Neutral Citation Number: [2023] EWHC 2532 (Ch)

Case No: PT-2022-000443

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**PROPERTY, TRUSTS AND PROBATE COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 October 2023

**Before**:

**SAIRA SALIMI**
**(sitting as a Deputy High Court Judge)**

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**Between:**

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| **(1) National Westminster Bank PLC**<br>**(2) Royal Bank of Scotland PLC**<br>**(3) Coutts & Co** | **Claimants** |
| **- and -** | |
| **(1) Ludlow Trust Company Limited**<br>**(2) Benjamin Fairhead (in his capacity as a representative party)**<br>**(3) Attorney General (in relation to certain charitable trusts)**<br>**and others** | **Defendants** |

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**Fenner Moeran KC** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the Claimants
**Mark Baxter** (instructed by **Addleshaw Goddard LLP**) for the First Defendant
**Wendy Mathers** (instructed by **Pinsent Masons LLP**) for the Second Defendant

Hearing dates: 4 October 2023

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**SAIRA SALIMI** :

1. These proceedings were brought under Part 8 of the CPR, as uncontentious matters relating to the administration of trusts. Each of the Claimants is a bank which is part of the NatWest Group, and each of them has been appointed as trustee of a number of trusts. They are seeking an order appointing the First Defendant ("Ludlow") as trustee of each of 61 trusts ("the Remaining Trusts") in place of the First Claimant ("NatWest"), the Second Claimant ("RBS") or the Third Claimant ("Coutts") (as the case may be) and making consequential provisions as to the vesting of land and other property in Ludlow.

2. The application is unopposed. The Second Defendant ("Mr Fairhead") was appointed by order of Master Kaye on 8 February 2023 to represent the interests of:

   (i) those persons interested in:

      a. the powers of appointment in the trusts of new and / or substitute trustees; and

      b. the trust funds of the trusts; and

   (ii) those persons who are the managing trustees (within the meaning of the Public Trustee Act 1906) of the custodian trusts listed at Schedule 2 to the Order of Master Kaye dated 8 February 2023 ("the custodian trusts").

3. The managing trustees of one custodian trust chose not to be represented by Mr Fairhead, but that trust is no longer part of these proceedings.

4. The Third Defendant (the Attorney General) took no active part in these proceedings.

5. The majority of the remaining Defendants are the persons who have a power of appointment of trustees under one of the Remaining Trusts. A minority are managing trustees of custodian trusts (either charitable or non-charitable) where one of the Claimants is the custodian trustee, or settlors of trusts where there is no express power of appointment conferred by the trust document itself.

6. All parties have prepared this case with admirable care and thoroughness, and Mr Fairhead has been thorough in his interrogation of the Claimants' decisions in the interests of the other trustees and beneficiaries of the trusts. I am very grateful for the work of all parties.

7. Following a case management conference, Master Kaye granted an order on 8 February 2023 that there should be no oral evidence in these proceedings unless notice of intention to cross-examine was given at least four weeks before the hearing. No such notice was given, and therefore written evidence only was before me on 4 October 2023.

**The factual background**

8. The legal issues in this case are straightforward but arise in a complex factual matrix. The background to this case is extensively set out in the first witness statement of David Price, Business Analyst in the Financial Planning and

Investment – Private Banking Services department of Coutts, and the brief summary below of the Claimants' actions is derived from that statement.

9. The Claimants made a commercial decision in 2019 to divest themselves of their trusteeships and trust administration business. Each of them (or their predecessor banks) had offered tax, trusts and estate services for many years. The NatWest Group also operated a single private client trust administration business, which provided trust administration services to all of the Claimants. In the years preceding the decision, the tax, trust and estate administration teams were significantly reduced and consolidated into a smaller number of teams. NatWest and RBS stopped accepting new trusteeships, or providing advice on the creation of new trusts, in December 2012, although Coutts continued to accept new trusteeships and provide advice on new trusts for its customers. The trust administration team was also reduced and consolidated, so that at the time of the decision to transfer it to a third party, it consisted of a single team based at offices in Bristol. That trust administration business was the business that NatWest Group proposed to transfer to a third party, on the basis that each of the three Claimants would retire as a trustee and the third party would be appointed in their place.

10. NatWest Group's motivation for divesting itself of its trust administration business was that the number of trusts for which it was responsible had been reducing over time, and therefore represented a decreasing proportion of the NatWest Group's business. As the trust administration business formed a very small part of a very large organisation, it was becoming difficult to justify investment of time and resources, such as investment in new trust-specific

technology. Given that, and NatWest Group's wish to simplify its business and focus on its core activities, it concluded that it should divest itself of the trusteeships and consequently of the trust administration business, arranging for a new trustee to be appointed in its place and for the transfer of the trust administration business to that new trustee.

11. As at December 2019, when NatWest Group decided to find a suitable replacement trustee, the Claimants between them were trustees, or co-trustees, of a total of 3,946 trusts for private clients and charities. They began the process of seeking a replacement trustee by listing ten potential parties to take part in a bidding process. That initial list was subsequently narrowed to a shortlist of six. Each of those six indicated interest in bidding for the trust portfolio and signed a non-disclosure agreement in order to take part in the bidding process.

12. Three interested parties submitted non-binding indicative offers before the deadline of 31 July 2020. On 17 August 2020, NatWest Group sent each of them a letter inviting them to make a final unconditional and binding offer for the trust business by 25 September 2020. Each of the three did so.

13. NatWest Group then reviewed the offers and carried out an exercise to assess the financial stability of each of the three bidders (including a careful assessment of Ludlow's financial position, as it was a new company at that time). Its financial crime and anti-money laundering teams also conducted searches on shareholders and associated companies. Once that detailed review had been completed, Ludlow was the highest scorer and proceeded to the final stage of the process, which involved a detailed due diligence exercise and approvals from NatWest Group's internal risk management teams. Once that

process had been completed, Ludlow was selected as the preferred replacement trustee. Ludlow was notified of that decision on 14 October 2020.

14. Ludlow entered into a Framework Transfer Agreement with the Claimants on 25 November 2020. That agreement provided, among other things and so far as relevant to this judgment, for the Claimants to appoint, or seek the appointment of, Ludlow as trustee of all the trusts of which the Claimants were then trustees. It also provided for exclusion of any trust from the transfer arrangements if the person with the power of appointment of new trustees did not consent to the transfer to Ludlow, and for the arrangements to be made for applications for any court orders that were required in order to implement and / or approve the transfer of the trusts. The trust administration business was transferred for the nominal consideration of £1 as a going concern. However, Ludlow agreed to pay the Claimants' costs of the process of transferring all the trusteeships, including the costs of applying for court orders in relation to any trust where such an order proved necessary.

15. Following the execution of the Framework Transfer Agreement, the Claimants sent letters on 30 November 2020 to all the settlors, co-trustees and beneficiaries of the trusts under management, explaining that they would be contacting all the parties required for consents to the transfer of each of the trusts to Ludlow. This was the only letter sent to the beneficiaries of the trusts, and to the managing trustees of the custodian trusts: the other letters referred to below were not sent to those people.

16. A further letter was sent to the settlors and co-trustees, as the holders of powers of appointment under the trusts, on 11 December 2020, providing further

information about Ludlow and inviting settlors and / or co-trustees to consent to the change of trustee by signing and returning a Deed of Retirement and Appointment. That letter also explained that, if the person with the power of appointment of new trustees wished to appoint a different alternative trustee, the Claimants would be happy to agree to this. A deed of appointment and retirement, with signing instructions, was enclosed with the letter, and settlors and co-trustees were invited to execute and return it, without dating it.

17. Settlors and /or co-trustees of the trusts for which Coutts was the relevant trustee were invited, by letter dated 6 January 2021, to attend a webinar on 12 January 2021 with the Ludlow management team. (This webinar was not available to those for whom NatWest or RBS was the relevant trustee.)

18. On 22 January 2021, another letter was sent out, acknowledging the impact of the Covid-19 pandemic and the legal restrictions in force at that time on the

process for executing and witnessing deeds, and giving settlors and co-trustees additional time to return their deeds of appointment and retirement.

19. On 16 April 2021, a reminder letter was sent out to all those who had not yet returned a deed of retirement and appointment.

20. In the week of 10 May 2021, a further reminder was sent out. This was the first letter to say explicitly that in the absence of a response, a court application would be made to transfer the trust to Ludlow.

21. On 13 August 2021, another reminder letter was sent to settlors and co-trustees – in total, six letters or reminders were sent by the Claimants to unresponsive settlors and co-trustees.

22. Responses were received from the great majority of trusts under management, and deeds of retirement and appointment were executed accordingly. The trusteeships were transferred in three groups, depending on the date of receipt of the deed of retirement and appointment. The first group of transfers took place on 6 April 2021, the second on 5 July 2021 and the third on 14 February 2022. In addition, 342 trusts came to an end and therefore no transfer was required.

23. By the time the transfers had been completed, there were 124 trusts governed by the law of England and Wales in respect of which no deed of retirement and appointment had been executed, either because the person with the power to execute such a deed had not responded to the requests to do so, or (in the case of five individuals) because the person who had the power lacked the capacity

to do so. By orders of Master Kaye dated 8 February 2023, litigation friends were appointed to represent each of those five individuals.

24. There were also 17 trusts governed by the law of Scotland, where the court's assistance was required to appoint a new trustee and / or for the resignation of a trustee. An application was made to the Court of Session in late 2021 in respect of 8 trusts and heard on 17 December 2021. A further application was made for another 8 trusts and heard on 1 February 2022. The final trust required the consent of a co-trustee for the application to the court to be made: once that was forthcoming it was submitted to the Court of Session on 7 April 2022. The Court of Session's analysis of the Scottish legal position is set out in the Opinion of Lord Braid dated 14 January 2022 in the Petition of the Royal Bank of Scotland PLC to resign as trustee ([2022] CSOH 3).

25. There were 20 trusts governed by the law of Ireland or Northern Ireland in the original portfolio, but these were all transferred by deed of appointment and retirement, and no application to the court was necessary in either jurisdiction.

26. Meanwhile, the Claimants had decided that in the circumstances of this case it would be impractical to find one trust whose beneficiaries and / or settlors could act as representative for them all, and that a better course would be to find a suitable solicitor, qualified in England and Wales, to take on the role of representative. Proposals were invited from three suitably qualified solicitors, and Mr Fairhead was chosen. He has fulfilled his responsibilities diligently in

interrogating the proposals made by the Claimants to transfer the trusts to Ludlow and has filed three witness statements in these proceedings.

27. In his first witness statement, dated 28 July 2022, Mr Fairhead set out the steps he took following his selection, but before his formal appointment by the court. In particular, he reviewed a number of documents including the trust instruments (considering, among other matters, whether there were any restrictions in the trust document that would affect the proposed transfer to Ludlow). He also carried out a detailed review of Ludlow's suitability, including reviewing the bid documentation and the assessment process, as well as seeking information about Ludlow's know-your-client and anti-money laundering processes. As part of that process, he sought and received confirmation that there would be no tax consequences of the proposed transfers.

28. Mr Fairhead also wrote to Defendants 4 to 147 in these proceedings, on 7 July 2022. That letter explained Mr Fairhead's role as representative and invited them to let him know if they had any comments, questions or objections to the change of trustee, or if they were perfectly happy with the proposed transfer. He asked for a reply whether or not they intended to participate actively in the claim, and he received responses in respect of 46 trusts. None of these responses constituted an objection to the transfer, although a small number of respondents did have questions about Ludlow's fee structure.

29. Mr Fairhead diligently pursued the question of fees for administration of the trusts once transferred to Ludlow. For those trusts of which Coutts was the trustee, the proposed new fee structure was very little different from the old and there was no obvious disadvantage to those with an interest in the trust fund.

For those trusts of which NatWest or RBS was trustee, Ludlow's new fee structure represented a substantial increase on the NatWest and RBS published fee structures. In practice, a number of trusts had been charged only nominal amounts in the period leading up to the decision to transfer the trust funds, and therefore the actual increase in fees would be even larger.

30. This has been in large part addressed by Ludlow's agreement to fix its fees so that, for the two years following the transfer of a trust, the trust will be charged no more than it was being charged by the relevant Claimant. Following that two-year period (and where permitted under the trust instrument and/or by legislation), the new fee structure will be applied to all trusts except those which hold only a life insurance policy (which will not be charged an annual administration fee). The person or persons with the power to appoint new trustees will have the opportunity, in that two-year period, to seek an alternative trustee.

31. Mr Fairhead also interrogated the level of insurance cover available to Ludlow. At the point when he initially inquired, the level of cover was £5 million, and there was a complete exclusion for cyber issues. Following Mr Fairhead's intervention, the level of cover was maintained at £5 million but a separate policy was obtained to cover cyber-attacks. The Claimants and Ludlow all submitted that there was no reason to suppose that the level of cover was inadequate but acknowledged that it was relatively low compared with the protection that would be available to clients of a large bank.

32. Six of the Remaining Trusts are charities, and therefore the Attorney General is party to these proceedings. By email dated 2 September 2022, the Attorney

General's office confirmed that as Mr Fairhead had been joined to the proceedings as representative for the trusts, including the charitable trusts, there was no need for the Attorney General to participate in the proceedings, and she would not be making any representations.

33. In separate correspondence, authority was sought from the Charity Commission to deal with the charitable trusts as part of the court proceedings. On 25 April 2022 the Charity Commission confirmed that, although the Commission could act in exercise of its powers under the Charities Act 2011 to appoint new custodian trustees of the charitable trusts, in all the circumstances of the case it was appropriate for the court to deal with them together with the other trusts, with the benefit of Mr Fairhead's representation (which would not be available in an application to the Charity Commission to exercise its statutory powers). The Charity Commission therefore consented, pursuant to s.115 of the Charities Act 2011, to the application to the court including the charitable trusts.

**The Remaining Trusts**

34. At the point when these proceedings were issued, there were 124 trusts in respect of which an order was sought. In the intervening period, some trustees

have signed deeds of retirement and appointment, and other trusts have been wound up and the assets distributed, and there are now 61 Remaining Trusts.

35. The Remaining Trusts fall into four groups:

    a. Discretionary trusts;

    b. Life interest trusts;

    c. Life insurance policy trusts; and

    d. Custodian trusts (both charitable and non-charitable).

36. The 20 discretionary trusts are all very similar to each other, as all three Claimants were using virtually identical precedents for the creation of *inter vivos* discretionary settlements. In each case a power of appointment of new trustees is conferred on the settlor or settlors during their lifetimes, and the general law (in particular, s.36 of the Trustee Act 1925) applies to the appointment of trustees after that date.

37. The life interest trusts, of which there were five at the date of the hearing, are more varied. One of them is a trust under the Settled Land Act 1925, but by virtue of s.64 of the Trustee Act 1925 the power of appointment of new trustees applies to trusts created under that Act. Three of them are will trusts, but I am satisfied that the court is not being asked to appoint an executor or administrator, as the administration of the estate in each case has been completed long ago. The appointment of a new trustee would therefore not offend against s.41(4) of

the Trustee Act 1925, which provides that the power in s.41(1) may not be used to appoint an executor or administrator.

38. The 10 life insurance policy trusts are the simplest of all: each of them holds a life insurance policy on trust, the proceeds of which are to be paid in accordance with the provisions of the trust deed at the death of the policyholder. No action is required of the trustee while the policyholder is alive.

39. The remaining group is the 26 custodian trusts, of which six are charitable trusts. In the majority of cases there is no express power of appointment and retirement, so the power falls to the managing trustees for the time being (in the context of a social club or similar organisation, usually the members of the management committee or equivalent).

**The legal framework**

40. The court is being asked to exercise its power under s.41(1) of the Trustee Act 1925, which provides as follows:

> *"The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee."*

41. The Public Trustee Act 1906 s.4(2)(f), which provides that "*the custodian trustee shall have the same power of applying to the court for the appointment of a new trustee as any other trustee*", has the effect that where any of the

Claimants is operating as custodian trustee of a trust, they may also apply for an order under s.41 of the Trustee Act 1925 in relation to that trust.

42. By virtue of section 64 of the Trustee Act 1925, the power also applies in relation to trustees of a trust under the Settled Land Act 1925.

43. This is a discretionary power of the court. In order to exercise it in relation to the Remaining Trusts, I must be satisfied both that it is "expedient" to appoint a new trustee, and that it has proved "inexpedient, difficult or impracticable" to do so without the assistance of the court.

44. So far as the first test, that of expediency, is concerned, I must consider both the suitability and willingness of the Claimants to act as continuing trustees of the Remaining Trusts, and the appropriateness of Ludlow as the new trustee.

45. The Claimants have already divested themselves of their trust administration business (including the staff with the relevant knowledge and experience) and the great majority of their trusteeships. No permission of the court was required to enable them to take those steps: they were commercial decisions that they were entitled to make. They are no longer equipped to operate as a professional trustee of the Remaining Trusts. Given the very small number of trusts in question, the Remaining Trusts would also not benefit from any economies of scale if the Claimants remained their trustees, and therefore it is likely that the costs of administration for each of those trusts would increase substantially.

That is manifestly not in the best interests of those with an interest in each of the trust funds.

46. Given that Ludlow is a very new enterprise and therefore has no track record to rely on, I had some uncertainty about whether the transfer to Ludlow as new trustee could be deemed to be "expedient". However, I concluded that the test is satisfied in relation to Ludlow, for the following reasons (derived from the witness statements of Mr Price and Mr Fairhead, and the underlying supporting documents):

    a. NatWest Group carried out a thorough and careful exercise to identify a suitable new trustee, with a number of stages of assessment, and Ludlow was the highest scorer in that process. All the documents relating to Ludlow's bid and the scoring process were before me, and it was clear that Ludlow had been the highest scorer in a thorough process. Mr Fairhead also reviewed all the documents and was satisfied that the process had been thorough and fair;

    b. After the substantial start-up costs of its first year in operation, Ludlow is moving towards profitability, as shown by its first two years' accounts;

    c. It has a senior team of very experienced trust professionals with a long history of working in this field, who have the necessary skills and knowledge to fulfil their fiduciary duties as trustees;

    d. In addition to those senior professionals, the trust administration team which supported all three Claimants in their trusteeships has been

transferred over to Ludlow (as described in the Framework Transfer Agreement) and the majority of those staff are now employed by Ludlow;

e. The question of Ludlow's fees has been extensively probed by Mr Fairhead. For those trusts where Coutts was formerly the trustee, there will be little difference in the fees charged. For those trusts where NatWest or RBS was the trustee, Ludlow's fees represent a significant increase, which will come into effect two years from the transfer of the relevant trust (for all trusts except those which hold only life insurance policies). However, Ludlow has committed to notifying all settlors and co-trustees of the proposed charges at the point of transfer, and again three months before the new charges come into effect, to give adequate opportunity to move to an alternative trustee. In particular, in submissions before me, it was confirmed that where Ludlow is taking on the custodian trusteeship of a fund which holds land, the managing trustees would be alerted to the possibility of requesting the Official Custodian for Charities to become the custodian trustee in relation to the land. This affects three of the trusts to be transferred;

f. The level of professional indemnity insurance cover is also a matter raised by Mr Fairhead. As Mr Moeran explained in oral submissions, the Claimants, as substantial banks, would have been able to cover any claims in relation to their trust business out of their profits. Ludlow, as a much smaller organisation, will be reliant on insurance. The insurance cover is currently set at £5 million, and originally contained an exclusion

for claims related to cyber issues. Following Mr Fairhead's intervention, separate cover has been purchased for cyber-attacks. The level of protection for the trust funds is less than they would have had if they had continued to be managed by the Claimants but is not obviously inadequate or obviously out of line with the market.

47. In respect of those trusts for which Ludlow is to be appointed as custodian trustee, I am also satisfied that it meets the requirement under s.4(3) of the Public Trustee Act 1906 to be a "*banking or insurance company or other body corporate entitled by rules made under this Act to act as custodian trustee".* The rules in question – the Public Trustee Rules 1912, r.30 – provide among other matters that a corporation constituted under the law of any part of the United Kingdom, empowered to carry out trust business, registered in the United Kingdom under the Companies Act 1948 (or any of its successor acts) and with a share capital of not less than £250,000, may act as a custodian trustee. Ludlow meets those requirements.

48. The second test is whether it is "difficult, inexpedient or impracticable" for the new trustee to be appointed in another way. As described in this judgment, the Claimants made extensive attempts to contact those with the power of appointment of new trustees, and Mr Fairhead also made attempts to contact them. In the case of some of the custodian trusts, an order for substituted service was also granted by Master Kaye on 8 February 2023, enabling service on addresses other than residential addresses. Those attempts to communicate with interested parties were largely successful: at the beginning of the process, in 2019, the Claimants were between them trustees of 3,946 trusts. By the date of

the hearing, that number had been reduced to the 61 Remaining Trusts. The majority of the trusts have transferred to Ludlow as trustee through the execution of Deeds of Retirement and Appointment. Of the others, some have come to an end and the funds have been distributed, and others have been transferred to an alternative new trustee. The 61 Remaining Trusts include five where the person with the power of appointment no longer has capacity to exercise it, and a number of trusts where one of the Claimants is the custodian trustee, but the trust deed makes no express provision concerning the appointment of trustees, and it is not clear exactly who the managing trustees with the power to appoint a new trustee are. In the remaining cases, contact has been made with some of the settlors or co-trustees – and some acknowledgment of service forms have been returned, none indicating an intention to object – but no deeds of retirement and appointment have been signed. In a small number of cases, no response has been received at all.

49. I am satisfied that the Claimants have tried conscientiously, on multiple occasions, to identify and contact all those with a power of appointment. In a few cases, the person with such a power is incapacitated, and each of those individuals is represented in these proceedings by a litigation friend. In others, multiple communications have been sent, and may even have been acknowledged, but neither objection nor positive engagement has been received. I am therefore satisfied that it is impracticable to effect the changes of

trusteeship without the court's involvement, and that the order sought by the Claimants should be made.

50. The Claimants also seek consequential vesting orders under s.44 of the Trustee Act 1925, in respect of land, and under s.51 of that Act, in respect of all stock or things in action held by the trusts, in order to facilitate the transfer of the trust funds to Ludlow. Those orders are reasonable and proportionate, and I am content to grant them.

**Case to be heard in private.**

51. The Claimants applied for this case to be heard in private under CPR r.39.2. I granted that application at the hearing on 4 October 2023. The case is manifestly one which involves confidential information (which under CPR 39.2(3)(c) expressly includes information relating to personal financial matters), as well as "uncontentious matters arising in the administration of trusts" under CPR 39.2(3)(f), and therefore the first limb of the test in CPR 39.2(3) is satisfied. I am also satisfied that it meets the second limb of that test, that it is necessary to sit in private to secure the proper administration of justice. It is unlikely that there will be wider interest in this case that would outweigh the interests of the privacy of the individuals involved, especially in the context of technical and unopposed litigation on a matter of trust law. I have considered, in accordance with CPR rule 39.2(2), whether holding the hearing in private would affect any duty to protect or have regard to a right to freedom of expression and have concluded that in this case it would not.

52. There was no suggestion that this judgment should be private, and I would not have entertained an application for it to be so. The order of the court will also

be public, although the schedule setting out the detail of the Remaining Trusts and the land to be vested in Ludlow as the new trustees will not be published. In addition, any person interested in any of the trusts will be able to apply for access to the court papers in so far as they relate to the trust in which they have an interest. In practice, as all parties have been careful to prepare witness statements in terms which anonymise the Remaining Trusts and their trustees, the only documents that will be withheld from a person with an interest in one of the Remaining Trusts are the underlying trust documents relating to the other trusts. I am satisfied that this strikes an appropriate balance between the requirements of open justice and the financial privacy of individuals.

**Costs**

**53.** In accordance with the Framework Transfer Agreement made between the Claimants and Ludlow, the costs of the change of trustees, including the costs of these proceedings, were borne by Ludlow and the parties are not seeking to exercise their right to be indemnified out of the trust funds. Therefore, no order as to costs was sought.