

IN THE SUPREME COURT OF SEYCHELLES

Reportable
[2022] SCSC ...
MC62/2020

In the matter between:

ALEXANDRE DE PIERPONT

IN HIS CAPACITY AS PROTECTOR OF FRANCOISE FOUNDATION

ELECTING DOMICILE AT SUITE 226, EDEN PLAZA, EDEN ISLAND Applicant
(*rep. by B Georges*)

V

**GOLD COAST DIRECTORS LIMITED OF SUITE 340-345 BARKLY WHARF
LE CANDAN WATERFONT, MAURITIUS Respondent**
(*rep. by S Rouillon*)

Neutral Citation: *Alexandre de Pierpont vs Gold Coast Directors Ltd* [2022] SCSC
MC62/2020

Before: Govinden CJ

Summary: Removal of Council; S49 of the Foundation Act

Heard: 2nd March 2022

Delivered: 27 May 2022

ORDER

- (1) The purported removal of the Applicant as the Protector of the Foundation was unlawful.
 - (2) The Respondent is removed as Council of the Foundation.
 - (3) The freezing order of the 27th of January 2022 is extended.
 - (4) The proceeds of sale of the Belgium properties shall remain in trust of the recipient.
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RULING

R GOVINDEN, CJ

The background and Pleadings

- [1] This is an application filed under Sections 49 of the Foundations Act, 2001, herein after referred to as “the Act”, filed by the Protector of Francoise Foundation, also referred to as the Applicant, asking for the removal of the Respondent as it’s Council. The Applicant avers in the application that it is the Protector of the Private Foundation registered in Seychelles and its Registered Agent’s office is located, at the Quadrant Street, Mahe, Seychelles. In further averments it is stated that the Respondent is a company located in Mauritius and that it appointed the respondent as the Council of the Foundation, in terms of clause 10.10 of its Charter, which provides that, “*each councillors in exercising its powers or performing his duties, shall act honestly and in good faith with a view to the best interests of the foundation*”. It is averred that the respondent has, contrary to this clause, engaged in actions which do not comply with the prescribed obligations and duties, in that it has appointed itself as Directors of Companies owned by the Foundation in an attempt to effectively take control of assets of the Foundation and that it also sought to have the Protector of the Foundation removed by way of a letter, in an effort to reinforce their position in the Foundation so as to facilitate their takeover of the Foundation’s assets. It is the Applicant’s case that this was neither done by way of an application to the court, nor by virtue of a court order, as stipulated by the law and therefore the Applicant avers that such removal of Protectors by the Respondent has no effect whatsoever. He prays that a new Council be appointed in their stead.
- [2] The Respondent has raised a Defence and a Counterclaim on the merits.
- [3] In it’s Defence the Respondent avers that under Section 49(2) of the Act an application may be brought by a founder, a councillor, a beneficiary or a supervisory person, but not by a former protector, which the Applicant is as he ceased to be the Foundation’s protector on or about the 6th of July 2020.

- [4] The Respondent denied that it was appointed as sole Councillor of the Foundation by the Applicant. It avers that to the contrary it was appointed by the Founder, Mrs Françoise Van Bastelaer.
- [5] The Respondent avers that it is a subsidiary of a Company incorporated in Mauritius , licensed to provide corporate and foundation services and that its parent company was engaged by the Foundation in December 2016 to form and administer the Foundation.
- [6] The Respondent avers that the Founder wished in connection with the Foundation are as follows;
- [7] (1) For it to hold all the issued shares of two Mauritian companies (then yet to be formed) which would acquire and hold the following immovable properties in Belgium, “*the Belgium properties*”.
- [8] (i) The Apartment situated at 479 Avenue Louise, Bruxelles, Belgium, bearing cadastral number 0224M7P0034
- [9] (ii) The Apartment situated at 479 Avenue Louise, Bruxelles, Belgium bearing cadastral register number 0224M7P0033.
- [10] (iii) The Apartment situated at 479 Avenue Louise, Bruxelles, Belgium bearing cadastral register number 0224m70032.
- [11] (iv) A Garage situated at 449 Avenue Louise Bruxelles, Belgium bearing cadastral register number 0223R4P0022 , and
- [12] (2) That upon her death for he nieces and surviving heirs Ms Carole PEETERS and Patricia PEETERS, hereinafter referred to as “Carole and Patricia”, to become the Foundation’s beneficiaries , with the Foundation to remain as a purpose Foundation without Beneficiaries during the Founder’s lifetime.
- [13] In accordance with the Founder’s instructions, the Parent Company of the Respondent caused the Foundation and its Charter, Hereinafter called “the 2016 Charter” to be registered in Seychelles under the provisions of the Act in December 2016. The

Respondent avers that following its registration the Founder by way of a resolution appointed the Respondent as the sole Councillor/ Council and by its Regulations , hereinafter referred to as the “ 2016 Regulations”, signed by the Founder appointed the Applicant and one Le Sellier de Chazelles as the Founder’s first protector.

The Respondent goes on to state that subsequent to registration of the Foundation, the following two companies were formed, which were and remain wholly-owned by the Foundation: (i) Immocarol Ltd (hereinafter referred to as “**Immocarol**”), incorporated in Mauritius on 12 January 2017 with company number 144160, and Patrim Ltd (hereinafter referred to as “**Patrim**”), incorporated in Mauritius on 12 January 2017 with company number 144158 (together hereinafter referred to as the “**Companies**”); and thereafter the Founder transferred the Belgium Properties to the Companies, as follows:

- (i) **Immocarol:** The Apartment situated at 479 Avenue Louise, Bruxelles, Belgium bearing cadastral register number 0224M7P0034;
 - (ii) **Patrim:** The Apartment situated at 479 Avenue Louise, Bruxelles, Belgium bearing cadastral register number 0224MP0033;
 - (iii) **Patrim:** The Apartment situated at 479 Avenue Louise, Bruxelles, Belgium bearing cadastral register number 0224M7P0032; and
 - (iv) **Patrim:** A Garage situated at 449 Avenue Louise, Bruxelles, Belgium bearing cadastral register number 0223R4P0022;
- (i) It is averred that the Founder’s wishes in respect of who should benefit from the Foundation’s assets after her death, were formalised by way of a Letter of Wishes dated 18 October 2016 and Amended Letter of Wishes dated 5 December 2017 issued and signed by the Founder (together hereinafter referred to as the “**Letters of Wishes**”) with respect to the Foundations, requesting that upon her death that her nieces, Carole and Patricia, become the Foundation’s Beneficiaries and benefit from the Foundation’s assets.

- (j) Pursuant to agreements dated 1 June 2016 and 14 November 2018 between the Founder and Applicant (hereinafter referred to as the “**Founder Pierpont Agreement**”), the Founder engaged Pierpont’s services for remuneration (c. CHF 30,000 every 3 months).
- (k) The Founder died in Belgium on 15 February 2020.
- (l) The Respondent avers that according to a letter dated 20 February 2020 from Vandendijk & Partners, the Applicant’s Belgium lawyers, to the Respondent (hereinafter referred to as the “**20 February 2020 Letter**”), since the death of the Founder, the Belgium-court appointed administrator of the Founder’s deceased estate has refused to pay to the Applicant his alleged fees of CHF 30,000 every months or any monies under the Founder Pierpont Agreement. However, it avers that as the Foundation and the Respondent were not parties to or signatories of the Founder Pierpont Agreement and Respondent it is of the view that:
 - (i) The Founder Pierpont Agreement was never binding on the Foundation or the Respondent;
 - (ii) In any event, on the Founder’s death the Founder Pierpont Agreement ended; and
 - (iii) The Foundation and Respondent are not under any legal obligation to meet the Founder’s obligations under the Founder Pierpont Agreement.
- (n) In the alternative, if it is proven that the Applicant is the Foundation’s Protector, the Respondent avers that:
 - (i) the remuneration (if any) payable by the Foundation to the Applicant is subject to the prior consent of the Respondent: per clause 17.12 of the Charter; and
 - (ii) it denies that the services provided by Applicant in respect of the Foundation justify remuneration or justify the remuneration referred to in the Founder Pierpont Agreement.

- (o) The Respondent avers further that following the Founder's death on 15 February 2020, in accordance with her Letters of Wishes, the Respondent as the Foundation's sole Councillor sought to amend the Foundation's 2016 Charter and 2016 Regulations to add Carole and Patricia as Beneficiaries of the Foundation. To do that clause 19.1 of the 2016 Charter and clause 4.1 of the 2016 Regulations required the Council to obtain the Protector's prior consent in relation to amending the Charter or Regulations, including to add Carole and Patricia as Beneficiaries of the Foundation, in contravention of the Founder's Letters of Wishes, the Applicant refused or failed to consent to the Respondent's proposal to amend the Foundation's Charter or Regulations to add Carole and Patricia as Beneficiaries and as a result the Foundation remained without Beneficiaries (but see paragraph 4(u) below).
- (q) According to the Respondent in the light of the Applicant's bad faith and misconduct and breach of duty as particularised above including in obstructing and defying the Founder's Letter of Wishes request that on her death Carole and Patricia become the Foundation's Beneficiaries, Carole and Patricia (as the Founder's lawful heirs), the Applicant was removed as Protector of the Foundation by written notice and the Respondent adopted the Applicant's removal on 6 July 2020 by Council resolution and updated the Foundation's statutory registers accordingly.

The Respondent particularised the removal of the Applicant as the Protector of the Foundation as follows. By letter dated 3 July 2020 by Carole and Patricia to the Applicant (hereinafter referred to as the "**Removal Letter**"), Carole and Patricia exercised their right (inherited from the Founder) under clause 17.5(a) of the 2016 Charter to remove the Applicant as Protector; in addition to the Removal Letter, the Applicant was sent a copy of the resolution of the Foundation's Council dated 6 July 2020, by which the Foundation adopted and approved the Removal Letter.

When the Founder died her rights under clause 17.5(a) of the 2016 Charter vested her lawful heirs under her personal deceased estate, namely, her nieces, Carole and Patricia;

while Foundation assets did not belong to the Founder and she had no ownership interest in the Foundation, her express right to remove Protectors under clause 17.5(a) of the Charter constituted the Founder's personal property which vested in her heirs, Carole and Patricia, on her death; and Whereas section 77(1) of the Act requires the Respondent to keep at the Foundation's register office, various registers, including the Foundation's register of supervisory persons kept at its registered office shows that, the Applicant ceased to be Protector on 6 July 2020 and currently the Foundation does not have a Protector.

In the alternative the Respondent avers that for reasons set out in the Respondent's Counterclaim, if the Court does not accept that the Applicant was removed as a Protector of the Foundation on 6 July 2020, the Respondent seeks an order pursuant to section 57(1) of the Act removing the Applicant as Protector.

The Respondent avers that after the Founder's death the Applicant purported to bring an application, case number MC 51/2020 (hereinafter referred to as the **"Former Proceedings"**) on behalf of the Foundation under section 49 of the Act for removal of the Respondent as the Foundation's Councillor, such application was wrongly suited and was dismissed by the Honourable Chief Justice of the Court by order made 31 May 2021. However, one of the Founder's nieces, Patricia, died on 15 December 2020, leaving Carole as the Founder's sole surviving niece and heir.

The Respondent goes on to state that following the dismissal of the Former Proceedings and in accordance with the Founder's Letters of Wishes (to add her nieces as Beneficiaries of the Foundation after her death), the Respondent (as sole Councillor of the Foundation) approved the amending and restating of the Foundation's 2016 Charter and 2016 Regulations and on 20 August 2021 the Foundation's amended and restated Charter (hereinafter referred to as the **"2021 Charter"**) (replacing the 2016 Charter) was registered with the Registrar under the Act and the Foundation's amended and restated Regulations (hereinafter referred to as the **"2021 Regulations"**) (replacing the 2016 Regulations) were

issued, which appointed the Founder's surviving niece and heir, Carole, as the Foundation's sole Beneficiary. She supported the retention of the Respondent as the Foundation's sole Councillor and agrees with the Respondent's contention that the Applicant ceased to be the Foundation's Protector in July 2020.

[15] Paragraph 5 and 6 of the Application are denied and the Applicant is put to strict proof thereof. By way of further answers to paragraph 5 and 6 of the Application, the Respondent avers as follows:

- (a) The Respondent denies that it has acted contrary to clause 10.10 of the 2016 Charter, the 2021 Charter or the Act;
- (b) The Respondent admits that it was appointed as director of the Companies, which are owned by the Foundation, and took control of Foundation assets in order to adhere, however it avers that it did so in order to fulfill the wishes of the Founder (see the Letters of Wishes) and to prevent any dilapidation of the assets by the Applicant, and it denied that such actions are in breach of the 2016 Charter, the 2021 Charter, the 2016 Regulations, the 2021 Regulations or the Act and asserts that such actions are proper and lawful in its capacity as the Foundation's sole Councillor;
- (c) The Respondent states that as sole Councillor of the Foundation, the role and duty of the Respondent, not of a Protector (or former Protector), is to govern and manage the Foundation and its assets (per sections 7(1)(b), 12, 33, 65 and 66 of the Act and clause 8.1 of the 2021 Charter). Analogous to a director of a company, a Councillor is empowered to act on behalf of a foundation; a Protector is not empowered to enter or sign legal agreements on behalf of a foundation or to pass or vote on foundation resolutions or to otherwise act on behalf of a foundation;
- (d) the Respondent avers further that in pursuant to sections 7(1)(b) and 12 of the Act and clause 8.1 of Foundation's 2021 Charter, the objects of the Foundatin include the management of its assets and income, and the distribution thereof of to its

Beneficiaries, as the Council may by a resolution of councillors determine in accordance with and subject to the provisions of its charter or regulations. In other words that the Respondent is authorised to manage the assets of the Foundation and to approve distributions of Foundation assets to its Beneficiary (Carole) by Council resolution; Accordingly it further argued that if a Protector is appointed, the Council, not the Protector, is responsible for running the Foundation and dealing with its assets;

- (f) In the circumstances, the Applicant the applicant avers that the allegations that the Respondent taking control of Foundation assets constitutes a 'breach of duty' is denied and is unfounded because ,the Respondent, as sole Councillor, is the person legally responsible for governing and managing the Foundation and its assets (per section 7(1)(b), 12, 33 and 66 of the Act and clause 8.2 of Foundation's 2016 Charter and clause 8.1 of the 2021 Charter);
- (g) Lastly, the Respondent aves that the Applicant acted in bad faith and in breach of his duties under clause 17.8 of the 2016 Charter, clause 17.10 of the 2021 Charter and under section 55(2) of the Act and/or failed to carry out or to properly carry out the duties as protector of the Foundation (hereinafter referred to as the **"Breache**. It avers that the following are particulars of breaches ;
 - (i) The Applicant refusing or failing, in breach of the Founder's Letters of Wishes, to conent to amending the Foundation's Charter and Regulations to add Carole and Patricia as Beneficiaries;
 - (ii) The Applicant's unfounded attempts to force the Foundation to deliver on the Founder Pierpont Agreement between the Founder and him, which ended on the Founder's death, to pay CH 30,000 every 3 months;
 - (iii) Unauthorised payment(s) in November-December 2019 (EUR 6,713.50 and in March 2020 (EUR 13,466) to Vandendijk &

Partners for legal services for the Applicant's personal benefit paid for from Foundation's assets;

- (iv) The refusal of the Applicant, on repeated request of the Respondent as sole Councillor of the Foundation, the sole owner of the Companies, to deliver up the keys of the Belgium Properties following the Founder's death; the reasons for the Applicant's said refusal remains unknown, but on or about 9 June 2020, the Respondent on behalf of the Companies and Foundation secured possession and changed the locks of the Belgium Properties, which are currently unoccupied and the Applicant no longer has access to them;
- (v) The Applicant's causing of the refusal of CFM Indosuez Wealth of 11, Boulevard Albert 1ER, MC 98000 Monaco (hereinafter referred to as "**Indosuez**") to respond to communications from the Respondent and AAMIL to the change of account signatories on the Foundation's accounts with the Indosuez (hereinafter referred to as the "**Indosuez Accounts**"). Indosuez officials maintain that they have been ;'instructed to act in this way', which is unacceptable as the Respondent, as sole Councillor of the Foundation, is responsible for managing the Foundation's assets and is entitled to full access to and signatory power on the Foundation's bank and securities accounts; the Respondent fears that the Applicant may be obstructing access to the Indosuez Accounts to conceal his misuse of the Foundation's funds;
- (vi) The Applicant seeking to avoid providing contact details in respect of Carole and Patricia, the heirs of the Founder's estate and the intended Beneficiaries of the Foundation per the Founder's Letters of Wishes; since then Patricia has died and

Carole has been appointed as the Foundation's sole Beneficiary (see paragraph 4(t) and (u) of the Defence); and

(vii) As confirmed in the 20 February 2020 Letter from Vandendijk & Partners, the Applicant's lawyers, to the Respondent, the Founder was found on 21 September 2019 by Decree of the Brussels Civil Court to be mentally incapacitated and no longer able to care for herself; in the context of the Founder having become a vulnerable person, the Applicant not providing particulars of what alleged services he provided to or for the Founder or the Foundation.

(viii) The Applicant embezzling funds from the Foundation, while Françoise had been declared mentally incapacitated on 21 September 2019 by the Brussels Civil Court. In that regard, it is alleged that a criminal case was commenced against him in Monaco, but he returned to Belgium, where a criminal case has been commenced against the Applicant by the State Prosecutor in Brussels.

[16] Notwithstanding the court order dated (27 January 2022), which ordered a temporary prohibition on the disposal of the Foundation's assets (hereinafter referred to as the "**Freezing Order**"), including the Belgium Properties, prior to the final determination of the Application herein, the Respondent avers that the following has already occurred following the dismissal of the Previous Proceedings:

- (i) That the Foundation (acting by the Respondent) has caused the sale of the Belgium Properties and is in the course of distributing the net sale proceeds (via the Companies) to Carole and to then wind up the Foundation and the Companies;
- (ii) With respect to the Belgium Properties, the three apartments have been sold to independent third parties. In that regards, the sale of one apartment has completed and the net sale funds have already been distributed to Carole, the

Foundation's sole Beneficiary; the other two apartments have also been sold and the Companies (as seller) are waiting receipt of the sale funds, which upon receipt are intended to be distributed to Carole, the Foundation's sole Beneficiary, in accordance with the wishes of the late Founder; and

- (c) Noting the terms of the Freezing Order, the Respondent shall (on receipt) hold and not distribute the balance sale proceeds relating to the Belgium Properties to Carole pending the determination of the Application herein.

[17] At any rate it is averred that the Applicant has no grounds or justification to block or prevent the distribution of the Foundation's realized assets (including the sale proceeds with respect of the Belgium Properties) to Carole, who is the Foundation's sole Beneficiary and when it was the Founder's wish (per the Letters of Wishes) that her nieces, Carole and Patricia (of which only Carole is surviving), receive the benefit of the Foundation's assets upon her (the Founder's) death; and that Carole is the Foundation's sole Beneficiary and that the Foundation is for the benefit of her only (see clause 8.1 of the 2021 Charter, clauses 2 and 3 of the 2021 Regulations and sections 7(1)(b) and 12(1) of the Act). For the avoidance of doubt, the Applicant (Pierpont) is not and has never been a Beneficiary of the Foundation and has no entitlement to any distribution of the assets of the Foundation or the Companies.

[18] The Respondent also avers that the Applicant is applying for removal of the Respondent as sole Councillor of the Foundation and it is a requirement of the Act (section 32) that the Foundation have a Council consisting of one or more persons, he (the Applicant) has not proposed a replacement Councillor; the Applicant having ceased to be the Foundation's Protector on 6 July 2020 (see paragraph 4(q) of the Defence), he has no standing to bring his Application herein under section 49(2) of the Act and that as at the date hereof, the Respondent has not been served with any affidavit in support of the Applicant's Application.

[19] In its Counterclaim, the Respondent avers that the Applicant acted in bad faith and in breach of his duties under clause 17.8 of the 2016 Charter, clause 17.10 of the 2021

Charter and under section 55(2) of the Act and/or failed to carry out or to properly carry out the duties as protector of the Foundation as particularised in its Defence. ;.

Accordingly the Respondent prays to this Court to grant the following relief:

- (i) To dismiss the Application with an order that the Applicant pay the Respondent's costs;
- (ii) A declaration that the Applicant ceased to be the Protector of the Foundation on 6 July 2020 and that, the Foundation not having a Protector and the Founder being deceased, the Respondent, as the Foundation's sole Councillor, was authorised to amend the Foundation's Charter and Regulations to add the Founder's surviving heir, Carole, as the Foundation's sole Beneficiary, without the need for the consent of the Applicant or any other person;
- (iii) Alternatively, an order under section 57(1) of the Foundation Act removing the Applicant as the Foundation's Protector;
- (iv) A declaration that the Respondent has not breached its duties to the Foundation owed as Councillor;
- (v) An order that the Foundation, acting by the Respondent, may continue realizing the Belgium Properties and distribute the balance net sale proceeds to Carole Peeters, the Foundation's sole Beneficiary.
- (vi) An order that the Applicant give a written account relating to the Indosuez Accounts and all other bank accounts of the Foundation, including copies of all account statements from opening of the Indosuez Accounts until now; and an order that the Applicant instruct Indosuez that the Respondent, as sole Councillor of the Foundation, is entitled to full access to and to become sole signatory of the Indosuez Accounts instead of the Applicant;
- (vii) An order that the Applicant deliver up to the Respondent all the records of the Foundation and the Companies in his possession or power;

(viii) An order that the Applicant pay damages to the Respondent and/or the Foundation as applicable for breach of his duties as the Foundation's Protector.

(ix) Such further orders as to the Court shall seem just in the circumstances.

[20] In its Answer to the Counterclaim, the Applicant denies that he has been validly removed as the Protector of the Foundation. He further denies that the letter of Wishes of the Founder requested that upon her death her nieces become beneficiaries. With respect to Founder Pierrepont Agreement, the Applicant avers that nothing prevented the Foundation and the Respondent from paying the Applicants for his services to the Foundation for his services as per agreement and Instrument of Appointment.

[21] With regards to his refusal to authorise the amendment of the Charter and Regulations the Applicant avers that he was not satisfied that they were necessary or desired by the Founder and had not been shown any reasons why they should be amended. At any rate he avers that this could not have been effected without his consent.

[22] With regards to alleged breaches of duties and bad faith on his part, the Applicant avers that bad faith existed only on the part of the Respondent who had attempted to subvert the Founder's wishes and denies to have been lawfully removed as the Protector. At any rate the Applicant avers that the alleged averments as to breaches shows evidence of the Respondent acting in self justification and that this includes acting on a letter of the PEETERS which created no rights either in law or on the facts.

[23] The Applicant avers that the acts and or omissions of the Respondent revealed their true intention which was to administer and manage the Foundation without oversight and that the accusations levelled against the Applicant were made in order to build up a spurious case against him.

[24] The Applicant avers that each and every one of his actions were done legally and made with the intention of protecting the Foundation in accordance with his powers in his role as Protector, he objected to the actions of the Respondent which were focussed on taking over the Foundation and managing in their own interest rather than those of the Foundation, in clear breach of the provisions of section 37(4) of the Foundations Act.

- [25] The Applicant was specifically chosen as the Protector of the Foundation by the Founder, who had absolute trust in him as revealed by the appointment itself, the agreement for services with the Founder and the fact that the Founder had allowed the Applicant use of an apartment of hers in Brussels. The Respondent had no such connection with the Founder, which is why it sought to remove the Applicant as Protector to allow it to have unfettered control over the affairs of the Foundation, in clear breach of the wishes of the Founder.
- [26] The Applicant avers that the right of the Founder to remove a Protector were personal to the Founder and did not pass to her heirs, and that her rights could only be transferred or assigned during her lifetime and not after her death. To the extent, thus, that the Respondent purported to act on any of the Founder's rights to remove him as Protector or to amend the Charter of the Foundation after the Founder's death, these actions are illegal, null, void and of no effect.
- [27] The Applicant denies any averments that he abused his power over the Founder for his personal gain and denies that any case, civil or criminal, has been commenced against him in any jurisdiction. In fact, according to him, it is him who has commenced action against Carole Peeters before the family court in Brussels, Belgium, seeking payment of sums due to him, and damages. The Applicant avers that these allegations against him are malicious and unfounded and designed simply to take the focus away from the illegal actions of the Respondent.
- [28] The Applicant avers that his purported removal as Protector of the Foundation was illegal, contrary to law and null and of no effect. As a consequence of this purported removal, and for the reasons he avers he states that the Respondent has breached its duties as Council of the Foundation and any action it has taken without the benefit of the oversight of a Protector are null and void. According to him, the result of this series of illegal actions, including the amendment of the Charter of the Foundation to include beneficiaries without the authority of the Founder or the Protector, is that the Respondent has breached its duties owed to the Foundation and must be removed.

[29] He finally avers that he will, if the Respondent is removed, immediately, appoint a new Council in accordance with the power to do so given to him by the Founder.

The court has had the benefit of referring to the documents referred to in the Pleadings . These materials are to a large extent uncontested and as such I relied on them as being truthful except to the extent that their content are subject to differential interpretation or denials , in which case the court will make its own assessment regarding the weight or admissibility.

The Law

The legal provisions that call for determination in the light of the facts and issues contain in this case is found in the Foundation Act 2009, which pertinent provisions, so far as they are relevant are to this case are as follows;

15. *Unless otherwise provided in the charter or regulations, in the event of an inconsistency between a term in the charter and regulations, the term in the charter shall prevail to the extent of the inconsistency.*

PART III — FOUNDER OF FOUNDATIONS

25. *Unless the charter or regulations provide otherwise, where a Foundation has more than one founder, their powers under the charter or regulations and this Act may only be exercised by all of them acting jointly.*
- 26.(1) *A founder may, in the charter or by any other written instrument, assign or transfer all or any part of the founder's rights and obligations as founder under the charter or regulations, to a person as the founder may determine.*
 - (2) *Where the rights, powers and obligations are so assigned or transferred by a founder under subsection (1), any reference to the founder in the charter, regulations and this Act shall be deemed to be a reference to the assignee or transferee, as the case may be.*
 - (3) *Any assignment or transfer under subsection (1) shall not be effective until written notice of it is provided to the council and registered agent.*

27. *A founder may reserve, in the charter or regulations, for the founder or any other person, any of the following rights, namely, the right to direct or approve the following —*

- (a) investment activities of the Foundation;*
- (b) amendment of the charter or regulations;*
- (c) appointment or removal of a councillor;*
- (d) appointment or removal of any supervisory person;*
- (e) rights, entitlements and restrictions of a beneficiary;*
- (f) addition or exclusion of a beneficiary;*
- (g) proposed continuation of the Foundation as a foundation registered or otherwise established under the written laws of a jurisdiction other than Seychelles;*
- (h) dissolution of the Foundation:*

Provided that no disposition of any assets of a Foundation shall be made other than through a resolution of councillors, which shall give effect to the exercise of the reserved powers in accordance with the terms the charter, regulations or procedures laid down by the council, as the case may be.

Sub-Part — Council of Foundations

32. *A Foundation shall have a council which consists of one or more persons.*

33. *The duties of a council are —*

- (a) to carry out the objects of the Foundation;*
- (b) to manage and administer the assets of the Foundation; and*

(c) to do such other acts as may be provided by the charter, regulations and this Act.

34.(1) *A councillor shall be appointed —*

(a) by the founder or founders, if appointed before registration of the Foundation; or

(b) in accordance with the terms of the charter or regulations, if appointed otherwise than under paragraph (a).

(2) Subject to the terms of the charter or regulations, where a councillor is not appointed to a Foundation or the number of councillors appointed is less than that required by the charter, an application may be made to the court by a founder, a supervisory person or a beneficiary, for the appointment by the court of one or more councillors for the purposes of complying with the requirements of this Act.

(3) Where the court is satisfied that without an order of the court, the requirements of the charter or regulations and this Act in respect of the appointment of a councillor will not be met, it may appoint one or more fit and proper persons that are not disqualified under section 35 to be the councillor or councillors, as the case may be.

(4) The charter or regulations and this Act in respect of a councillor shall apply to any councillor appointed under subsection (3).

(5) The appointment of a person as a councillor is personal to that person and shall not be assigned.

35. *A person shall not be appointed or remain as a councillor —*

(a) in the case of a natural person, if the person is a minor or mentally incapacitated or an undischarged bankrupt;

(b) in the case of a legal person, if the person is wound up or otherwise dissolved;

(c) in the case of a protector, if the protector will be the sole councillor;

- (d) *in the case of a founder, if the founder will be the sole councillor; and*
- (e) *in any case, if the person is otherwise disqualified from being a councillor under this Act or any other written law.*

36.(1) *Where —*

(a) *a councillor is appointed under section 34, the Foundation shall give written notice of the full name and address of the councillor to its registered agent; and*

(b) *the name and address of a councillor appointed under section 34 are specified in the charter or regulations, the Foundation may file with the Registrar notice of the full name and address of that councillor in the approved form, accompanied by the fee set out in Part 2 of Schedule 1,*

within 14 days of such appointment.

(2) *A Foundation that contravenes subsection (1)(a) is liable to a penalty of US\$50 for each day or part thereof in respect of which the contravention continues.*

37.(1) *A councillor shall act in accordance with the charter, regulations and this Act.*

(2) *A councillor, in the discharge of the duties, exercise of the powers and performance of the functions of the councillor, shall —*

(a) *act honestly and in good faith with a view to the best interests of the Foundation; and*

(b) *exercise the care, diligence and skill that a reasonably prudent person would exercise in similar circumstances.*

38. *Subject to the charter or regulations, the councillors may, by a resolution of councillors, fix the remuneration of each councillor in respect of services to be rendered to the Foundation in any capacity.*

39. *The acts of a councillor are valid notwithstanding any defect that the Foundation may afterwards discover in the appointment or qualification of that councillor.*

40.(1) *Subject to any limitations in the charter or regulations, if the requirements of subsection (2) are satisfied, no agreement or transaction between a Foundation and —*

(a) *one or more of its councillors; or*

(b) *any person in which any councillor has a financial interest or to whom any councillor is related, including as a councillor of that other person,*

shall be void or voidable for this reason only or by reason only that a councillor is present at the meeting of councillors that approves the agreement or transaction, or that the vote or consent of the councillor is counted, for that purpose.

(2) *An agreement or transaction referred to in subsection (1) is valid if —*

(a) *the material facts of the interest of each councillor in the agreement or transaction or the interest in or relationship of each councillor to any other party to the agreement or transaction is disclosed in good faith to all councillors and all supervisory persons; and*

(b) *the agreement or transaction is approved or ratified by a unanimous resolution of councillors with the consent of all supervisory persons.*

(3) *Subject to any limitations in the charter or regulations, a councillor who has an interest in any particular business to be considered at a meeting of councillors may be counted for the purposes of determining whether the meeting is duly constituted under section 45(5).*

41.(1) A councillor shall not be personally responsible for any debt, obligation or default of a Foundation unless —

(a) it is proved that such debt, obligation or default was incurred by or resulted from the councilor's dishonesty, fraud, wilful default or other conduct carried out in bad faith; or

(b) it is expressly provided for in this Act or in any other written law.

(2) Subject to subsection (3) and the charter or regulations, a Foundation may indemnify for all expenses, including legal fees, judgments, fines and amounts paid in settlement and reasonably incurred in connection with legal, administrative or investigative proceedings against any person that—

(a) is or was a party or is threatened to be made a party to any threatened, pending or completed proceedings, whether civil, criminal, administrative or investigative, by reason of the fact that the person is or was a councillor a supervisory person, a registered agent or a liquidator of the Foundation; or

(b) is or was, at the request of the Foundation, serving as a councillor, a supervisory person, a registered agent or a liquidator of, or in any other capacity is or was acting for, another Foundation.

(3) Subsection (2) shall apply to a person referred to in that subsection, if the person acted honestly and in good faith with a view to the best interests of the Foundation and, in the case of criminal proceedings, the person had no reasonable cause to believe that the person's conduct was unlawful.

(4) The decision of the councillors, with the written agreement of the protector or protectors, as the case may be, as to whether a person acted honestly, in good faith and in the best interests of the Foundation, and as to whether the person had no reasonable cause to believe that the person's

conduct was unlawful is, in the absence of fraud, sufficient for the purposes of this section, unless a question of law is involved.

(5) If the person referred to in subsection (2) has been successful in defence of any proceedings referred to in that subsection, that person is entitled to be indemnified for all expenses, including legal fees, judgments, fines and amounts paid in settlement and reasonably incurred by that person in connection with such proceedings.

(6) A Foundation may purchase and maintain insurance in relation to a person that —

(a) is or was a councillor, a supervisory person, a registered agent or a liquidator of the Foundation; or

(b) at the request of the Foundation is or was serving as a councillor, a supervisory person, a registered agent or a liquidator of, or in any other capacity is or was acting for, another Foundation,

against any liability asserted against the person and incurred by that person in that capacity, whether or not the Foundation has or would have had the power to indemnify that person against the liability under subsection (2).

42.(1) *Subject to this Act and any other written law, and except as is necessary for the proper management of a Foundation, the councillors shall keep confidential all information regarding the way in which the council is carrying on its objects, the nature and amount of assets of the Foundation and the conduct of their administration.*

(2) The councillors shall so far as is reasonable and within a reasonable time of receiving a request in writing in that behalf, provide full and accurate information as to the nature and amount of assets of the Foundation and the conduct of their administration —

- (a) *subject to the terms of the charter or regulations, to —*
 - (i) *a founder;*
 - (ii) *a supervisory person; or*
 - (iii) *any beneficiary who is not a minor or mentally Incapacitated.*
- (b) *in compliance with an order of the court; or*
- (c) *being any lawful disclosure required under any written law.*

(3) *The councillors shall, subject to the charter, regulations, any order of the court or any disclosure required to be made under any written law, not be required to produce and make available to any person, any document which —*

- (a) *discloses their deliberations as to the manner in which they have exercised or not exercised a power or discretion, or discharged a duty conferred or imposed on them; or*
- (b) *discloses the reason for, or relates to, a particular exercise or non-exercise of a power, a discharge or non-discharge of a duty, or the material on which such reason was or might have been based.*

43.(1) Subject to any limitations in the charter or regulations, a councillor may by written instrument appoint an alternate who need not be a councillor.

(2) An alternate for a councillor appointed under subsection (1) is entitled to attend meetings in the absence of the councillor who made the appointment, and to vote or consent in the place of the councillor until the appointment lapses or is terminated.

44.(1) Except where the charter provides otherwise, the councillors acting unanimously may delegate to any one of them by a document signed by each one of them any of their powers.

(2) A power so delegated under subsection (1), may be exercised as provided for in the document of delegation.

45.(1) Subject to any limitations in the charter or regulations, the councillors may meet at such times and in such manner and places in or outside Seychelles as the councillors may determine to be necessary or desirable.

(2) A councillor shall be deemed to be present at a meeting of councillors, if the councillor participates by telephone or other electronic means, and all the councillors, participating in the meeting are able to hear each other.

(3) Subject to a requirement in the charter or regulations to give longer notice, a councillor shall be given not less than 3 days notice of a meeting of councillors.

(4) Notwithstanding subsection (3), a meeting of councillors held in contravention of subsection (3) shall be valid if all the councillors or such majority as may be specified in the charter or regulations entitled to vote at the meeting have waived notice of the meeting, and for this purpose the presence of a councillor at a meeting shall be deemed to constitute waiver by the councillor.

(5) *A quorum for a meeting of councillors shall be that fixed by the charter or regulations, but where no quorum is so fixed, a meeting of councillors shall be properly constituted for all purposes, if at the commencement of the meeting a majority of the total number of councillors are present in person or by alternate.*

46.(1) *Each Foundation shall keep —*

(a) *minutes of all meetings of councillors; and*

(b) *copies of all written resolutions consented to by the councillors.*

(2) *Where minutes are kept pursuant to subsection (1) in relation to the proceedings at any meeting of the councillors, until the contrary is proved, the meeting shall be deemed to have been duly held and convened, and all proceedings which took place at that meeting to have duly taken place.*

(3) *The minutes and other records referred to in subsection (1) shall be kept at the registered office of the Foundation, or in such other place as the councillors consider fit and, the councillors shall inform the registered agent of the address of the other place.*

(4) *The minutes and other records referred to under subsection (3) shall not be open to public inspection but shall at all times be open to inspection by each of the councillors, founders or supervisory persons, or as may otherwise be required by a written law.*

(5) *The minutes and other records required to be kept under this section shall be preserved for a period of not less than 7 years after the end of the period to which they relate.*

47. *A Foundation that —*

(a) fails to keep minutes or to cause to be kept other records in contravention of section 46(1); or

(b) fails to comply with section 46(5),

commits an offence and is liable on conviction to a fine not exceeding US\$25000.

48. *Subject to any limitation in the charter or regulations, an action which may be taken by councillors at a meeting may also be taken by a resolution of councillors consented to in writing, by telex, facsimile transmission, telegram, cable or other written electronic communication, without the need for any notice.*

49.(1) *A councillor may be removed in accordance with charter, regulations or this Act.*

(2) Where the charter or regulations do not provide, or do not adequately provide for the removal of a councillor —

(a) a founder;

(b) a councillor;

(c) a beneficiary; or

(d) a supervisory person,

may apply to the court for the removal of a councillor, for any of the following causes —

(i) where the interests of the councillor are incompatible with the interests of a founder, a beneficiary or with the objects of the Foundation;

(ii) where the councillor is disqualified from being a councillor under section 35; or

(iii) where the councillor has failed to carry out or failed to carry out properly, the duties or functions required of a councillor in fulfilment of the councillor's obligations under the charter, regulations or this Act.

(3) Upon an application under subsection (2), the court may order the removal of a councillor.

50.(1) *This Act shall apply to a councillor until —*

(a) the resignation or removal of that person as a councillor in accordance with the charter, regulations or pursuant to an order of the court;

(b) the Foundation ceases to be a Foundation registered under this Act;

(c) the winding-up or dissolution, as the case may be, of the Foundation;

(d) the death, incapacity or bankruptcy of the councillor being a natural person, or the winding-up or dissolution of the councillor, being a legal person, or the occurrence of any other event which disqualifies the councillor from acting as such.

(2) *Where —*

(a) a person ceases to be a councillor under subsection (1), the Foundation shall within 14 days of that person ceasing to be a councillor give written notice thereof to its registered agent in Seychelles; and

(b) the name and address of that person were specified in the charter or regulations, the Foundation may file notice of the full name and address of that person with the Registrar within 14 days in the approved form, accompanied by the fee set out in Part 2 of Schedule 1.

(3) Notwithstanding that a person has ceased to be a councillor, any liability to the Foundation which the person may have incurred as a councillor shall continue to be a liability enforceable against that person by the Foundation.

(4) A Foundation that contravenes subsection (2) (a) is liable to a penalty of US\$50 for each day or part thereof in respect of which the contravention continues.

51.(1) *In the event of a change of name or address of councillor —*

(a) a Foundation shall within 14 days of such change give written notice thereof to its registered agent in Seychelles; and

(b) a Foundation may, where the new name and address of the councillor are specified in the charter or regulations, file notice of the full name and address of the councillor with the Registrar, in the approved form, accompanied by the fee set out in Part 2 of Schedule 1.

(2) A Foundation that contravenes subsection (1) (a) is liable to a penalty of US\$50 for each day or part thereof in respect of which the contravention continues.

Sub-Part III — Protectors of Foundations

52.(1) *Where the charter or regulations provide for the appointment of a protector, such a protector may be a natural person or a legal person.*

(2) *A founder, a beneficiary or a councillor may be appointed as a protector, but —*

(a) *a sole councillor; or*

(b) *a sole beneficiary,*

shall not be appointed as such.

(3) *Where more than one person is appointed to act as protector, such persons shall act unanimously, unless the charter or regulations provide otherwise.*

(4) *A protector may be appointed —*

(a) *by the founder in the charter or regulations or by such other written instrument; or*

(b) *by such other person empowered to do so in the charter or regulations.*

53.(1) *Subject to the terms of the charter or regulations, where no protector is appointed to a Foundation or the number so appointed is less than that required by the charter or regulations, a*

founder, a councillor or any remaining protector may apply to the court for the appointment of one or more persons to be the protector or protectors respectively.

(2) Where the court is satisfied that an application made under subsection (1) is justified, it may appoint one or more consenting person or persons, as the case may be, to act as the protector or protectors respectively.

(3) The charter, regulations and this Act shall apply to a person appointed as the protector under subsection (2), as they apply to a protector appointed pursuant to the charter or regulations.

54. *The appointment of a person to act as the protector is personal to that person and shall not be assigned or delegated, except that where the protector is a legal person, it may act through its duly authorised officers or agents.*

55.(1) *Subject to subsection (2), the charter or regulations may—*

(a) specify the powers of a protector; and

(b) provide for powers in addition to or more limited than those provided in this Act.

(2) *A protector shall, subject to the terms of the charter or regulations —*

(a) take such action as the protector may deem necessary to ensure compliance the Foundation and councillors with the charter, regulations and this Act; and

(b) generally monitor the management of the Foundation by the councillors, including the conduct of the councillors.

(3) *A protector shall have full right of access to the books, records and accounts of a Foundation.*

(4) *A protector shall have the right —*

(a) *to be informed of all meetings of councillors;*

(b) *to table business to be considered at such meetings;*

(c) *to attend and be heard but not to vote at such meetings;*

(d) *where any business of a Foundation is conducted by—*

(i) the circulation of documents, to be included in the circulation of documents at the time that they are circulated to the councillors; or

(ii) the delegation of powers to a councillor or an agent, to be informed of the terms and any exercise of the delegation.

(5) *References in subsections (2), (3) and (4) to a protector apply to all protectors holding office at the relevant time acting jointly and severally.*

56. *A protector appointed under the charter, regulations or this Act, shall cease to act as the protector in the event of —*

(a) *the resignation of the protector;*

(b) the removal of the protector in accordance with the charter, regulations or this Act;

(c) the dissolution of the Foundation; or

(d) the death, incapacity or bankruptcy of the protector, being a natural person, or the winding-up or dissolution of the protector, being a legal person.

57.(1) Subject to the terms of the charter or regulations, where a person ceases to be qualified to act as the protector or has failed to carry out or to properly carry out the duties required of a protector under the charter, regulations or this Act, on an application to the court by a founder, a councillor, a beneficiary or a supervisory person, the court may order the removal of the protector, and the appointment of a fit and proper consenting person to act as the protector.

(2) The charter or regulations and this Act shall apply to a protector appointed by the court under subsection (1), as they apply to a protector appointed pursuant to the charter or regulations.

58. A protector or person acting as an officer, employee or agent of a protector or performing any functions on behalf of a protector, shall not be liable in damages for anything done or omitted to be done in the discharge or purported discharge of the duties of the protector under the charter, regulations or this Act unless it is proved that the act or omission was done in bad faith.

PART V- BENEFICIARIES OF FOUNDATIONS

59.(1) A beneficiary shall, by reference to the charter or regulations, be —

(a) identifiable by name; or

(b) ascertainable by reference to —

(i) a class; or

(i) a relationship to another person, whether or not living at the time of the establishment of a Foundation or at the time by reference to which, under the terms of the charter or regulations, members of a class are to be determined.

(2) A founder may be a beneficiary but a founder shall not be the sole beneficiary.

(3) Subsection (2) is not contravened if a founder is the sole beneficiary of a Foundation during the founder's lifetime:

Provided that the charter or regulations designate or provide for the designation of one or more person or persons as the beneficiary or beneficiaries respectively, upon the founder's death or legal incapacity.

60.(1) *Subject to a contrary term in the charter or regulations where for the time being —*

(a) a Foundation has no beneficiary and there is no term in the charter or regulations for the appointment of such beneficiary; or

(b) a founder is the sole beneficiary and there is no term in the charter or regulations for the appointment of such beneficiary,

the council shall by a resolution of councillors select and appoint or designate one or more beneficiary or beneficiaries respectively.

(2) Subsection (1) shall not apply to a Foundation established to carry on a specified purpose only under this Act.

61.(1) *Subject to a contrary term in the charter or regulations, a beneficiary is entitled on request to inspect and obtain a copy of—*

(a) the charter and any amendment thereto;

(b) the regulations and any amendment thereto;

(c) any audit report or other report on the financial position of, and any annual financial statements of, the Foundation; and

(d) minutes of any meetings and written consent resolutions of a council.

(2) A request to inspect documents under subsection (1) shall be made in writing to a council or registered agent.

(3) In the event that a Foundation does not make documents referred to under subsection (1) available for inspection within a reasonable time, the court may, upon an application by a beneficiary, order their delivery or inspection if appropriate by a person professionally qualified to assess the information therein contained and report to the beneficiary who made the application to the court.

62. *Where a councillor fails to take all reasonable steps to secure compliance by the Foundation with the requirements of section 61, or has wilfully caused any default by the Foundation*

under that section, the councillor commits an offence and is liable upon conviction to a fine not exceeding US\$25000.

63. *A beneficiary under a Foundation is not owed —*

- (a) by the Foundation;*
- (b) by a person appointed under the charter, regulations or this Act; or*
- (c) by a person appointed by such other written instrument,*

a duty that is analogous to a fiduciary duty.

64. *The charter or regulations may provide that a beneficiary shall forfeit any benefit, right or interest thereunder in the event that the beneficiary challenges —*

- (a) the establishment of a Foundation;*
- (b) the transfer of any assets to or by a Foundation;*
- (c) the charter or regulations or such other written instrument; or*
- (d) any decision of a founder, a councillor or a supervisory person.*

Issues for the court determination

The court has carefully scrutinised the pleadings in this case and their attached affidavits and documents in support and have given very close attention to the submissions of parties for and against the application. Special consideration have also been given the the applicable legal provisions and principles in this case . Having done so it is of the view that the issues left for determination are four folds and they are as follows;

- (i) Whether the Applicant has been validly removed as Protector.
- (ii) If the Protector remains as such , whether his actions and or ommissions consist of breaches of his statutory duties which merits his removal as the Protector.
- (iii) If the Applicant remains the Protector of the Foundation, wheteher the Respondent has failed in its statutory duties towards the Foundation that merits its removal as Council.
- (iv) What should happened to the consequences of the intervening actions carried out by the Foundation with the participation of the Respondent with respect of the assets of the Foundation.

(i) Whether the Applicant has been validly removed from office.

A Protector can only be removed in accordance with the provisions of the law. This legal procedure is provided in its Section 56 of the Act (*Supra*). According to this provision he or she would stop holding office only upon resignation, removal in accordance with the Charter, Regulations or the Act, the dissolution of the Foundation or finally with his death, incapacity or bankruptcy in the case of a natural person or the winding up or dissolution of the Protector, where he is a legal person.

In the case before the Court it is common ground that the Council only sought to remove the Applicant from office of Protector in accordance withthe provisions of the Charter; Regulations or the Act and that the other legal grounds are not applicable and were not relied upon. I therefore find

that the others not relevant in the Court's determination. When it comes to the pertinent provisions, Section 57 of the Act also finds its relevance. According to this Section when a person ceases to be qualified to act as the Protector or has failed to carry out or to properly carry out his duties required of a Protector under the Charter, Regulations or the Act an application can be filed with this court by a Founder, a Councillor, a Beneficiary or a supervisory person for the removal of the Protector, and the appointment of a fit and proper consenting person to act as Protector.

Accordingly, and so I find a Protector duly appointed can only be removed from office for failure to carry out his duties only by way of a court application to be made by the stated office holders and an ensuing court order to that effect.

Having come to this conclusion I now scrutinise the facts of the case so as to see whether there was compliance to Section 57. In respect of the Charter. The 2021 Charter provides in its clause 17.7 that a Protector may be removed from office by a Founder or such other persons (if any) as may be designated in the Regulations as being empowered to remove a Protector. This is the only removal provision in the Charter. Clause 17.5 of the Charter being only procedural.

The Court has scrutinised also the provisions of the Regulations 2021. Having done so I find that there are no provisions which deal with removal of the Protector. Clause 4 only relates to the subsequent appointment of Protector.

The silence of the Charter and the Regulations leaves a Section 56 removal squarely within the regulatory provisions of Section 57 of the Act

The Respondent seems to agree and in its Defence it has averred the manner that the Section 56 removal was instituted in this case. According to paragraph Q(i) and (ii) of the Defence and Counterclaim, the

Respondent particularised the removal of the Applicant as the Protector of the Foundation as follows. By letter dated 3 July 2020 by Carole and Patricia to the Applicant (hereinafter referred to as the **“Removal Letter”**), Carole and Patricia exercised their right (inherited from the Founder) under clause 17.5(a) of the 2016 Charter to remove the Applicant as Protector; in addition to the Removal Letter, the Applicant was sent a copy of the resolution of the Foundation’s Council dated 6 July 2020, by which the Foundation adopted and approved the Removal Letter.

When the Founder died her rights under clause 17.5(s) of the 2016 Charter vested her lawful heirs under her personal deceased estate, namely, her nieces, Carole and Patricia, while Foundation assets did not belong to the Founder and she had no ownership interest in the Foundation, her express right to remove Protectors under clause 17.5(a) of the Charter constituted the Founder’s personal property which vested in her heirs, Carole and Patricia, on her death; and whereas Section 77(1) of the Act requires the Respondent to keep at the Foundation’s register office, various registers, including the Foundation’s register of supervisory persons kept at its registered office shows that, the Applicant ceased to be Protector on 6 July 2020 and currently the Foundation does not have a Protector.

When one applies the provisions of law to the facts of the case as above referred in the light of the manner that the removal proceedings was undertaken in the words of the Respondent, it is clear that the purported removal of the applicant in office was unlawful.

First and foremost clause 17(5)(a) of the Charter doesnot cater for removal of Protector. This clause relates to the appointment of a Protector by a Founder, of which Carole and Patricia were not. They were not the persons specified in clause 3 of the Charter and neither were they the persons upon whom the Founder’s right had been transferred on assigned in terms of the definition of “Founder” in clause (1) of the Charter.

Secondly, it is clear that Carole and Patricia should have resorted to a court order under Section 56 and 57 of the Act , in the absence of any specific provisions in the Charter and Regulations relating to removal of Protector even if they had legal basis to do so.

This finding leads me to the inescapable conclusion that the Applicant has been invalidly removed from the office of Protector as the adopted procedure was erroneous. I find that the removal letter is null and void and of no effect. The Applicant is and has remained as Protector of the Foundation since the date of his appointment. There is accordingly no need to appoint another person to replace him. He brought this action to this court as the Protector and not as the former protector as alleged by the Respondent.

(2) Breaches of duty on the part of the Applicant.

The Respondent in its Defence and Counterclaim is now claiming that there are enough proven defaults on the part of the Applicant that merits his removal from the position of Protector, in the event that this court comes to the above conclusion. The Respondent has related to a number of events that it alleges shows breaches that should lead to his removal as the Protector.

According to Section 55 of the Act the powers of a Protector are those enshrined in the Charter or Regulations. Subsection 2 of the same Section gives to the Protector power to act as an oversight mechanism so as to be a check on the statutory powers of the Councillors by ensuring that the latter complies with the provisions of the Charter and Regulations, whilst at the same time supervising and checking and balancing the management of the Foundation by the Councillors. He also exercises such functions as the Foundation Secretary, by having the right to attend the meetings of the Foundation, keep records and generally ensure that there is proper records of the business of the Foundation.

The conflict between the parties seems to have originated in February 2020 on the date the Applicant instituted a grievance with the Foundation on the basis that he has not been paid his Protector's Fees by the Foundation. The situation worsen when the Respondent took the position that the Founder Pierpont Agreement was not binding on the Foundation and the subsequent attempt to remove the Applicant as Protector.

The action of the Respondent to support outright an act which deprived the Applicant his fees and the ensuing consequential embittered relationship of the parties are relevant to make a decision on this issue. To me this act led to an impasse that prevented and hindered the Applicant from carrying out his statutory duties. Moreover, I have already found that the unilateral attempt to remove the Applicant from his position was wrong. This being an act that had the effect of locking the Applicant out of the affairs of the institution and prevented him from carrying his statutory duties under the Act, especially Section 55.

The facts of this case shows that he was blocked out of the business of the organisations by the action of the Respondent and Carole and Patricia which resulted in him being placed in a position of incapacity to act in its best interest and to check and balance the powers of the Foundation to date. This inevitably led to him being unable to perform his duties in accordance with his statutory obligations. Any alleged lapses that resulted due to his inability to act therefore cannot consist of neglect of duties or actions done in bad faith. All of the alleged breaches related to by the Respondent falls under this category. I accordingly find that the Applicant did not fail on his duties as Protector and if ever there was a failure due to his incapacity to act as Protector, this was caused by the acts and or omission of the Respondent acting in connivance with others.

(3) Whether the Councillor should be removed from its post.

Whether the Applicant remain the Protector or not the Respondent as sole councillor of the Foundation has to act in accordance with its duties under the Charter, Regulations and the Act. This is such as a result of the Applicant pleading that the Respondent has contrary to its duties failed to act honestly in good faith and in the best interest of the organisation. Something which is categorically denied by the Respondent.

The Applicant says that the Respondent has unilaterally appointed itself as Protectors of the company owned by the Foundation in an attempt to take effective control of its assets. He also avers that the attempt to unilaterally remove him as Protector is further evidenced by the attempt to reinforce its position so as to facilitate their taking over the Foundation asset.

I note that as a fiduciary, the Respondent has a duty to act honestly, in good faith and in the best interest of the Foundation and that in so doing it has to exercise care, diligent and skills that a reasonable prudent person should exercise in the circumstances. Accordingly, the court's hence required to judge the different averred acts and or omissions of the Respondent against the standard that a reasonable; prudent Councillor would have done or omitted to do in the specific facts of the case.

I have considered the entirety of the facts of the case as pleaded and I have made an assessment against this objective standard. First of all I find credible the facts that I am going to rely upon . These relates to admissions made through several averments before the Court by the Respondent and Carole and Patricia and the Respondent itself. Having so apply my mind to them . I find that the Respondent to have been in breach of it duties on several grounds.

First of all the Respondent failed to act with due diligent as a reasonable Councillor in the specific circumstances would have acted. This is so

when it outrightly supported the position that as the Foundation and the Respondent were not parties to the Founder Pierpont.Foundation Agreement , they cannot be bound by it. The court cannot subscribe to this view as it was the Founder herself who engaged the services of the Protector and it was her that decided to remunerate the Protector with the fee of CHR30,000 every 3 months. This form part of the wishes of the Founder.

In the letter of wishes, last line, when it comes to rewarding of the Protector the Founder wishes is as follows: *“Leur remuneration est fixée par lettre séparé et sera assuré par la Fondation a partie du décès ou de l’incapacité intellectuelle de Francoise”*. In other words the remuneration of the Protector is fixed by a separate document and this to be assured by the Foundation following the death or mental incapacity of the Founder.To this court the Founder Pierpont Agreement is precisely the separate document which fixed the quantum of fees as referred to in the Letter of Wishes.However, despite this following the death of the Founder the Respondent categorically failed to give effect to the content of the Letter of Wishes and instead availed itself to the very ludicrous argument of privity of contract.This consist of a breach of duties to act with due care; skills and diligence as a reasonable Councillor, as a careful attention to the facts of the case would have led to honouring the wishes of the Founder regarding the said remuneration. Instead of actively engaging the Protector to resolve this issue in good faith, the Respondent took a stance that led to the Foundation deadlock and the result seen today. I accordingly find that it failed in this duty.

Furthermore, the Respondent failed to exercise such care, skill and diligent as Councillor and rely entirely on Carole and Patricia when it came to the implementation of the content of the Letter of Wishes and its

legal implication following the death of the Founder. The distribution of the properties were done entirely on the assumption that the nieces and the administrator of the Founder's estate were right in their assertions. In so doing, the Respondent forfeited its statutory powers to them. It appears that the Respondent's sole and only interest was to distribute the Belgium properties to them no matter what. In so doing it failed to take into account its role and duties and that of the Protector as set out in the Charter, the Regulations and the Act in the distribution of those assets.

There was a need for ascertaining an independent legal advice as to whether Carole and Patricia were assimilated in the position *quod* Founder, following her death and could hence change the wish of the Founder *vis a vis* of which they stood as beneficiaries. I find that a Councillor exercising reasonable care and diligence would have sought for such guidance and advice/

Finally, as I have found about the Respondent acted unlawfully when it acted in concert with the others in order to remove the Applicant from his position. This also shows a lack of care towards the Founder that has severely affected its interest.

As a result of this I come to only one conclusion, that Respondent should be removed as the Councillor of the Foundation. I accordingly order the removal of the Respondent as the Foundation's Council. Another Councillor or Council shall be appointed in accordance with the Charter, Regulation and the Act.

(4) Properties of the Foundation acquired by third parties.

There has been dealings in the properties of the Foundation by Carole and Patricia with the assistance of the Respondent. This issue is made live by both parties, with the Applicant when it

seeks to remove the Respondent and the latter proposing to legalise and justify some of the dealings with the Belgium properties, following the dismissal of the original suit.

In that regard averments are made that the Belgium properties which form the bulk of the assets of the Foundation, has been sold and the net sale proceeds are in the course of distribution via the companies to Carole and that this will be followed by the winding up of the Foundation and the companies. It is averred that the sales have been made to unknown and unstated independent third parties and that they are in various stages in the sales transaction.

In considering this issue the court is concerned about the rights or possible rights of third parties who might have acquired any of the Belgium properties for value and without notice. They may have done so without notice of the issues arising in this case and in good faith. In this regard it might create injustices to those third parties if those sales are rescinded especially as they are unknown and unrepresented in this case.

At the same time I am concerned about the fact that the proprietary interest of the Foundation must be protected in order to prevent injustices. It is for these reasons that I will issue an order that the freezing Order that I made on the 27th of January 2022 be further extended until further orders of this court. As regards to the proceeds of sale that has been received with respect of any of the Belgium properties I order that the purported beneficiary Carole Peteers or any persons holding the set sale funds thereof shall hold the funds in trust until further orders.

I make no order as to cost.

Signed, dated and delivered at Ile du Port, Victoria on 27th May 2022

R. Govinden

Chief Justice

R. J. Govinden

Chief Justice