

Tanya Marya Dick Stock v Pantrust International SA

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Thomas, Clyde-Smith
Judgment Date:	22 January 2016
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Text

[2016] JRC 21

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Grime **and** Thomas

IN THE MATTER OF THE MANOR HOUSE TRUST AND IN THE MATTER OF THE
RUSSIAN TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Tanya Marya Dick Stock
Representor
and
Pantrust International SA
First Respondent

Richard George De Winton Wigley
Second Respondent
James Richard De Winton Wigley
Third Respondent
G.B. Trustees Limited
Fourth Respondent

Advocate S. C. Thomas for the Representor.

Advocate S. M. J. Chiddicks for the First to Third Respondents.

Advocate M. L. Preston for the Fourth Respondent.

Authorities

Representation of the Manor House Trust and the Russian Trust [\[2015\] JRC 208](#).

Stock -v- Pantrust International and Others re Manor House Trust and the Russian Trust [\[2015\] JRC 223](#).

Stock -v- Pantrust and Others [\[2015\] JRC 268](#).

Trusts (Jersey) Law 1984.

In re VR Family Trust [\[2009\] JLR 202](#).

In re E Trust [\[2008\] JLR 360](#).

Lewin on Trusts 19th edition.

Underhill and Hayton Law of Trusts and Trustees 18th edition.

Dunlop on Jersey Company Law First Edition.

Companies (Jersey) Law 1991.

Caversham Trustees Limited v Patel and 7 Others [2008] JLR Note 8.

Ross River Limited v Cambridge City Football Club Limited [2007] EWHC 2115.

Trust — matters consequential upon removal of First to Third Respondents as trustees of the Manor Trust and the Russian Trust.

THE COMMISSIONER:

1 This judgment deals with a number of matters that have arisen consequential upon the

removal of the first to third respondents as trustees of the Manor House Trust and the Russian Trust (together “the Manor House and Russian Trusts”) and the appointment of the fourth respondent as trustee in their place. We will refer to the first respondent as “Richard Wigley”, the second respondent as “James Wigley”, the third respondent as “Pantrust” and to all three as “the former trustees”. We will refer to the fourth respondent as “the new trustee”.

- 2 The background to this matter is set out in the previous judgments of the Court dated 8th October, 2015, (*Representation of the Manor House Trust and the Russian Trust* [\[2015\] JRC 208](#)) and 6th November, 2015, (*Stock -v- Pantrust International and Others re Manor House Trust and the Russian Trust* [\[2015\] JRC 223](#)). The former judgment shows the confusion that had arisen as to who was trustee of the Manor House and Russian Trusts, hence the first to third respondents all being referred to as the former trustees. In the latter judgment, by which the former trustees (or whichever of them was in fact trustee) were removed as trustees, the Court ordered the former trustees to take immediate steps to place the new trustee in control and possession of all of the assets comprised within the trust funds of the Manor House and Russian Trusts. It also adjourned an issue over security that the former trustees had purported to grant to Pantrust over the assets of the Manor House and Russian Trusts.
- 3 Taking first the transfer of assets to the new trustee, there were four issues brought before the Court for adjudication, three of which resolved themselves during the course of the hearing without the need for any adjournment as had been requested by Advocate Chiddicks for the former trustees:-
 - (i) *Basin Lane Investments Limited* (“Basin Lane”). This Jersey incorporated company owns Flat 0, 48 Berkeley Square, London (“the Berkeley Square Flat”), which is the subject of a charge in favour of Pantrust. It was not in dispute that this flat was an asset of the Russian Trust, but there was a dispute as to whether Basin Lane itself was an asset of the Russian Trust. In particular, it had been used by the former trustees to hold title to a number of properties in England for the benefit of another entirely unconnected client. In the end it was proposed by Advocate Chiddicks that they will procure the transfer of these unconnected assets out of Basin Lane and then transfer the shares in Basin Lane to the new trustee or its nominee on the basis that its then sole asset would be the Berkeley Square Flat subject to the charge, which we will deal with later. He asked for 28 days in order to complete this. We will therefore make an order to this effect.
 - (ii) *Park Heights Limited* (“Park Heights”). An asset of the Russian Trust is the shares in Park Heights Limited, a Jersey incorporated company, which gives right to the occupation of a flat in Jersey (“the Park Heights Flat”) which shares have again been secured in favour of Pantrust. The transfer of these shares to the new trustee had been delayed by the issue of the existence of this security but it was agreed that, as offered by the former trustees, these shares would be transferred to the new trustee subject to that security, which we will deal with later. We will order that this transfer

takes place within 14 days.

(iii) *Lilianfeld Holdings Limited* ("Lilianfeld"). This is a company incorporated in Cyprus which owns a property in St Petersburg. The new trustee contends that Lilianfeld is an asset of the Russian Trust, whilst the former trustees contend it is an asset beneficially owned by the representor to whom it has offered to transfer the same. As the representor supports the transfer to the new trustee rather than to her, it was agreed that it would be a waste of time and costs to further debate the issue. With the consent of the representor, therefore, the former trustees will procure the transfer of the shares in Lilianfeld to the new trustee. Advocate Chiddicks pointed out that his client's offer to transfer this asset to the new trustee was subject to receiving an indemnity and in discussion the Court could see no objection to the former trustees being able to follow this asset for liabilities properly incurred as trustees. It therefore asked Advocate Chiddicks to set out in writing the form of indemnity his clients were looking for. However, on reflection, the issue of security for the former trustees was dealt with in the Court's judgment of 6th November, 2015, where it said this at paragraph 12:-

"12 The respondents must take immediate steps to place G.B. Trustees in control and possession of all of the assets comprised within the trust funds of the Manor House and Russian Trusts and we make that order. The respondents, to the extent that they are trustees, will have the benefit of any release and their equitable right to follow the trusts' funds for liabilities properly incurred provided by law. They will not, however, seek to retain any part of the trusts' funds by way of security, over and above the security they have already apparently obtained to which we refer below, and this in the light of the particular circumstances of the Manor House and Russian Trusts and the orders that we are making to preserve the trusts' funds pending the outcome of the substantive proceedings."

In our view, this asset should be transferred to the new trustee on the same basis as all the other assets that are being transferred. We will therefore order that the shares in Lilianfeld will be transferred by the former trustees to the new trustee within 14 days on that basis.

(iv) 3NP LLC "3NP". This is a company incorporated in Colorado which has the benefit of approximately \$1.9M currently injunctioned in an account in Colorado at the instance of the representor, imposed, as we understand it, to prevent the former trustees having access to those funds at a time when they were still trustees of the Manor House Trust. Advocate Preston, for the new trustee, took us through a number of documents as summarised in his email of 12th November, 2015, to 3NP's US advisers, indicating that 3NP is an asset of the Manor House Trust, including, in particular, its own responses to discovery requests in the Colorado proceedings in which it confirms that it is an asset of the Manor House Trust. In his letter of 26th November, 2015, Advocate Sinel said the position in relation to 3NP was very confused and difficult and his clients were taking advice. He wrote again on 4th

December, 2015, stating that, following a review of the company filings, it was quite clear that it was owned by another company, TIC Lending LLC ("TIC") and was not owned by the Manor House Trust. He further pointed to pleadings filed by the representor both in Jersey and Colorado in which she had asserted that 3NP was owned by Richard Wigley and a Mr Fishman.

- 4 The assertions in the representor's pleadings were based upon her understanding at the relevant time and have little relevance, in our view, to the issue of 3NP's actual ownership. If we had to make a decision on the basis of the evidence now before us, we would find on the balance of probabilities that it is an asset of the Manor House Trust. However, there are three reasons why we do not think it appropriate to make such a finding:-

(i) 3NP is a Colorado based entity.

(ii) We are faced with the bare assertion contained in Advocate Sinel's letter of 4th December, 2015, that 3NP is owned by TIC. We have not seen the company filings on which that assertion was based, nor has TIC been given an opportunity to be heard before this Court to substantiate its claim to ownership. Natural justice requires that it be given such an opportunity.

(iii) Whilst it would seem that the ownership of 3NP is not a matter in dispute in the Colorado proceedings, its assets are currently enjoined there and we are cautious about making an order which might interfere with the conduct of those proceedings, the final hearing in respect of which is to take place, we understand, in March of this year. What is of concern here to the representor and to the new trustee is the sum of \$1.9M, the release of which could bring very welcome cash-flow relief to the Manor House Trust. On balance and with liberty to apply, we feel that the lifting of the representor's injunction over these funds in Colorado and orders as to where those funds should then be paid should be the subject of an application to the Colorado courts.

- 5 Next, we turn to the issue of security.

Security

- 6 As we commented at paragraph 18 of the judgment of 6th November, 2015, it is unusual for a trustee to take security over assets it wholly controls as trustee, but that is what the former trustees have purported to do, thus leaving the assets in the hands of the new trustee in what the new trustee would describe as a stranglehold, impeding the ongoing administration of the Manor House and Russian Trusts and potentially leading to their insolvency.

- 7 The security, all taken in favour of Pantrust, is as follows:-

- (i) A charge over the Berkeley Square Flat for £500,000 registered on 12th July, 2013.
- (ii) A security interest over the shares relating to the Park Heights Flat for £500,000 created on 24th April, 2013.
- (iii) An unregistered charge over St John's Manor and surrounding grounds owned by St John's Manor Limited, an asset of the Manor House Trust, for £5M, the relevant documentation being executed on 30th May, 2013.
- (iv) A registered charge over St John's Manor and surrounding grounds for £1M registered on 25th April, 2014. It ranks as a second charge behind a charge in favour of HSBC in the sum of [£6M], interest in respect of which is outstanding.

8 It is helpful to set out what the Court said in relation to the issue of security in its judgment of 6th November, 2015, at paragraphs 15 – 19:-

“15. A discrete issue arises in relation to security apparently taken by [Pantrust] over certain of the trust assets. In his first affidavit, [Richard Wigley] has exhibited structure charts which indicate: -

(i) In respect of the Russian Trust, a charge over the [Berkeley Square Flat], a charge over the shares in the company that owns [the Park Heights Flat] and cross guarantee and signed promissory notes all in favour of [Pantrust].

(ii) In respect of the Manor House Trust, a charge over [St John's Manor] and again a cross-guarantee and signed promissory note all in favour of [Pantrust].

16. None of the security documentation has been exhibited and we have no information as to the circumstances in which that security was granted and whether it was in favour of the [Pantrust] as trustee (in which case, [the new trustee] will assume the benefit as successor trustee), or, as seems more likely, in favour of the [Pantrust] personally in respect of the Pantrust loans.

17. Advocate Thomas asked that the respondents be ordered to release that security for the following reasons:-

(i) It was unclear how such security was created and/or it is unknown in respect of what liabilities the security was taken.

(ii) The granting of such security by [Pantrust] to itself is vitiated by a conflict of interest and liable to be set aside at the beneficiaries' insistence.

(iii) There is an extant dispute in Colorado in which [Pantrust] is asserting

claims to which it has yet to be found to be entitled.

(iv) Such continuing direct security held over the assets of the Manor House and Russian Trusts amounts to an unacceptable degree of continuing control and also undermines the ability of the incoming trustee to manage the trust property effectively, such as by refinancing the mortgage over [St John's Manor].

18. Whilst it is perhaps unusual for a trustee to take security over trust assets in respect of a liability owed to it personally, we are not prepared to order such a release without first seeing the relevant documentation, secondly understanding the circumstances in which the security was taken and thirdly, allowing the respondents to address us on the issue. At the same time, the existence of such security may well impede the ability of G. B. Trustees to take control of the trusts' assets and the issue must therefore be resolved without delay. We therefore order the respondents to provide:-

(i) Within 21 days copies of all the security documentation that exists in favour of [Pantruat] in relation to the Manor House and Russian Trusts and any of the assets within the trusts' funds.

(ii) Within 5 weeks an explanation by way of further affidavit of the full circumstances in which that security was obtained and the basis upon which it was granted by the entities concerned, with copies of all relevant meetings, minutes, resolutions and correspondence being exhibited thereto.

19. The parties will attend upon the Bailiff's Judicial Secretary this afternoon to fix a date for a further hearing (estimated, we would suggest, half a day), for the Court to consider whether or not the security held by [Pantrust] should be released, the hearing to take place as soon as possible, before the Court as currently constituted if practicable, after the expiration of 5 weeks, allowing the parties reasonable time to file sequential skeleton arguments and authorities on dates that we ask them to agree."

- 9 As directed by the Court, Richard Wigley has filed an affidavit dated 15th December, 2015, setting out the background to the creation of the security and exhibiting the relevant documentation. We note in passing that he makes no reference to the existence of any cross guarantees. The former trustees have also filed an amended answer and counterclaim to the representations brought by the representor (now consolidated). From these documents and for the purpose of the issue before us, we would summarise the position of the former trustees in this way:-

(i) The true nature of the relationship comprising the Manor House and Russian Trusts was not one of discretionary trusts, but one of agency between John Dick Sr

(as principal) and the former trustees (as agents). John Dick Sr controlled the assets and the former trustees did as they were told.

(ii) At John Dick Sr's direction, loans (referred to by the parties as "the Pantrust loans") were made by entities affiliated with the former trustees through two of their companies, namely La Hougue Financial Management Services Limited and Oxford Financial Services Limited to meet his expensive lifestyle and fund the investments in which he was involved. No disclosure is given as to the identity of the recipients of these loans. The principal recipient appears to have been Land Securities Investors Limited, based, as we understand it, in Colorado and owned by the Dick Family Trusts Nos 1 and 2. There were some 157 (unidentified) ultimate lenders and some 78 private loans to unidentified recipients. The total currently outstanding is some US\$29.5M, although no claim is made in the Jersey proceedings for repayment of the Pantrust loans by the trustee of the Manor House and Russian Trusts as debtor.

(iii) It was an express or implied term of the contractual relationship between John Dick Sr and the former trustees that:-

(a) They would at all times act in accordance with his instructions insofar as they were able to do so.

(b) He would indemnify them in respect of any loss, damage or liability incurred as a result of acting upon his instructions.

(c) He would in reality remain the sole party beneficially entitled to the assets of various family trusts.

(d) He would assume liability in respect of and repay all lending procured by the former trustees on his behalf and for the benefit of the various family trusts.

(iv) The pleading filed by the former trustees describes the conduct of John Dick Sr and his family as a conspiracy to defraud the former trustees in respect of the Pantrust loans and counterclaims against them (joining them as third parties) for an indemnity in the case of John Dick Sr and for losses equivalent to the amounts outstanding under the Pantrust loans for all of them. The former trustees sought leave to join new trustee as a third party for an indemnity out of the assets of the Manor House and Russian Trusts on a number of alternative bases but not on the basis that it is liable to repay the Pantrust loans pursuant to the facilities (as described below). That application was refused by the Master on the 23rd December, 2015, (*Stock -v- Pantrust and Others* [\[2015\] JRC 268](#)).

(v) Because there are no discretionary trusts, the former trustees plead that the representor is not a beneficiary and lacks standing to seek relief under Article 51 of the Trusts (Jersey) Law 1984.

(vi) Examples of facility letters in respect of the loans which are still outstanding dating from 1994 to 2012 were exhibited to Richard Wigley's affidavit. They are in almost identical terms, being addressed to the trustees of the Manor House and Russian Trusts (and to the trustees of the Dick Family Trusts No 1 and No 2). They

are signed by Richard Wigley on behalf of La Hougue Financial Management Services Limited or (in the main) Oxford Financial Services Limited as the case may be and countersigned and accepted by him on behalf of the Manor House and Russian Trusts. Each provides at paragraph 9 that no security was required at the time of the facility other than a promissory note, but that the lender reserved the right to request documentation for the loan at any time so as to take a formal charge on assets in the ownership of "the Borrower".

(vii) "The borrower" in each case is described in this way:—

"Borrower

The Russian Trust, The Dick Family Trusts Nos 1 and 2 and The Manor House Trust including entities owned or financially connected thereto but normally Land securities Investors Ltd ("the Borrower")".

It is not made clear whether the liability of the various trusts is joint or several.

(viii) Until 2009, loans are stated as being made on behalf of clients of whom La Hougue Financial Management Services Limited was trustee. From 2009 onwards, the loan facilities were made on behalf of clients for whom Pantrust acted as trustee, but made through Oxford Financial Services Limited as the lender in these terms:-

"FACILITY LETTER

Further to our recent discussions, Pantrust International S.A. on behalf of clients for whom it acts as Trustee through Oxford Financial Services Limited ("the Lender") or its assigns, is now writing to confirm our offer of a loan facility ("the Facility") on the following terms and conditions:"

(ix) Thus it would seem that from 2009 Pantrust was lending monies which it was holding as trustee for other clients, through its associated company Oxford Financial Services Limited, to itself as trustee of the Manor House and Russian Trusts.

(x) Richard Wigley explains that little thought was given to formalising the security for this lending as the assets within the various family trusts was sufficient to act as collateral for lending. The former trustees became concerned about the adequacy of the collateral in or around 2003 but even so, at the request of John Dick Sr, no security was taken over the ensuing ten years, so that the assets within the various family trusts would appear unencumbered to the outside world. We assume that the unidentified lenders were content with this lack of security, which is perhaps surprising given the very large sums involved.

(xi) That remained the position until 2013/14 when relationships between the former trustees and the Dick family had soured and proceedings in Colorado had commenced. Security was put in place by the former trustees through the trust structures in the manner which we will now describe.

- 10 On 20th March, 2013, Pantrust wrote a letter addressed to the various family trusts in this way:-

“To: The Russian Trust 20th March 2013

The Dick Family Trusts No. 1 and No 2 (by facsimile)

The Manor House Trust

We refer to the attached schedule of outstanding loans and the respective Facility Letters (Clause 9) and Promissory Notes that incorporate the terms of the facility Letter, to request that we, in our capacity as the controlling entity for the respective Lenders, are provided with whatever documentation is necessary so as to enable the Lender to perfect security by way of a formal charge over assets in the ownership of the respective Borrower and related entities.

We are sorry to have to implement this request but the recent declaration of bankruptcy by Land Securities Investors Ltd and some related entities has left us with no alternative but to request tangible security.

It should also be noted that as advised to the various connected parties in February 2013, the Lenders require 85% of any net sale proceeds, including refinance monies to be utilized towards repayment of outstanding interest and capital on the respective loans until all the liabilities have been repaid or separate agreement has been reached regarding the continuance of some loans at a reduced level.

Details of specific security required immediately will be furnished to you shortly but you are hereby put on notice that all assets are being looked upon as security where there is a net equity value available.”

- 11 The letter was signed by Richard Wigley on behalf of Pantrust and countersigned and its terms accepted on behalf of the Manor House and Russian Trusts by the same Richard Wigley. It can be seen, therefore, that because Pantrust was the trustee of the Manor House and Russian Trusts, it was in effect writing to itself, accepting terms it had itself proposed on behalf of the unidentified lenders.
- 12 That letter was followed by a letter from Pantrust to the Russian Trust dated 21st March, 2013, asking it to complete documentation to be forwarded shortly, to enable “the lender” to obtain security over the Berkeley Square and Park Heights Flats. That letter was signed on behalf of Pantrust by Richard Wigley and counter signed and accepted by him on behalf of the Russian Trust. Again, it can be seen that Pantrust was writing to itself.
- 13 The minute of a meeting of “the Trustees of the Russian Trust” (i.e. Pantrust), held on 22nd March, 2013, shows that it was attended by Richard Wigley and James Wigley (his son), as directors. There is no disclosure of any conflict of interest on their part. The resolution is in

these terms:-

“The Chairman advised the Meeting that Pantrust International S.A. on behalf of the lenders of various loans had written to indicate that in accordance with Clause 9 of the facility letters they would now require tangible security. A copy of the letter is attached, details of the initial security requirements are detailed. After due and careful consideration the Board was of the opinion that it was in the best interests of this Trust to provide the requested security through its connected entities.”

The minute is signed by Richard Wigley as Chairman.

14 On 21st March, 2013, Pantrust wrote in similar terms to “The Manor House Trust” (i.e. again to itself) requesting a second unregistered charge over St John's Manor and grounds. We only have an office copy of that letter, but it was purported to be signed by Richard Wigley.

15 The minute of a meeting of “the Trustees of the Manor House Trust” (i.e. Pantrust), held on 22nd March, 2013, shows that it was attended by Richard Wigley and James Wigley as directors. There is no disclosure of any conflict of interest on their part. The resolution is in these terms:-

“The Chairman advised the Meeting that Pantrust International S.A. on behalf of the lenders of various loans had written to indicate that in accordance with Clause 9 of the facility letters they would now require tangible security. A copy of the letter is attached, and in a subsequent communication, a copy of which is also attached, details of the initial security requirements are detailed. After due and careful consideration the Board was of the opinion that it was in the best interests of this Trust to provide the requested security through its connected entities.”

The minute is signed by Richard Wigley as Chairman.

16 The minute of the meeting of the directors of La Hougue Financial Services Limited held on 24th April, 2013, shows that it was attended by Richard and James Wigley as directors. Again, there is no disclosure of any conflict of interest and the resolution is in these terms:-

“The Chairman produced to the Meeting a copy of a Resolution made by The Russian Trust on the 22nd March 2013, together with a letter of the same date, copies of which are attached hereto and deemed to be incorporated herein, and advised that, after consideration and discussion, it was felt prudent for this entity, being the holder as nominee for The Russian Trust of [shares relating to the Park Heights Flat] to proceed with providing to Pantrust International, S.A. of Panama City, Republic of Panama, a charge over the said shares. The Chairman further advised that he had made contact with Advocate Steven Slater of St Helier, Jersey, who had confirmed that he was prepared to prepare

the necessary documentation so as to effect the said charge.”

This minute has been signed by Richard Wigley and it would appear James Wigley.

- 17 The minute of the meeting of the directors of St John's Manor Limited on the same date, namely 24th April, 2013, shows that it was attended by Richard and James Wigley as directors. Again, there is no disclosure of any conflict of interest and they resolved as follows:-

“The Chairman produced to the Meeting a copy of a Resolution made by The Manor House Trust on the 22nd March 2013, together with a letter of the same date, copies of which are attached hereto and deemed to be incorporated herein, and advised that, after consideration and discussion, it was felt prudent to proceed with providing to Pantrust International, S.A., of Panama City, Republic of Panama, an unregistered second charge, together with authority to register, over the property St John's Manor and surrounding grounds situated in the Parish of St John, in the Island of Jersey in the Channel islands, together with all lands owned in the Parishes of St John, St Mary and St Saviour, Jersey Channel Islands. The Chairman further advised that he had made contact with Advocate Slater of St Helier Jersey, who had confirmed that he was prepared to prepare the necessary documentation so as to effect the said unregistered second charge”.

- 18 The exhibits to Richard Wigley's affidavit contain a copy of the security interest agreement dated 30th May, 2013, made by La Hougue Financial Management Services Limited (in which it describes itself as the trustee of “The Russian Trust”) in favour of Pantrust over the shares relating to the Park Heights Flat. That company was not, of course, trustee of the Russian Trust, but (as we understand it from the minutes) held the shares on behalf of Pantrust as nominee but in any event, it was presumably intended that Pantrust, as trustee, should grant itself personally a security interest in those shares.

- 19 We then move on a year to 25th March, 2014, when there was a letter from Pantrust to the directors of St John's Manor Limited offering a facility of £1M. The letter is again signed by Richard Wigley on behalf of Pantrust, and countersigned and its terms accepted by him on behalf of St John's Manor Limited.

- 20 The meeting of St John's Manor Limited accepting the facility was held, according to the documentation exhibited, the day before on 24th March, 2014, and was attended by Richard and James Wigley as directors. On this occasion, they did address the issue of conflict in this way:-

“The Chairman noted that, under the Articles of Association of the Company, no declared interest prevented any of those present from being entitled to vote at or from being counted in the quorum of the meeting.”

The directors resolved as follows:-

“The Chairman advised the Meeting that a request had been made to Pantrust International, S.A., Panama City, Republic of Panama, (“Pantrust”) to provide a loan facility in the sum of £1,000,000 to this Company to assist in servicing this Company's repayment obligations in respect of a loan provided by HSBC Bank Jersey during the period that Land Securities Investors Ltd is in Chapter 11 Bankruptcy and, therefore, unable to service the loan. The said Pantrust had agreed to provide the loan subject to the terms and conditions of a facility letter, a copy of which was presented to the Meeting together with a copy of a Promissory Note. In this connection Pantrust had requested that this Company complete documentation to enable a second judicial hypothec over the freehold property known as St John's Manor, St John, Jersey connected buildings and surrounding lands, in the capital sum of £1,000,000. The Chairman went on to say that he had communicated with HSBC Bank, Jersey, which Bank hold a first judicial hypothec over the said property and the said Bank had confirmed it had no objection to Pantrust obtaining a second judicial hypothec over the said property. After discussion and careful consideration bearing in mind the ultimate benefit which would accrue to the Company.”

That minute was signed by Richard and James Wigley and a second charge was registered over St John's Manor and surrounding grounds as a second charge behind that of HSBC.

- 21 Assignments dated 29th September, 2014, show that Pantrust acquired for itself, from both La Hougue Financial Management Services Limited and Oxford Financial Services Limited, the benefit of what we understand to be the Pantrust loans. It therefore became the lender, as opposed to acting on behalf of other lenders, of funds lent to itself as trustee, although we can see from the above that by that date security had already been taken in its favour as lender.
- 22 It is not asserted by the former trustees that any beneficiary of the Manor House and Russian Trusts had approved the taking of any of this security. The former trustees deny the existence of any discretionary trust.
- 23 Richard Wigley provides no evidence of any monies passing from the unidentified lenders to the Manor House and Russian Trusts pursuant to these facilities; on the pleaded case of the former trustees any facility would have been in favour of John Dick Sr. He explains the position in his second affidavit at paragraphs 18 and 19 in this way:-

“18 It is important to understand the mechanics of how loan monies were made available for Mr Dick and his various entities and how the internal accounting arrangements within LHFMS (La Hougue Financial Management Services) and then Pantrust operated. For over thirty years LHFMS and Pantrust operated the banking account system known as a Global Clients account which, like many similar accounts used in a number of professions, held all clients' money in a

pooled account in respect of each currency and with each bank that LHFMS and Pantrust used. From the mid-1980s the bank used was predominantly Barclays. From 2008, when the business [was transferred] o Panama, it was largely HSBC.

19 When a private loan was arranged between a third party client of LHFMS or Pantrust and Mr Dick, there would often be no need to make an actual transfer of monies between the lender and borrower by way of a bank transfer in the conventional sense, because the same outcome could be achieved by making a notional change in the accounting records of LHFMS/Pantrust's Global Clients Account. In short, a reduction would be made in the available balance for the lender and a commensurate increase would be made in the available balance for the borrower."

- 24 Even so, no copies of the clients account were exhibited, showing the changes in the accounting records which reflect the facilities apparently granted and identifying the clients involved.

Submissions

- 25 The principles underlying the so-called "self dealing rule" under English law have long been recognised and applied by this Court (see, for example, *In re VR Family Trust* [2009] JLR 202 and *In re E Trust* [2008] JLR 360). It is based upon the consideration that a trustee cannot be both seller and buyer (or, in this case, lender and borrower) and the wider principle that a trustee must not put himself in a position where there is a conflict or possible conflict between his interest and his duty (see Lewin on Trusts 19th edition at paragraph 20–105).
- 26 Trustees have a duty of undivided loyalty to their beneficiaries. *Underhill and Hayton Law of Trusts and Trustees 18th edition* puts it this way at paragraph 57.29:-

"Duty of undivided loyalty

57.29 More fundamental than the prescriptive duties laid down by trust law and the trust instrument is the proscriptive fiduciary obligation of undivided loyalty owed to the beneficiaries. This fiduciary obligation is the obligation to put the interests of the particular beneficiaries above all other interests (unless otherwise authorised). Thus for example no profit can be made from the trust property or the office of trustee (unless authorised), and (unless authorised) the trustee must not place himself in a position where his own interest conflicts with the interests of his beneficiaries or his duty in one capacity conflicts with his duty in another capacity or in a position where there is a sensible possibility of such conflict arising. If however there is a conflict or possibility of conflict the trustee must prefer his duty to his interest, except as permitted by the trust instrument, the beneficiaries or the court to consider his

interest.”

These principles flow through to directors of a company, who again cannot place themselves in a position of conflict where their personal interests or duties to others may conflict with the interests of the company (see paragraph 20.6.7 of Dunlop on Jersey Company Law First Edition).

Article 116 of the Articles of Association of St John's Manor Limited provides:-

“116 A Director or alternate Director who is in any way whether directly or indirectly interested in a contract or proposed contract with the Company shall declare the nature of his interest at a meeting of Directors. In the case of a proposed contract, the declaration shall be made at the meeting of the Directors at which the question of entering into the contract is first taken into consideration, or, if the Director was not at the date of that meeting interested in the proposed contract, at the next meeting of Directors held after he became so interested. In a case where the Director becomes interested in a contract after it is made the declaration shall be made at the first meeting of the Directors held after the Director becomes so interested. In a case where a Director is interested in a contract which has been made before he was appointed a Director, the declaration shall be made at the first meeting of the Directors held after he is so appointed.”

This is consistent with the minimum requirements set out in Art. 75 of the Companies (Jersey) Law 1991 (“the Companies Law”). Article 75(1) provides:-

“(1) A director of a company who has, directly or indirectly, an interest in a transaction entered into or proposed to be entered into by the company or by a subsidiary of the company which to a material extent conflicts or may conflict with the interests of the company and of which the director is aware, shall disclose to the company the nature and extent of the director's interest.”

Article 75(2B) and (3) provide that:-

“(2B) Any disclosure at a meeting of the directors shall be recorded in the minutes of the meeting.

(3) A disclosure to the company by a director in accordance with paragraph (2) that he or she is to be regarded as interested in a transaction with a specific person is sufficient disclosure of his or her interest in any such transaction entered into after the disclosure is made.”

As to the consequences of failing to make disclosure, Article 76 of the Companies Law provides that where a director fails to disclose an interest under Article 75, the company or a member may apply to the Court for an order setting aside the transaction concerned but pursuant to Article 76(3),

“...the court shall not set aside a transaction unless it is satisfied that –

(a) the interests of third parties who have acted in good faith thereunder would not thereby be unfairly prejudiced; and

(b) the transaction was not reasonable and fair in the interests of the company at the time it was entered into.”

27 We have not seen the constitution of Pantrust and are not aware therefore of what, if any, requirements there are for disclosure by directors either under its constitution or under Panamanian law but there is no reference to any disclosure being made by the directors in any of the minutes relating to the security granted in 2013. The minute of the meeting of the directors of St John's Manor Limited held on 24th March, 2014, does, however, make reference to an interest having been disclosed and we will come to that.

28 The facilities made available before November 2007 were governed by Jersey law, at a time when the Manor House and Russian Trusts were Jersey based. From November 2007, when the proper law was changed to that of Panama, the facilities were drawn up under Panamanian law. Although the change to Panamanian law has been challenged by the representor, on the face of the documentation at the time the security was taken, the Manor House and Russian Trusts were governed by Panamanian law. However, Advocate Chiddicks did not seek to argue that the former trustees, as fiduciaries, were not subject to the self dealing rule.

29 In his skeleton arguments and at the hearing, he submitted that the Court should not interfere with the security taken in 2013/14 for the following reasons:-

(i) The challenge to the security had been made on an ad hoc basis without any amendment to the representor's pleadings. Relief should not be sought beyond that contained in the pleadings. He cited from *Caversham Trustees Limited v Patel and 7 Others* [2008] JLR Note 8, where the representor had sought substantive relief beyond that contained in its summons and where it was held that it was fundamental to the administration of justice that parties should be given proper notice of orders that were being sought against them, hence the requirement for a written summons or pleading.

The representor should therefore apply to amend her pleadings and the issue should be dealt with thereafter in accordance with established procedure.

(ii) As pleaded in the answer and counterclaim, it was understood by John Dick Sr and the representor that the assets of the Manor House and Russian Trusts would be made available as security for the Pantrust loans. There was, therefore, no conflict of interest. Furthermore, the security was put in place with the knowledge of John Dick Sr. Advocate Chiddicks cited from paragraph 55.39 of Underhill and Hayden on Trusts and Trustees 18th Edition:-

“55.39 in Holder v Holder an additional ground upon which a

beneficiary failed to have a purchase set aside was that he had acquiesced in the purchase. It would be inequitable to allow him to assert any equity to set the auction sale aside (if he had such equity) because he had full knowledge of the sale and stood by making no attempt to stop completion, and restitutio in integrum was impossible.”

(iii) The issue of security was inextricably linked to the relationship between the former trustees and John Dick Sr which was the main issue in the substantive proceedings and it would be wrong to interfere with the security, pending resolution of that issue, the factual matrix of which, as the Master pointed out in his judgment of 23rd December, 2015, was complex.

(iv) The only purpose for the representor and the new trustee seeking a lifting of the security was to enable the new trustee to sell or charge those assets to the prejudice of the counterclaim brought by the former trustees.

30 Following the hearing, Advocate Chiddicks sent the Court a copy of pages 77 and 78 of Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties by Matthew Conaglen, which he said shows that as a matter of English law, a party seeking to rescind a transaction involving a third party must establish that the third party was “privity” to the conflict which is alleged to give rise to the right to rescind, (citing *Ross River Limited v Cambridge City Football Club Limited* [2007] EWHC 2115). Richard Wigley's evidence is that the vast majority of the lending comprising the Pantrust loans was provided not by Pantrust personally but ultimately by third parties, thus, although the parties named as lender in the facility agreements were either La Hougue Financial Management Services Limited, Oxford Financial Services Limited or Pantrust, those companies were acting as agent for the true lenders. Properly characterised therefore, the loan transactions involved third parties. Even if, which is not admitted, Pantrust's actions in entering into the security transactions were tainted by conflict of duty, the representor had not adduced any evidence to establish that the true lenders were privy to such a breach, and it followed that the rescission of the security transactions could not be justified.

31 The representor and the new trustee point to what they say is a manifest conflict of interest, at least at the time the security was taken in 2013/14 and indeed, that conflict of interest was one of the reasons for the removal of the former trustees by the Court (see paragraph 9(iv) of the judgment of 6th November, 2015). There is no evidence before the Court of any beneficiary of the Manor House and Russian Trusts acquiescing; John Dick Sr is excluded from benefit under both trusts.

32 Through the security, the former trustees retain control of the Manor House and Russian Trusts' assets in a manner which is analogous to a Mareva injunction in their favour, without an application to the Court for the granting of such relief and the giving of cross undertakings in damages.

33 The position in relation to St John's Manor was particularly serious in that the existence of

the second charge in favour of Pantrust made any refinancing of the HSBC loan impossible; HSBC had indicated that it had no interest in any such refinancing.

- 34 In any event, there was no need for the former trustees to have security, as the Court had acted to protect their interests. Quoting from paragraph 11 of the judgment of 6th November, 2015:-

“11 Consequential orders will need to be made to place G B Trustees in possession of the trusts' assets and we will come to that shortly. Serious issues have been raised, however, by the respondents and unclear as the picture may be at this stage, there is prima facie evidence of substantial sums being made available by the respondents to or for the benefit of the Settlor over many years, some \$US29.5m of which is outstanding and we take the view that justice requires that the trusts' assets be preserved to meet any order the Court might ultimately make. G.B. Trustees must therefore exercise its powers to maintain and preserve the trusts' assets, so that they remain available for that purpose.”

Decision

- 35 We do not accept that the representor and the new trustee are seeking relief beyond that pleaded in the two representations. Those representations sought, primarily, the removal of the former trustees as trustees in favour of the new trustee and the placing of the new trustee in control and possession of the assets of the trusts. The fact that the former trustees have taken security over those assets is directly relevant to the task of placing the new trustee in possession and control of them.
- 36 At the removal hearing, the representor sought the transfer of the assets freed from that security, but the Court was unwilling to consider making such an order without knowing the circumstances in which that security was taken and without giving the former trustees an opportunity to be heard properly on the issue. The approach of the Court is set out in the extract from paragraphs 15–19 of the judgment of 6th November, 2015, set out in paragraph 8 above, and it can be seen that the former trustees had ample notice of the issue it was facing and a full opportunity to make submissions at the adjourned hearing. The Court made the point at paragraph 18 of that judgment that the existence of any such security could impede the ability of the new trustee to take control of the assets of the Manor House and Russian Trusts and the issue, therefore, had to be resolved without delay. In compliance with the directions given, Richard Wigley has filed an affidavit setting out “the full circumstances in which that security was obtained and the basis upon which it was granted by the entities concerned, with copies of all relevant meetings, minutes, resolutions and correspondence being exhibited thereto” and the former trustees have been represented at the adjourned hearing.
- 37 It is on the basis of the evidence of the former trustees that we are determining the issue of

security and in our view, they have been treated fairly.

- 38 As to conflict, it was not suggested by Advocate Chiddicks that the position of the former trustees could be defended on the basis that they were trustees of discretionary settlements. From at least 2009, Pantrust was, on the face of the facility letters, making loans on behalf of other clients for which it was trustee, through its associated company Oxford Financial Services Limited, to itself as trustee of the Manor House and Russian Trusts. The wording in each case was “Pantrust on behalf of clients for whom it acts as Trustee.;... is now writing to confirm our offer of a loan facility”. It was putting forward a facility with its various terms and conditions through a letter signed by Richard Wigley addressed to itself as trustee of the Manor House and Russian Trusts, which Richard Wigley then accepted on behalf of the Manor House and Russian Trusts. The documents show one mind lending and borrowing.
- 39 When it came to the taking of security in 2013, that was taken in the name of Pantrust alone so that at some point it had become both creditor and debtor; formal assignments as we have said followed in September 2014.
- 40 The issue with which the Court is concerned is the way in which Pantrust granted itself security over the trusts' assets in 2013 (we will come to the security taken in 2014 in a moment). We have set out the documentation exhibited by Richard Wigley in some detail, but the whole process commences with the letter from Pantrust to the Manor House and Russian Trusts of 20th March, 2013, which we have set out in full at paragraph 10 above. The letter was signed by Richard Wigley for Pantrust and accepted by him, on behalf of Pantrust, as trustee of the Manor House and Russian Trusts. Again, the documents show there to be one mind on both sides. There then followed meetings of the Manor House and Russian Trusts themselves and of the underlying companies (the minutes of Basin Lane granting security over the Berkeley Square Flat were not exhibited) attended by Richard Wigley and James Wigley. No disclosure of any conflict was made by the directors.
- 41 On the basis that these are discretionary trusts, the former trustees have put themselves in a position where their personal interests conflict with the interests of the beneficiaries of the trusts. They have used their powers as trustees to procure security for themselves personally. Such a conflict is not permitted by the trust deeds and has not been approved by the beneficiaries or the Court. The conflict is all pervasive, extending as it does to the decisions taken (by the same people) at corporate level.
- 42 We reject as misconceived Advocate Chiddick's submission that in order to impugn these transactions the beneficiaries must show that the unidentified “true lenders” of the Pantrust loans were privy to the conflict. The passage from Fiduciary Loyalty is concerned with the ability of a principal to rescind a transaction with a third party when its agent has received a bribe or commission from that third party and thus had a clear conflict of interest as its agent—the facts in *Ross River v Cambridge City*. In this case the third party lenders are not seeking to rescind the Pantrust loans because of any conflict Pantrust may have had as

their agents. Pantrust's conflict is between its personal interests and its duties owed to the beneficiaries of the Manor House and Russian Trusts of which it was trustee.

- 43 The security taken in 2013 stands to be set aside on the ground of conflict alone but the difficulty for the former trustees goes much further than this. They deny the existence of any discretionary trusts and the status of the representor as a beneficiary. Their relationship they say was with John Dick Sr and was contractual in nature. It is John Dick Sr who is liable to indemnify them, not the Manor House and Russian Trusts, and in their pleadings, they seek damages from John Dick Sr and his family. They do not seek repayment of the Pantrust loans from the Manor House and Russian Trusts, pursuant to the various facility letters. Indeed, by the evidence of Richard Wigley, the facility letters must be a fiction as there were no discretionary trusts in existence and so no facilities can ever have been made available to them or to their connected entities. Instead, monies were made available to John Dick Sr and his various entities, on the basis that he would provide collateral over assets beneficially owned by him, not beneficially owned by the Manor House and Russian Trusts.
- 44 If the facility letters are fictions, then any security obtained pursuant to them can have no validity. The letter of 20th March, 2013, to the Manor House and Russian Trusts, which the former trustees say do not exist as discretionary trusts and which set the obtaining of security in train, make express reference to the security being obtained pursuant to these facility letters – not to any facilities made available to John Dick Sr personally. Indeed, there is no reference to John Dick Sr in any of the facility letters or subsequent documentation.
- 45 The position, therefore, on Richard Wigley's evidence is:-
- No claim is made by Pantrust for the repayment of any loans due by the Manor House and Russian Trusts. No claim is made against the new trustee in its capacity as debtor trustee for the repayment of the Pantrust loans; indeed, a contractual claim against the new trustee under the facility letters would be entirely at odds with the case put forward by the former trustees.
- (i) The true nature of the relationship comprising the Manor House and Russian Trusts was one of agency between the former trustees and John Dick Sr—not one of discretionary trustees and beneficiaries.
 - (ii) The facility letters were therefore addressed to discretionary trusts that did not exist.
 - (iii) The security obtained in 2013 was for liabilities of discretionary trusts or their connected entities that did not exist, under those fictional facility letters.
- 46 The former trustees have therefore procured security in favour of Pantrust for loans that were never made to the discretionary trusts defined as the Manor House and Russian

Trusts or to their connected entities. If there were no such trusts, then there can have been no entities connected to them. The entities concerned were on the case of the former trustees connected to John Dick Sr. In these circumstances, and taking into account that no unconflicted mind was ever put to whether security should be granted, the security obtained in 2013 has no validity and must therefore be released.

- 47 We do not agree with Advocate Chiddicks that the issue of this security should await the outcome of the main proceedings. On the former trustees' own evidence, the security cannot stand, and to leave it in place would impede the proper administration of the Manor House and Russian Trusts. We do not agree that lifting the security will allow the new trustee to charge or sell assets to the prejudice of the former trustees. The former trustees are protected by the injunction imposed by the Court on the new trustee, which will have to apply back to the Court for any application to further charge or sell the trusts' assets, upon which the former trustees will have the opportunity of being heard.
- 48 The position in relation to the second charge created over St John's Manor and surrounding grounds in 2014 appears to us to be different in this way: -
- (i) The request for financial assistance would appear to have come from St John's Manor Limited to Pantrust to assist it in servicing the mortgage in favour of HSBC. The mortgage had previously been serviced from funds made available by Land Securities Investors Limited, which was then in Chapter 11 bankruptcy.
 - (ii) The facility letter was addressed by Pantrust to St John's Manor Limited, as opposed to being addressed to itself, as trustee. Pantrust was not lending to itself. It was signed on behalf of Pantrust by Richard Wigley and countersigned and accepted by both him and James Wigley on 3rd April, 2014.
 - (iii) Minutes of the meeting of directors on 24th March 2014 resolving to grant this security do purport to declare an interest on the part of the directors. There are arguments as to whether this discharges their obligation under Article 116 of the Article of Association and Article 75 of the Companies Law, but at least there is reference to the existence of a conflicting interest.
- 49 It seems likely that as a result of the Colorado proceedings which commenced in August 2013, there was a need in 2014 for funds to be made available to service the HSBC loan. What we do not have is any evidence from Richard Wigley as to whether any sums were in fact advanced by Pantrust either to St John's Manor Limited or directly to HSBC pursuant to this facility. It seems curious that the former trustees do not appear to be seeking repayment of this loan by St John's Manor Limited to Pantrust. Instead it forms part of the former trustees' claim against John Dick Sr and the family for an indemnity and damages, but even so, in the interests of justice, it is necessary for us to inquire as to whether, in fact, any funds have been paid by Pantrust pursuant to this facility letter.

- 50 It is, of course, the existence of the second charge over St John's Manor and surrounding grounds that is causing the new trustee its greatest difficulty, but in the circumstances, we are not prepared, certainly at this stage, to order the release of the charge. The new trustee is now in receipt of the bank statements of HSBC, and at the same time, the former trustees must still be in possession of their own accounting records, and in particular, the accounting records of their client accounts through which, as we understand it, any payments would have been made.
- 51 We will therefore give directions for the Court to be provided with evidence as to the existence of funds being paid by Pantrust under this facility before hearing further argument on all aspects of this second charge. The onus will be on the former trustees to demonstrate that funds have been paid under this facility.

Summary

52 In summary:-

- (i) The former trustees will procure the transfer of the shares in Basin Lane to the new trustee or its nominee, with its then sole asset being the Berkeley Square Flat within 28 days.
- (ii) The former trustees will procure the transfer of the shares giving ownership of the Park Heights Flat to the new trustee or its nominee within 14 days.
- (iii) The former trustees will procure the transfer of the shares in Lilianfeld to the new trustee or its nominee within 14 days.
- (iv) The former trustees will procure the release of all charges, hypothecs or other security vested in any of them or held to their benefit over the Berkeley Square Flat, the Park Heights Flat, and the unregistered charge over St John's Manor and its surrounding grounds within 28 days.
- (v) In the event of refusal or default by the former trustees or any of them or by any company, corporation or entity owned or controlled by any of them to give effect to the above, then the Viscount is directed, pursuant to Article 52 of the Trusts (Jersey) Law 1984 to:-
 - (a) execute share transfer forms in the form that will be annexed to the Act of Court and
 - (b) execute any other transfer, release, assignment or other document or instrument or endorsement necessary to give effect to this order.
- (vi) The Court will give directions as to the filing of evidence for a further hearing on the issue of the second charge over St John's Manor and surrounding lands.

(vii) There will be liberty to apply.