Y Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Tibbo, Nicolle, Clyde-Smith, Commr. and Jurats Tibbo and Nicolle, (Clyde-Smith, Commr.)
Judgment Date:	04 August 2011
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Text

[2011] JRC 135

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Commissioner., and** Jurats Tibbo **and** Nicolle

IN THE MATTER OF THE REPRESENTATION OF N

AND IN THE MATTER OF THE Y TRUST

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984, AS AMENDED

Between
N
Representor
and
A
First Respondent
B
Second Respondent
C
Third Respondent
D
Fourth Respondent

and

Advocate P. D. James as Guardian ad litem for E and F and as representative of the issue of E and F and D
Fifth Respondent

Advocate R. J. MacRae **for the Representor**.

Advocate F. B. Robertson **for the First Respondent**.

Advocate P. D. James **for the Fifth Respondent**.

Authorities

In the matter of the R.E. Sesemann Will Trust [2005] JLR 421.

In re the Exeter Settlement [2010] JLR 169.

In Re the S Settlement [2001] JRC 154.

Public Trustee -v- Cooper [2001] WTLR 903.

Jones -v- Firkin-Flood [2008] EWHC 2417.

Lewin on Trusts (18th Edition).

Re Manisty's Settlement [1973] 2 AER 1203.

R -v- The Charity Commissioners for England and Wales ex parte Baldwin (2001) W.T.L.R.137.

Scott -v- National Trust for Places of Historic Interest or Natural Beauty (1998) 2 All ER 705.

Trump Holdings Limited -v- Planning and Environment Committee [2004] JLR 232.

THE COMMISSIONER:

1 This is an application by N as trustee of the Y Trust ("the Trust") for the Court to approve and bless the decision it took on 14 th December, 2009, to make final distributions out of the Trust. It is an application which has caused the Court considerable difficulty.

2 The Trust was declared on 19 th September, 1990. The late G ("the settlor") settled into the Trust by way of assignment her entitlement to benefit from the Will or intestacy of her mother H, who died intestate on 18 th November, 1990. The major asset settled was a property in Surrey. The Trust was established on advice for tax reasons and to keep assets out of France, where the settlor was resident.

3 The Trust is a discretionary trust governed by Jersey law and the beneficiaries are the children and remoter issue of the settlor, including her two sons A (aged 61) and B (aged 59), B's three children, C (aged 32), D (aged 18) and F (aged 15) and C's daughter, E (aged 14). A is single and has no children.

4 By an instrument of variation dated 3 rd February, 2005, J, who was the settlor's personal solicitor, was appointed Protector of the Trust, whose consent is required to the exercise of certain powers of the trustee, including the addition and exclusion of beneficiaries and distributions. Following the death of the settlor on 26 th May, 2007, J resigned as Protector in favour of K.

5 In her letter of wishes of 1 st February, 2000, the settlor expressed the wish that everything should go equally to her two sons, A and B but that Surrey property should never be sold or torn down and always remain as a refuge and *pied-à-terre* for her descendants. In her last and more detailed letter of wishes dated 29 th November, 2002, she expanded upon her wish for the Surrey property to constitute a base for family use and for future generations, so as to preserve her late father's life-work in one place where it could be visited and seen. She reiterated that she wished the trustees to treat her sons A and B equally in terms of amounts and timings of distributions from the Trust.

Rectification

6 At the outset of the hearing Mr MacRae applied for the Trust to be rectified. Shortly before the hearing, Miss Victoria Connolly of Carey Olsen noted something which had not been noticed by anyone involved in this Trust to date, namely that clause 1(2)(i)(ii) of the Trust, dealing with the definition of the beneficial class, read literally could be interpreted as restricting the class of beneficiaries to B, A and C. It is in the following terms:-

> *"The children and remoter issue of the late G now living"*.

On the date that the Trust was declared, the only remoter issue then living was C.

7 The Court heard evidence from J that such a restriction was never in the contemplation of the settlor as was made clear in her letters of wishes. The Court received an affidavit from R, the solicitor who drafted the Trust and who wrote a commentary on its provisions dated 12 th September, 1990, for the benefit of the settlor. That commentary explains that the beneficiaries of the Trust are to include "any grandchildren that you [the settlor] may ultimately have". It is clear to him that the definition of the beneficiaries was not intended to be so restricted and that by way of regrettable typing error the words *"or hereafter born before the Closing Date"* which are contained in the subsequent provisions relating to the definition of the beneficial class, had been omitted.

8 Mr McRae referred us to the legal test applicable to rectification as set out in paragraph 12 of *In the matter of the R.E. Sesemann Will Trust* [2005] JLR 421, namely that in order for the Court to order rectification, the following three-fold test must be met.

> (i) The Court must be satisfied by sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intentions of the party(ies);
>
> *(ii)* There must be full and frank disclosure; and
>
> *(iii)* There should be no other practical remedy.

9 As it is a discretionary remedy, delay can be a relevant factor (see *In re the Exeter Settlement* [2010] JLR 169) but there has been no delay in bringing this matter once discovered to the attention of the Court.

10 Mr James supported the application and Mr Robertson, on behalf of A, rested on the wisdom of the Court. We had no hesitation in finding the test met and ordered the rectification of Clause 1(2)(i)(ii) by the addition of the words *"or hereafter born before the Closing Date"*.

History of the Trust

11 During the lifetime of the settlor, regular distributions were made to her out of the relatively limited cash and investments held, some of which were passed on to her sons. It would seem that for some considerable period A had lived at the Surrey property rent free. Following her death, the retention of the Surrey property, which was in a bad state of repair, was by consensus unsustainable. It was sold on 2 nd April, 2008, for £4m which, when added to the £1m or so held in cash and investments made the Trust, in the words of K, economically viable. A large distribution of US$2.4m was made to B, who lives in the United States, for the purpose of his financing a house purchase there.

12 A and B, who are half brothers, are clearly very different in character. From before the death of the settlor, N received very extensive correspondence from B, mostly by e-mail. That correspondence continued up to and beyond the morning of the decision made by N which is the subject of this application. The correspondence can be fairly described as aggressive and often offensive but would always appear to have been dealt with, in the main by M the director with day to day responsibility for the Trust, in a professional and restrained manner.

13 A, by way of contrast, is described by his English lawyer, S, as a shy and retiring person who likes to think matters over very carefully and to take time in the process. S had learned to be patient in his dealings with him. He is a gardener leading a modest lifestyle. He owns two properties in France, but lives with relatives in a manor house in England. He has no dependants and has made a Will in favour of three Peruvian friends of his. K described B as manipulative and A as unassertive.

14 On 12 th May, 2008, there was a meeting between M and P from N and K. According to O of N, it was not a formal meeting of N as trustee as that would have required the presence of two directors. It was however minuted and contained this paragraph:-

"[M] made reference to an email from [B] whereby he had suggested that the Trust fund should be apportioned 25% to himself, 25% to A and the remaining 50% for the benefit of the issue of the above. [M] commented that it was the Trustee's opinion and final decision that the Trust fund would be split 50% for the benefit of A and 50% for the benefit of [B] and his children. [K] agreed that this was a fair apportioning of the Trust assets and the Trustees should continue to administer the Trust with this split in mind".

15 A discussion took place about the formation of a US trust for the benefit of B's children who are US resident. The minutes record that N had agreed in principle to the transfer of 25% of the trust fund into such a trust, although no final decision could be made until the precise details of the trust were known and had been fully considered, as well as the tax implications. Furthermore, no decision could be made about the exact value of assets to be transferred until it was possible to ascertain the amounts available with the benefit of the trust accounts and that of the underlying company. The minutes read:-

> *"[M] commented that following review of the accounts the Trustees would be able to calculate the 50% which would make up the amount to be allocated for the benefit of [B] and his family.* Following this calculation the Trustees would then be able to confirm the total amount of distributions already made to [B] and therefore the resulting amount which could be settled into any US Trust. [K] confirmed that if the resulting amount was less than the 25% originally proposed then the Trustees would have no option other than to accept that a smaller amount would be settled into any new Trust."

16 A copy of these minutes was sent to both B and A.

17 On 25 th February, 2009, M met with A and S at the offices of Frank Hirth plc the accountants to the Trust. Most of the meeting was taken up with taxation issues, but the notes of the meeting prepared either by Frank Hirth or N contain the following:-

> *"M … confirmed that the Trustees had now notionally split the current trust assets into 2 parts.* A portion for the notional allocation to B … and his family and a portion for A's benefit.
>
> *[M] thought it to be the intention of [B] that he establish a new US trust for the benefit of his family and that the Trustees would be requested to consider transferring the notionally apportioned assets for [B] and his family into this Trust.* However there had been no further progress on this since late in 2008.
>
> *It was agreed that it was required to ascertain [B's] intentions for certain*.
>
> *[A] mentioned he was considering requesting a large distribution from the Trustees (equal to the amount notionally apportioned by the Trustees for his benefit) once the current tax issue has been resolved*.
>
> *[A] further commented that he did not wish [B] or his family to benefit from any funds currently notionally apportioned for [A's] benefit.* [A] was considering strategies to ensure during his lifetime and after his death no assets currently retained for his benefit reverted to [B] or his family. One such strategy being considered was the addition of beneficiaries at [A's] request. It was still uncertain which strategies would be used.
>
> *[Frank Hirth] advised therefore that until such time as [B's] and [A's] intentions had been confirmed it was agreed that the Trust assets remain in cash*.
>
> *[Frank Hirth] stipulated that [A] was not to receive any benefit from the Trust until such time as advised OK to do so by [Frank Hirth].* Emergency requests would be considered on a case by case basis and with the consultation of [Frank Hirth].
>
> *Action points:-*
>
> *[A] and [Frank Hirth] to liaise to resolve US reporting*
>
> *[A] and Withers to file DOM1 form*
>
> *[A] to decide if [Frank Hirth] are to deal with UK historic tax from the perspective of [A's] personal reporting or whether this would be best dealt with by [A's] personal advisor with [Frank Hirth] providing reporting information on behalf of the Trust only*.
>
> *[B's] future intentions to be clarified*.
>
> *[A's] future intentions to be clarified*.

[Frank Hirth] to review the split of benefit between the beneficiaries for the occupation of the Surrey property.

[A] to advise, following the resolution of all outstanding tax issues whether he may request a large distribution leading to the termination of the Trust. [Frank Hirth] to advise at the time of the best way forward on this issue.

If [B] establishes US trust [Frank Hirth] and Trustees to consider inclusion of C in the remaining Trust and/or additional beneficiaries as may be requested by [A].”

18 A told us in evidence that some time after this meeting he had posted a letter to N nominating two people (Peruvian friends) that he would like to have added as beneficiaries. This assertion had not been contained in his affidavit or put to M who gave evidence before him and there would not appear to be any record of N having received such a letter. Both K and O said they would have had to consider such a request very carefully, as it would involve bringing outsiders into the Trust.

19 M said that there had been a number of telephone calls between him and A following this meeting in which he had asked him “to consider” C being a beneficiary of his notional share of the trust fund but without success. Apart from this, there had been no communications with A or it would seem his advisers in relation to his future intentions in relation to his notional share of the trust fund prior to the decision on 14 th December, 2009. We were not made aware of any follow up to the various action points.

20 A meeting then took place on 23 rd March, 2009, between M, O and K, attended by Q and P from N. This was a meeting of the trustees. There was discussion about the US trust and a decision to distribute a small sum to B's children. The minutes contain the following passage:-

“It was further agreed that the notional split of 50/50 between A and B of the Trust assets would be adhered to and that following the subtraction of the benefit B had already received from his notional entitlement, all remaining funds would be for the benefit of his children.

Following any transfer to a new US trust B and his family would be excluded from the Y Trust. The Trustees would then retain the funds for A's benefit in the Y Trust however would consider making a large distribution to him if requested and following adequate tax advice. It was noted that it may be in A's best interests if some funds were retained in Trust to cover his living expenses in retirement. It was also discussed and agreed that once this stage is reached it may be cost effective for the trust to be transferred to a smaller firm in the UK.”

21 These minutes were not copied to either A or B or their advisers.

22 An exchange of e-mails between M and K in June 2009 shows a change in their thinking in that they started to consider moving away from a notional 50/50 split. In M's words their thinking was evolving. Quoting from M's e-mail of 9 th June, 2009:-

> *"At the moment I am thinking that we should take consideration of the fact that A will not need so much support so perhaps we should be thinking that we could be a little more generous in what we fund the new trust with.* Especially as A has made it clear that he does not want C to remain in his pot. Anyway we have a number of issues to resolve before we get to this stage."

23 In the meantime, C, who does not apparently have a good relationship with her father, had been in direct contact with N and in August 2008 had raised the possibility of a distribution to enable her to purchase a house in the US for herself and her daughter. N helped find her appropriate US tax advice and in December 2008, indicated that it would consider assisting her with a property purchase although there could be no commitment as to any distribution or the amount.

24 By November 2009, N had, in M's words, given C a green light in respect of a distribution of some £500,000 to be utilised for a property purchase for herself and her daughter, although no formal confirmation of amounts could be given prior to the proposed meeting between the trustees and the Protector on 14 th December, 2009. She was advised not to submit any formal offers at that stage.

25 The trustees' meeting which is the subject of this application then took place on 14 th December, 2009, and was attended by M and O on behalf of N and K, as the Protector. P was in attendance.

26 That morning, M had received an e-mail from B, pressing for decisions in relation to distributions to both C and the proposed US trust and repeating his demand, made on many occasions previously, for a re-balancing of the trust fund in his favour, to take into account what he described as the large amount of benefit already received by A through his occupation of the Surrey property free of any rent (which he assessed at some US$ 700,000), and for the work that he had undertaken dealing with his mother's estate over some two years.

27 As this is the decision which we are being asked to sanction, we set out the minutes in full, save for those parts that dealt with small distributions to B's children.

> *"[K] noted receipt of several emails, as copied to both [M] and [P] from B making various allegations against the Trustees and Protector.* The allegations were considered and it was noted that all had been dealt with in previous correspondence from the Trustees and the Protector sent to B.
>
> *The Chairman moved on to consider the current position of the Trust and it was*

noted that the Trust assets currently comprised cash fixed deposits totalling approximately £3,400,000.

The trustees and the Protector discussed the current circumstances of the beneficiaries in order to determine an amount which they felt appropriate to be distributed.

It was noted that B had received distributions from the Trust totalling £1,900,000 in the period since 25 May, 2007, [the date of the settlor's death]. It was agreed that B required no further funds to be distributed for his benefit.

It was resolved to apportion £1,900,000 for the benefit of A. The Trustees felt this to be an ample amount for an individual with a modest lifestyle, no dependants and no immediate or foreseeable requirements. It was noted that A also retained assets in his own name. The Trustees noted that advice would be sought from the appointed tax advisers as to the most effective way for these funds to be utilised for A's benefit.

Following the above distributions it was noted that £1,500,000 would be available for the other members of the beneficial class.

It was noted that these individuals were at present F, D, C and E.

It was resolved to distribute £500,000 for the benefit of C in order that these funds could be utilised towards the purchase of a property for C and her daughter E. Any funds not used for the purchase could be retained by C to assist with general living expenses. It was noted this amount would facilitate the purchase of a property of adequate size and in doing so ensure the future security and comfort of C and E.

It was decided to distribute £1,000,000 for the benefit of F, D and E. These funds would be distributed to a new US Trust of which each of the aforementioned would be beneficiaries.

It was felt that this amount would provide adequate financial support to the beneficiaries of the US Trust and that the trustee of the US trust could have regard to the fact that E would benefit from the distribution to her mother."

The US trust was to be split 45/45/10 in favour of D, F and E respectively.

28 In broad terms, the mathematics are as follows. The trust assets available for distribution were £3.4M to which, for the purpose of calculating the 50/50 notional division, had to be added to the £1.9M B (and his children) had already received since the settlor's death, giving a total of £5.3M. Each notional fund was therefore half this amount, namely £2.65M. Of his notional share, B (and his children) had already received £1.9M, leaving £750,000 available for his children. By deciding to distribute £1.5M to his children (£500,000 to C and £1M to the US trust) N had "taken" £750,000 out of A's notional share.

29 Neither A nor his advisers had been given notice of the change in the Trustees' thinking or that a meeting was taking place at which these distributions were under consideration. M informed both A and B of the decision by e-mail on 22 nd January, 2010. In his evidence before us, (although not in his affidavit) A said he had learned of the decision in a phone call to N that day and had spoken to M before the e-mail was sent to him. He said that M was abrupt and slightly aggressive in his manner, in order, he felt, to shut him up and have him accept the decision. He said he spoke to him again a week later. M had no recollection of these calls, but denied that he would have treated him in such a manner. We accept A's evidence that such calls did take place and we think it is likely that M would have been somewhat defensive in the light of N's decision to use part of A's notional share to benefit B's children against his wishes.

30 A took no action for some two months before forwarding M's e-mail to his solicitor S on 25 th March, 2010. In the meantime, N had proceeded to implement the decision in part, by distributing £500,000 to C on 19 th March, 2010. S's reaction, as expressed in his telephone call with M of 11 th June, 2010, was that N had been bullied and threatened by B. In his letter of 17 th August, 2010, to N, he highlighted the abrupt and significant change between the "final decision" of N as set out in the minutes of the meeting of 12 th May, 2008, and the decision of 14 th December, 2009. N was put on notice that if any part of the decision was implemented, A would make an immediate application to the Court. N pre-empted that threat by itself bringing this application by representation dated 24 th November, 2010.

31 At a directions hearing on 22 nd March, 2011, the Court raised the issue of whether it was open to it to sanction a decision that had been part performed but none of the parties sought to argue against its ability to do so. N wanted the application heard and accepted the risk that if the Court declined to bless the decision, the reasons put forward by the Court may have an adverse impact upon its ability to defend proceedings subsequently brought in relation to that part of the decision that had already been implemented, namely the distribution to C.

Role of the Court

32 In the case of *In Re the S Settlement* [2001] JRC 154, which is the authority for the application in Jersey of the principles enunciated in *Public Trustee -v- Cooper* [2001] WTLR 903, the Court set out a non-exhaustive list of categories of cases where it would be proper for a trustee to invoke the jurisdiction of the Court. At paragraph 10(2) Birt, Deputy Bailiff, quoted from a judgment of Robert Walker J in an unnamed case (cited by Hart J in *Cooper)* thus:-

> ***"(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them, but because the decision is***

particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers."

33 The parties submitted and the Court is prepared to agree that the decision of 14 th December, 2009, which results in a final division of the Trust was a momentous decision, which falls into the second category.

34 The Court must ask itself three questions when it is asked to give directions in so-called *"momentous decision"* cases quoting from paragraph 11 of *In Re S*:-

"(1) Are we satisfied that the Trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out each of the steps we have described earlier in this judgment?

(2) Are we satisfied that the opinion which the Trustee has formed is one at which a reasonable trustee properly instructed could have arrived?

(3) Are we satisfied that the opinion at which the Trustee has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?"

35 There was no allegation that the N had acted in bad faith or that its decision had been vitiated by conflict. We were concerned therefore with the second question, namely whether the decision was one at which a reasonable trustee, properly instructed, could have arrived.

36 Mr James pointed out that the three questions set out in *Re S* appear rather limited when reference is had to the judgment of Hart J in *Public Trustee -v- Cooper* on which they were based. Hart J said this:-

"What then are the duties of the court in considering a category (2) case? They will depend on the circumstances of each case. In the present case, before the court can give general liberty to the provident Settlement trustees to carry into effect the decision made by them on 20th October to accept the bid, i.e. to grant the declaration sought, it must be satisfied, after a scrupulous consideration of the evidence before it, of **at least** three matters." [our emphasis]

37 That there may be further matters beyond the three identified in *Re S* is illustrated by the judgment of Briggs J in *Jones -v- Firkin-Flood* [2008] EWHC 2417, a case in which the court declined to bless the decision of the trustees, where Briggs J said this:-

"281 I am fortified in reaching my conclusion that I ought not to confirm or bless the provisional resolution by my perception, which I have already described in detail, that the Trustees had by their conduct prior to

February 2008 demonstrated their collective and individual unfitness to be Trustees of this trust. It is most unusual for the court to be invited to bless a discretionary decision by trustees against such an unpromising background. Furthermore, it seems to me that the relatively limited role which the court has hitherto chosen to adopt in category (2) cases (within the *Public Trustee -v- Cooper* ***analysis) may well have been developed in the context of decisions by trustees whose general fitness was not in dispute.*** For that reason I would add to the category of cases in which the court may feel insufficiently certain about the propriety of a proposed discretionary decision that it declines to bless it, without at the same time prohibiting it, a case just like the present, where the trustees have demonstrated a general unfitness to act, by conduct prior to the taking of the decision in question."

38 The general fitness of N to act as trustee was not an issue before us and Mr James did not suggest that, in the circumstances of this case, we should go beyond the second question namely was this a decision at which a reasonable trustee properly informed could have arrived.

39 Briggs J made the further in our view helpful comments in relation to the category (2) cases:-

"256 Returning to the more general function of the court in category (2) cases, I was referred for additional guidance to the following passage in *Re: Hastings-Bass Deceased* [1975] Ch 25, ***at page 41, per Buckley LJ, giving the judgment of the Court of Appeal:-***

"To sum up the preceding observations, in our judgment, where by the terms of a trust … a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."

Strictly that was not a category (2) case within the analysis in *Public Trustee -v- Cooper*, ***since the relevant decisions had by then already been taken and acted upon, but I can see no reason why its inherent good sense is inapplicable to a category (2) case."***

40 Guidance on the role of the court in an application of this kind is given by Lewin on Trusts (18 th Edition) at paragraph 29–299:-

"29–299 The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees'

> powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty: it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

41 In this case, A has had the advantage of extensive disclosure by N and of rigorous cross-examination of N's witnesses.

The hearing

42 The hearing took place over three days and the Court heard evidence from M, O, K, A, J and S. It also received an affidavit from D supporting the application and five affidavits and a skeleton argument from B supporting the application, the fifth affidavit arriving on the second day of the hearing. An application by B to attend the hearing via Skype was refused.

43 This is an administrative application and we are not therefore going to summarise the evidence of the witnesses which we have considered carefully, but will refer to it where necessary to do so. The facts are in the main documented and the need for us to make findings of fact is limited.

Reasons for decision

44 In his first affidavit of 3 rd December, 2010, M said the decision had been reached after careful consideration of the interests of all of the beneficiaries. They specifically considered the circumstances of each of the beneficiaries, the previous distributions made to them and

tax advice received in relation to the US beneficiaries, to the effect that it was more beneficial for them to be beneficiaries of a US resident trust rather than an offshore trust, and the wishes of A in relation to his notional share, something which M described in evidence as being a bit of a *"bombshell"*. A further factor, he said, was the fact that A had lived in the Surrey property for a number of years without paying any rent. In his fourth affidavit of 3 rd June, 2011, he said that the principal matter which led to a change in the view of N and the Protector after the May 2008 meeting was A's wishes in relation to his notional share of the fund.

45 M informed us in his evidence that the meeting of December 2009 took between 1 and 1 $^{1}/_{2}$ hours and all of those present had independently arrived at the same decision upon which they all agreed. The first task was to balance the distributions between B and A, which entailed a distribution of £1.9m to A, a very reasonable sum in the light of his life-style and needs, and then to decide the allocation of the balance. Notwithstanding the wording of the meeting of May 2008, he had always understood that B's children would benefit from A's notional share on his death, but A's wish expressed at the meeting with him in February 2009 that his notional share should be taken out of the trust fund and not be made available to B's children made a separation of their respective interests desirable. It was not a *"final decision"* that they reached in May 2008. B was *"banging the table"* for money and he thinks this wording was used to try to put him in his place.

46 In his affidavit of 19 th May, 2011, O said that the decision was not spontaneous but made after careful consideration of the needs, welfare and individual circumstances of the beneficiaries, including the previous distributions and the US tax advice in relation to the US resident beneficiaries. He was aware of the trustee's view expressed at the meetings in May 2008 and March 2009 but had always understood that B's children would be treated as secondary beneficiaries under A's notional share, notwithstanding that the minutes did not expressly say that. The use of the expression *"final decision"* in the May 2008 minutes was unfortunate but it was not a decision and it was not final—nothing was implemented. An important consideration was the wishes A had expressed in February 2009 in relation to his notional share of the trust fund, which was a significant change from how the trustees believed the Trust should be administered. M had asked him at the meeting whether he felt the decision was fair and reasonable in all the circumstances and he confirmed that it was. The trustee had properly applied its mind to the exercise of its discretion and taken into account any relevant considerations. The decision was consistent with the settlor's wishes in relation to equality of treatment between A and B and that future generations should also benefit from the trust fund.

47 K was not the decision maker but the decision required his consent as protector. In his affidavit of the 20 th May, 2011, he said he approved the decision which was proper and reasonable having regard to the circumstances and the individual interests and needs of the beneficiaries. It was obvious to him that the settlor wished future generations of her family to benefit not just her sons and to hive off 50% for A's sole benefit was inconsistent with the manner in which both N and he had previously understood that the Trust would be

administered. In evidence he said it was important in his view for B's children to have funds. He and N had not been as accurate as they should have been in reviewing the minutes so that they properly reflected their thinking but there were no final decisions in either May 2008 or March 2009. Nothing was written in stone. They were simply expressing an intention at those dates as to how the assets would be administered.

Sanction of the Court

48 N had sent A a copy of the minutes of the meeting of May 2008, which said that the trust fund would be split as to 50% for him, and had met with him in February 2009, when he had been told that half the trust fund had been notionally allocated to him. He and his advisers had been sent off to clarify his intentions as to his notional share. However, without prior notice, N then made a decision to use a substantial proportion of that notional share to make a distribution to B's children, specifically against his wishes.

49 Mr Robertson's approach was to take N's witnesses through the minutes of the meetings in May 2008 and March 2009 on the basis that they constituted decisions of the trustee and to press for an explanation as to the subsequent change in N's position. He sought to hold N to those decisions unless it could point to some new circumstance which had arisen in the meantime which could give a rational explanation for the decision made in December 2009 to depart from the notional 50/50 split. If A's wishes as to B's children expressed in February 2009 were so important, how was it, he asked, that N confirmed the 50/50 notional split at its meeting in March 2009? If A's benefit from the occupation of the Surrey property rent free had been a factor, then N had known about that benefit and apparently rejected it well before the meeting in May 2008. How could the US tax advice have been a factor as that had been received well before the March 2009 meeting?

50 In Mr Robertson's submission there was no rational basis for the complete change in the clearly documented decisions of N in May 2008 and March 2009, other than it had got itself into a mess. When in December 2009 it looked at the figures, it had a problem. It found that after taking into account the distributions made to B, there were insufficient funds in his notional share to give £500,000 to C for her house purchase and to make the US trust viable. Its only option was to take £750,000 out of A's notional share. It was, he said, a perverse and capricious decision which bore no regard to the earlier decisions and administration of the Trust. The decision was (i) contrary to the wishes of the settlor of the Trust, (ii) contrary to the legitimate expectations that N created over a period of years that A and B would each receive 50% of the trust fund, (iii) a complete change of position from the proper and reasoned May 2008 decision and (iv) a decision which no reasonable trustee could have made in all the circumstances of the case.

51 Both M and O rejected the suggestion that N was in a mess or had approached the decision making in December 2009 in this way. All three N witnesses accepted, with the benefit of hindsight, that it was regrettable (M went so far as to say it was unreasonable) that N did not give A and his advisers notice of the meeting in December 2009 and the

possible shift away from the 50/50 notional split, but maintained that even if N had done so it would have made no difference to the decision.

52 We do not think that a distribution to the settlor's grandchildren can be said to have been contrary to her wishes. She never contemplated the sale of the Surrey property, indeed she sought to impose restrictions preventing the trustee from selling it, but it is not unreasonable to suppose that, provided B and A were treated equally, she would have wanted her own grandchildren to have some share of the proceeds. It cannot be said to have been irrelevant to any sensible expectation of hers (see *Re Manisty's Settlement* [1973] 2 AER 1203), whereas a distribution to the Peruvian friends of A might be so described.

53 The regrettable manner in which A has been treated by N must however be seen in the context of two legal principles that apply to the administration of discretionary trusts.

54 The first principle is that trustees must not fetter the future exercise of their discretion, but must exercise their judgement according to the circumstances as they exist at the time. A trustee cannot pledge himself or undertake beforehand as to the mode in which a power will be exercised in the future (see *Lewin* 29–204). We agree with Mr MacRae and Mr James that the minutes of the meetings in May 2008 and March 2009 simply reflect the thinking of the trustee and Protector at those times, and did not purport to and cannot fetter the future exercise of the trustee's discretions. Nothing was done that had any legal effect. No appointment into two funds was made. No distributions were made. The division was “notional” i.e. existing only in thought or imaginary (see The Shorter English Dictionary). What Mr Robertson characterised as decisions were nothing more in law than a record of N's thoughts at the time. Throughout the period up to December 2009, A remained a member of the class of beneficiaries with no greater interest in the trust fund than any of the other beneficiaries. Whilst N should no doubt take into account its previous thinking, which M and O said it did, it cannot be fettered by such previous thinking. When it came to the decisions to be made in December 2009 it was required to exercise its judgement in the circumstances existing at that time which included all of the factors mentioned by M and O, irrespective that some of those factors may have been known to N since before the meetings in May 2008 and/or March 2009.

55 The second principle is that the rules of natural justice in the traditional sense do not apply. Quoting from *Lewin* :-

> ***“29–155 A beneficiary, moreover, has no general right to a hearing from the trustees, not even when the exercise of the power depends on a judgment as to a state of facts.*** The rules of natural justice do not apply. It seems, however, that there may be occasions when the trustees would be acting unreasonably if they failed to give a beneficiary an opportunity to persuade them against a particular course. In that limited sense the concept of legitimate expectation, well known in public law, may have some part to play in the law of trusts. Similarly, it seems that the trustees ought to take into account any previous indications they have given as to the manner in which they might

exercise their powers in the future."

56 In *R -v- The Charity Commissioners for England and Wales ex parte Baldwin* (2001) W.T.L.R.137, cited by *Lewin* as authority for the proposition that the rules of natural justice do not apply, the Commissioners had made a decision, which involved the applicant in the loss of her home, without giving her notice or allowing her to make representations. The Commissioners had accepted, as did N in this case, that it might have been appropriate to have informed the applicant and to invite her comments before implementing the decision. Quoting from the judgment of Mr Jack Beatson QC, at paragraph 48 and 49:-

The Court concluded that in the circumstances, the Commissioners had done just enough to inform themselves before making the decision to set aside the applicant's appointment.

> ***"48. It was also common ground by the close of argument that the public law rules of natural justice strictu sensu are not applicable to charities. Reliance again was placed on*** *Scott -v- National Trust* ***at 718E and also on the decision of the Supreme Court of Victoria in*** *Karger-v Paul* [1984] VR 161 ***in which McGarvie J. stated at page 166:-***
>
> ***'I see no reason for importing rules of natural justice into the exercise of discretion by the Trustees of the Will.*** Such an implication is not necessary. The Trustees of the Will did not exercise their power in a type of situation where a right to make representations upon its exercise is normally afforded' .
>
> ***49. The difference between the public law and the trust approach is that the former focuses on the individual's opportunity to be heard before a decision, whereas the trust concept focuses on the information available to the person making the decision."***

57 The statement in *Lewin* that there may be occasions when the trustees would be acting unreasonably if they fail to give a beneficiary an opportunity to persuade them against a particular course is derived solely from the case of *Scott -v- National Trust for Places of Historic Interest or Natural Beauty* (1998) 2 All ER 705, where Walker J said this:-

> ***"There are two other general points that I would mention.*** In reaching decisions as to the exercise of their fiduciary powers, trustees have to weigh up competing factors, ones which are often incommensurable in character. In that sense they have to be fair. But they are not a court or an administrative tribunal. They are not under any general duty to give a hearing to both sides (indeed in many situations 'both sides' is a meaningless expression), and I think that some of Mr Aldous' submissions on this point were put too high. Nevertheless, if (for instance) trustees (whether of a charity, or a pension fund, or a private family trust) have for the last ten years paid £1,000 per quarter to an elderly, impoverished beneficiary of the trust it seems at least arguable that no reasonable body of trustees would discontinue the payment, without any ***warning, and without giving the beneficiary the opportunity of trying to***

persuade the trustees to continue the payment, at least temporarily. The beneficiary has no legal or equitable right to continued payment, but he or she has an expectation. So I am inclined to think that legitimate expectation may have some part to play in trust law as well as in judicial review cases (where it plainly has an enormously important part to play – see the GCHQ case [1984] 3 All ER 935 ***at 943–944 and 949*** , [1985] AC 374 ***at 401 and 408).”***

58 The minutes of the meeting held in February 2009 make it clear that nothing was said to A which was contractual in nature and A did not assert otherwise. He made few demands upon the Trust and although he might have felt that £750,000 had been taken from his share, he in fact had no share in or entitlement to any part of the trust fund. The effect of the decision was to give him £1.9M. The key issue is the information available to N at the time the decision was made and we come to this later, but this is not a case in which N had applied actual benefits to A in such a way as might arguably have imposed upon it a duty to give A the opportunity of persuading it against the distribution to B's children.

59 Mr Robertson accepted that *Scott* was a tentative authority for the proposition that legitimate expectation had a part to play in trust law and he did not pursue the point with great vigour. We are not prepared to hold on the basis of that authority and on these facts that it has any part to play in this case. In any event, the Court of Appeal in *Trump Holdings Limited -v- Planning and Environment Committee* [2004] JLR 232 held that there were four requirements for substantive legitimate expectation to be established, namely:-

Albeit set in the context of public law, there is no evidence that a representation was made to A that had the character of a contract or that he relied on the same to his detriment. His evidence was that nothing in his life had changed following the February 2009 meeting and there was nothing that he did in the expectation that he had a notional interest in one half of the trust fund.

“(i) that a clear and unequivocal representation has been made;

(ii) that the expectation is confined to one person or a few people, giving the representation the character of a contract;

(iii) that it is reasonable for those who have the expectation to rely upon it and that they do so to their detriment; and

(iv) that there is no overriding public interest that entitles the representor to frustrate that expectation.”

60 In the context of this case, and in the absence of allegations or evidence of bad faith or conflict, we must focus on the information available to N when it made its decision in December 2009. By not consulting A beforehand, N took the serious risk that, had he been consulted, he may have provided N with information that would or might have led it to act

otherwise than it did. However, the evidence of A was clear. N's assessment of his needs and life-style as set out in the minutes of the meeting in December 2009 was correct. His position had not changed in any way from the meeting in February 2009. Over and above his needs, he had no particular wishes in relation to his notional share other than that he did not want it to go to B's children; a factor which N took into account.

61 As Mr Jack Beatson QC said in *R -v- Charity Commissioners*, at paragraph 58:-

> ***"In public law the courts are, as a general rule, reluctant to refuse to grant a remedy for failure to comply with the requirement of procedural fairness on the ground that it would make no difference to the ultimate result.*** The Commissioners refer to this as the "useless formality" point. The trust test is, however, that a decision will not be so flawed as to be invalid unless the trustees, if properly advised, would have acted otherwise or possibly, in the light of recent authority, might have acted otherwise. The cases for that proposition are collected in *Scott -v- National Trust*. ***They are*** *Re Hastings-Bass* [1975] CH 25; *Mettoy Pension Trustees Limited -v- Evans* [1990] 1 WLR 1587 ***and*** *Stannard -v- Fisons Pensions Trust* [1992] IRLR 27."

62 The key question we believe was that put by the Court to Mr Robertson viz what information was not before N in December 2009, as a result of it failing to consult A, which would or might have led to it acting otherwise? – a question which Mr Robertson was unable to answer.

63 The Court had to remind itself of its limited role and the legal principles that apply to discretionary trusts. The focus is not upon the expectation of the beneficiary but upon the information available to the person who the settlor has appointed as decision maker. There is no authority for the importation into trust law of a right to be heard or consulted. Such rights would potentially render trusts unworkable.

64 N was required to make its decision in December 2009 in the circumstances as they existed at that time, properly informed and with regard to but not fettered by its previous thinking. The evidence is that it did so. Other trustees, or indeed the Court, might have exercised the trustee's powers differently, i.e. by restricting the distribution to B's children to what was left of his notional share. However the decision by N to allocate more than that to the settlor's grandchildren cannot be said to be beyond the limits of rationality.

65 We therefore sanction the decision of N taken on 14 th December, 2009. In doing so we wish to say this. Whilst we have found that the decision was within the bounds of rationality and therefore to be sanctioned, we were very troubled by the high handed manner in which we feel N had treated A and his advisers. It was indeed regrettable that having met with A and his advisers in February 2009 and engaged in the kind of discussions reflected in the minutes of that meeting, N should then have proceeded to deal with the trust fund in this way without informing A and his advisers of its intention to do so. A would always have

been disappointed with the decision that was made, but the manner of his treatment can only have added to his sense of grievance.