 1980 (similar in all material respects to sub-sections 66(1) and (2) of the Trustee Ordinance) that an honest breach of trust is statute barred after the expiration of the appropriate limitation period while liability for a dishonest breach of trust endures without limitation of time.

142. This court prefers the *Armitage* [supra] interpretation. Section 66 (2) of the Trustee Ordinance speaks to the discovery of "any breach of trust" creating a limitation period of four (4) years from the date on which the right of action accrued. Whereas, Section 66(1) of the Trustee Ordinance, prescribes that once there is fraud or fraudulent breach of trust – there shall be no period of limitation. It seems that the situations are different

[27] At page 719 letters B to G

and clearly distinguishable, and if there is fraud or fraudulent breach of trust the right to bring a claim will endure without limitation.

143.The fact that the claim is not statue barred is not significant. The court has already determined that the first defendant did not breach his fiduciary duties owned to the claimant.

LACHES

144.Underhill's Law of Trusts and Trustees 18th Edition at paragraph 94-37 sets out the circumstances to be considered along with the substantial lapse of time in bringing a claim:

> "where it would be practically unjust to give a remedy either because the party had by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he had, though perhaps not waiving it, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards asserted."

145.The doctrine of laches was considered by the Court of Appeal in the United Kingdom in *Patel and Ors. v Shah and Ors* (2005) EWCA Civ 157 where Lord Justice Mummery adopted with approval, the following principle formulated by Aldous LJ in *Frewley v Neill* (2000) CP Reports 20:

> "In my view, the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The enquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

146.Moreover, at paragraph 33 Mummery LJ observed:

> "In the case of an ordinary trust by way of gift to trustees for the benefit of the beneficiaries, where the beneficiary is not required or expected to do more than receive what has been given for his benefit it will obviously be extremely rare for laches and delay on the part of the beneficiary to make it unconscionable for that beneficiary to assert his claim to the beneficial interest, or for the trustee to claim that he has been released from the equitable obligations that bind his conscience."

147. The issue of laches and estoppel were further considered by the House of Lords in *Fisher v Brooker and Anor* (2009) URHL 789.[28] Lord Neuberger emphasized that the person raising an estoppel argument must show that: (i) he reasonably relied upon delay in prosecuting a claim as establishing that the claimant had no such claim; (ii) he acted on that reliance; and (iii) it would be unfairly detrimental to him if the claimant was now permitted to raise or to enforce such a claim. Additionally, Lord Neuberger confirmed that detrimental reliance was also an essential ingredient of laches[29].

148. No one could have believed or have acted upon a misapprehension that the claimant would not assert any claim to Nagib's or Linda's estate. The best evidence of this comes from the history of proceedings in Trinidad and Tobago and in Lebanon. This claim is not one where the court would apply the defence of laches.

ABUSE OF PROCESS

149. The first defendant's third general defence is that it is an abuse of process to permit a collateral attack in the courts of Trinidad and Tobago on the validity of the order made in the Proceedings. This is particularly since the claimant filed proceedings in Lebanon to set aside the order and then renounced the said proceedings.

[28] At page 805 letters e and f
[29] At page 805 letter h

150. In opposition to this position the claimant relied on the case of *Jet Holdings Inc and Others v Patel* (1989) 2 All ER 648. In that case the court had before it the question of enforcement proceedings taken in relation to an American judgment obtained against a defendant. That defendant had submitted to the American jurisdiction but failed to attend court because of what he alleged were improper pressures brought to bear upon him by the plaintiffs. In awarding summary judgment to the plaintiffs the court relied on the findings that the American judgment was obtained by fraud, stating:

> "The US court was fully cognizant of the issue of whether the failure to attend was or might have been because of improper purposes… On the evidence before me I cannot see that the US judgment was obtained by fraud even using the wider meaning of that term. The US court considered the matter. [The defendant] was represented and the issue was resolved against him."

151. The deputy judge's decision was appealed. The Court of Appeal held that a foreign judgment will not be enforced at common law if it has been obtained by fraud. This is even where the same allegation of fraud had been investigated and rejected by the foreign court. The foreign court's decision whether there was fraud is neither conclusive nor relevant. Therefore, the defendant was entitled to resist enforcement on the ground of fraud.

152. The decision in *Jet Holdings* [supra] was followed in *Adams v Cape Industries plc* (1991) 1 All ER 929 where the Court of Appeal at page 1051 said:

> "It is at least cleat that our law does not oblige a defendant who can show that a foreign judgment has been obtained by fraud to have used any available remedy in the foreign court with reference to that fraud if he is successfully to impeach that judgment in our courts… The position may well be the same in cases where there

> has been a breach of natural justice of the two primary kinds considered by Atkin LJ in *Jacobson v Frachon*, namely absence of notice of the proceedings or failure to afford the defendant an opportunity of substantially presenting his case."

153. These cases, are not relevant to the issues here. This case is not about enforcement of a decision obtained in Lebanon. Rather, it purports to have this court try issues and resolve them according to Lebanese law. The claimant is calling upon this court to decide whether had he been served and had an opportunity to be heard, a court in Lebanon would have decided that the claimant was entitled to a share of Nagib's estate. This claim has nothing to do with enforcement proceedings as in *Jet Holdings* [supra] and *Adams* [supra].

154. This court is of the opinion that it is beyond its jurisdiction or in the least wholly immaterial to proffer an opinion about the claimant's entitlement to property according to Lebanese law. The court in Lebanon decided that issue. Any challenge to that decision has to be made in Lebanon. The claimant did have the opportunity to make such a challenge and he decided not to, this was his prerogative. The claimant's prerogative does not expand this court jurisdiction to determine whether he has an entitlement according to Lebanese law.

155. The court considers that this claim, whether the first defendant breached his fiduciary duties in relation to the Proceedings in Lebanon, is a collateral attack. They, therefore do amount to an abuse of process.

156. Disposition – it is hereby ordered that:

i. There be judgment for the first defendant against the claimant.

ii. The claimant shall pay the first defendant's Costs. In default of agreement between the parties, the Costs is to be assessed by the Registrar.

iii. The claim is dismissed against defendants Inez Matouk, George Elias (deceased), Lily Aboud, Robert Elias and Michael Elias (deceased). There are no orders as to costs.

Avason Quinlan-Williams

JRC: Romela Ramberran