B v Erinvale PTC Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, OBE., Jurats Pitman, Austin-Vautier, Clyde-Smith
Judgment Date:	15 October 2020
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Text

[2020] JRC 213

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, OBE., Commissioner, and Jurats Pitman and Austin-Vautier

Between
B
Representor
and
Erinvale PTC Limited
First Respondent

and

C (by his delegate D)

Second Respondent

and

E and F
Intervenors

Advocate P. C. Sinel **for the Representor**.

Advocate B. J. Lincoln **for the First Respondent**.

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

Advocate S. A. Franckel **for the Intervenors**

Authorities

Matrimonial Causes (Jersey) Law 1949.

Matrimonial Causes Law

Companies (Jersey) Law 1991

Trusts (Jersey) Law 1984

S v Bedell Cristin [2005] JRC 109

Lewin on Trusts

Garnham v PC [2002] JRC 050

B v Erinvale PTC Limited and Ors [2020] JRC 174

HHH Employee Benefit Trust [2015] JRC 193

RBC Trust Company (Jersey) Limited v E and Fifteen Others [2010] JLR 653

Schmidt v Rosewood Trust Limited (Isle of Man) [2003] UKPC 26

In the matter of the VR Family Trust [2009] JLR 202

In the matter of the IMK Family Trust [2008] JLR 250

Re the H Trust [2006] JLR 280

Trust — The Representor applies to be made a beneficiary of the A Settlement in her own right.

THE COMMISSIONER:

1 The Representor ("B") applies to be made a beneficiary of the A Settlement in her own right. The background to the application is the divorce proceedings commenced by the second Respondent ("C") against her, in which she is seeking ancillary relief.

2 The parties married on 5 th January, 1997, and have one now adult child, namely J. C has two children by an earlier marriage, namely the intervenors E and F. B also has two children from an earlier marriage.

3 C created the A Settlement on 17 th September, 2012, and according to his letters of wishes, settled into it the whole of his free estate. We understand that the assets within the A Settlement are currently valued at some £50 million, although there is an issue as to the extent, if any, that E has contributed to those assets.

4 The A Settlement is a discretionary settlement governed by Jersey law. The beneficial class is described in this way:-

> ***"1. The Settlor***
>
> ***2. The Settlor's Spouse***
>
> ***3. The Settlor's children and remoter issue."***

5 C, the settlor, has the right to appoint and dismiss trustees and the power of the trustee to exclude or add beneficiaries is subject to the trustee first obtaining the "Relevant Consent", which is defined as follows:

> ***"Relevant Consent" means***
>
> > ***(1) Whilst the Settlor is alive and of full capacity, the prior or simultaneous written consent of the Settlor to the action proposed;***
> >
> > ***(2) Where the Settlor is alive but suffering from mental incapacity such as to prevent him from giving informed consent to a proposed action, the prior or written consent of the person or persons duly empowered to manage the Settlor's affairs; or***
> >
> > ***(3) Where the Settlor is dead, the prior or simultaneous written consent of the Settlor's personal representatives;"***

6 The trustee of the A Settlement is a private trust company called Erinvale PTC Limited ("Erinvale"). Erinvale was incorporated in Jersey on 15 th December, 2015, in order to act as trustee to a number of H family trusts in place of Vivat Trustees Limited ("Vivat"). Erinvale

is in turn owned by a purpose trust established by C. Equiom (Jersey) Limited ("Equiom"), a regulated entity, is responsible for the administration of Erinvale. The original directors of Erinvale were C, D and L. C and D resigned from the board on 19 th June, 2017, and were replaced by M and Alice Dumoitier. Alice Dumoitier is a director of Equiom. The current directors are therefore M, L and Alice Dumoitier.

7 D is a long-term business associate of C and was formerly a director of Vivat. L is also a long-term business associate of C and heads up the US side of the group of companies, which are ultimately owned by the A Settlement. M is currently an employee of the Jersey regulated finance company Q Limited, which is 90% owned by the A Settlement, with the remaining 10% being owned by M. M was formerly employed within the Vivat group and worked with the H family in his capacity as a director. There is an agreement by which L will receive 15% of the net proceeds of sale of any disposal of the US based businesses, but neither he nor M receive separate remuneration for their role as directors of Erinvale.

8 C was diagnosed with a brain disease in 2012 and on 14 th December, 2018, was found by the Court to lack capacity. D was appointed his delegate.

9 We are given to understand that the marriage between C and B had been unhappy for some time, but matters were brought to a head when his English lawyer wrote to her on 25th April 2017 requiring her to vacate the matrimonial home in Jersey. She now lives in Property 3 appointed to her by another settlement created by C. On 30 th May, 2017, C issued a divorce petition, which was subsequently amended on 22 nd June, 2017, with the *decree nisi* being pronounced on 16 th August, 2017.

10 C has agreed not to apply for the pronouncement of the decree absolute as that may result in B ceasing to be a beneficiary, as she would no longer be his spouse, and it was therefore agreed between the parties that the decree absolute would not be sought until the conclusion of her application for ancillary relief.

11 C executed two letters of wishes on 17th September 2013 and 11th November 2013, but in both he expressed this wish in relation to provision for B:

> *"Provision for [B] – Please set aside a fund of assets totalling £4m (four million pounds) for [B].* I would like [B] to be able to withdraw up to £1m (one million pounds) from this fund to spend as she wishes. The remainder should please be invested by you to maximise the income return and provide [B] with a monthly income which is distributed to her.
>
> *In addition to this I would like [B] to be entitled to use the [Property 3] whenever she wishes for the rest of her lifetime.* This property is owned by the trustees of the [K] Settlement so I will address this with them in a separate Letter of Wishes."

12 The usual procedural steps were taken in the matrimonial proceedings, including the filing of affidavits of means and the issuing of schedules of deficiencies, but on 10th January 2019, B applied by way of representation in the Samedi Division, convening Erinvale and invoking the supervisory jurisdiction of the Court over the A Settlement (amongst others) and seeking the following orders:

> (i) Disclosure of information by Erinvale to enable the Courts seized of this action and of the divorce proceedings to do justice to the same.
>
> (ii) The appointment of B as a beneficiary in her own right.
>
> (iii) That “B's Settlement” be paid to B.

13 “B's Settlement” was defined in the representation as follows:

> *“B's Settlement” means a settlement of monies calculated by reference to:*
>
> > *(a) the longevity of [B's] relationship with [C];*
> >
> > *(b) [B's] contribution as partner, mother, and wife;*
> >
> > *(c) the nature and size of the Matrimonial Assets; and*
> >
> > *(d) the availability both presently and historically of assets held directly or indirectly for either or both parties both before and after marriage*.
>
> *The calculation referred to above to be unaffected by gratuitous dispositions made before or during the marriage.”*

14 “Matrimonial assets” was defined as follows:

> *“Matrimonial Assets” means assets presently available to the parties, whether held directly or indirectly (in a trust or similar vehicle) and assets historically available to the parties before during and after the inception of their relationship, likewise including assets held directly or indirectly (in a trust or similar vehicle).”*

15 Thus, there are parallel sets of proceedings in the Samedi and Family Divisions in which B is seeking the same ultimate relief. The ancillary relief proceedings were referred up to the Royal Court by the Registrar and a hearing of both matters took place before the Master on 2 nd April 2019, in which he identified the need for the Royal Court to determine whether it was appropriate for B to proceed in the Samedi Division, pursuant to the representation, or in the Family Division, pursuant to the ancillary relief proceedings. A number of questions designed to address that issue were therefore referred to the Royal Court. The Royal Court sat on 11 th July, 2019, and on 21 st November, 2019, the Bailiff issued a draft judgment. Without going into the answers given to the questions posed, he ruled that the

determination of B's entitlement should be pursued before the Family Division.

16 By a consent order of 16 th April, 2020, it was ordered, *inter alia*, that her application to be appointed a beneficiary of the A Settlement in her own right should be dealt with as a *cause de brièveté*. At the same time C was convened as a party to and the Intervenors were permitted to intervene in these proceedings and Erinvale was convened as a party to the matrimonial proceedings.

17 With all of C's free assets now being within the A Settlement, B is concerned as to her current status as a beneficiary as his spouse. If C were to die before the decree is made absolute, then under Article 24 of the Matrimonial Causes (Jersey) Law 1949 ("the Matrimonial Causes Law") the matrimonial proceedings would abate and arguably, she would cease to be a beneficiary of the A Settlement, as she would be a widow, rather than a spouse. Similarly, if C were to die after the making of a *decree absolute* but before orders for ancillary relief were made, the matrimonial proceedings would continue, pursuant to Article 37(1) of the Matrimonial Causes Law, but she would cease to be a beneficiary of the A Settlement, as she would no longer be his spouse. For these reasons, she wishes to be appointed a beneficiary in her own right.

18 Our attention has not been drawn to any request by B to be appointed a beneficiary in her own right prior to the issue of the representation on 10 th January, 2019, but we were shown a letter from Advocate Sinel, for B, to Advocate Lincoln, for Erinvale, dated 2 nd July, 2019, in which that request was made. In that letter Advocate Sinel said this:

> *"…[B], historically, has been treated very much like a chattel and her position as a beneficiary been dependant upon her relationship with [C].* To solve that unfortunate state of affairs I would be grateful if the trustee would be kind enough to appoint [B] as a beneficiary in her own right as a human being irrespective of her position as a spouse…"

19 Advocate Lincoln responded that Erinvale would need to consult with the other beneficiaries, which would take time, but pointed out that B remained a beneficiary in the meantime, as C's spouse. The request for her to be appointed a beneficiary was repeated orally by Advocate Sinel before the Court on 11 th July, 2019.

20 Although this specific issue was not before the Court on that occasion, the Bailiff asked for written submissions on B's status as a beneficiary should C pre-decease her before the decree absolute was pronounced. In his skeleton argument of 19 th July, 2019, Advocate Lincoln set out the position of Erinvale in this way, recognising that it could not fetter the future exercise of its discretion:

> *"i. It has at all times been the Trustee's understanding that [C] intended that [B] should receive support from the Trust in the event of his death. This is evidenced in particular*

by the letters of wishes as referred to above. It appears that the trust instrument may have failed inadvertently to reflect this intention.

ii. The Trustee considers [C] and [B] as human beings going through a difficult time and requiring support. This is evidenced by the trustee's continued support of both parties in maintaining their standard of living throughout the ongoing divorce proceedings, both in terms of providing them with the means to pay any legal bills and also more generally.

iii. Whilst the Trustee remains of the view that the issue of the extent of any financial provision that should be made for [B] in the divorce is a matter that should be dealt with by the Matrimonial Court in the divorce proceedings, it recognises that its support is likely to be required in order to meet any award that might be made in [B's] favour.

iv. In those circumstances, in the event of [C's] death prior to the decree absolute, as things stand, and taking into account the latter letter of wishes and [B's] likely financial needs and resources at that time, the Trustee considers that it would then conclude that it was appropriate for financial support to be provided for [B] from the Trust. In order to provide [B] with such financial support as the Trustee may consider appropriate in all the circumstances, the Trustee's current position is that it would make use of such powers as are available to it under the Trust as may be appropriate, including (if and to the extent so advised) the Power of Addition."

21 By his letter of 23 rd July, 2019, to Advocate Sinel, Advocate Lincoln explained that Erinvale did not consider it appropriate to appoint B a beneficiary in her own right at that time for reasons which were consistent with the reasons given to the Court. He said the decision had not been formalised, as Erinvale wished to give B an opportunity to consider its reasons and provide any response that might be considered appropriate. At that point, Erinvale had not canvassed the views of the other adult beneficiaries.

22 Advocate Sinel responded that Erinvale had refused to provide any guarantees or clear assurances that it will comply with orders made in the matrimonial proceedings or to add B as a beneficiary in her own right. Its position was far from neutral and was clearly aligned with C and other beneficiaries who were hostile. Erinvale's position did not hold water for the reasons he elaborated upon.

23 Following further correspondence, Advocate Sinel issued a summons on 18 th December 2019 seeking an order that B be appointed a beneficiary in her own right. Erinvale considered the matter on 10 th January, 2020, resolving not to add her as a beneficiary in her own right at that time.

24 All three directors were present at the meeting which was chaired by Alice Dumoitier with L attending by telephone. At paragraph 3 of the minute it was noted that no director, either directly or indirectly, had any interest in the matters under consideration, which to a material extent, conflicts, or may conflict with the interests of the trustee, which required disclosing,

pursuant to Article 75 of the Companies (Jersey) Law 1991 or otherwise.

25 At paragraph 4, the minute sets out the purpose of the meeting and *inter alia* the consultation process that had been undertaken with the beneficiaries. Paragraph 5 sets out the Trustee's powers, noting that the addition of a beneficiary required the Relevant Consent, but in view of C's incapacity, that would have to be given by D. At paragraph 6.1 it was noted that Erinvale had liaised with Mourant in respect of its decision. The reasons for the decision are given in paragraph 6.2 of the minute which we set out in full:

> *"6.2.1 A decree absolute has not yet been granted in order to ensure that [B] retains her status as a beneficiary pending the determination of the ancillary relief proceedings.* Therefore, adding [B] as a beneficiary in her own right will not make any material difference to her current beneficial status vis-à-vis the Trust.
>
> *6.2.2 The Trustee considers that, due to [C's] lack of capacity, it cannot canvass his personal views in respect of whether or not [B] should be added to the beneficial class at this point in time.* [D] has not commented on the Trustee's in principle decision not to add [B] as a beneficiary in her own right, either in response to the Trustee's invitation to do so or otherwise.
>
> *6.2.3 [C's children and grandchildren] have confirmed that they are not in favour of [B's] addition as a beneficiary in her own right at this time.* [J] has not provided views on the subject, either in response to the Trustee's invitation in the 26 July 2019 letter or in response to the further letter sent to him alone on the subject.
>
> *6.2.4 The Trustee, in reaching its decision has considered [C's] original intentions as to who should benefit from the Trust, as they appear from the trust instrument and the letter of wishes*.
>
> *6.2.5 The Trustee is within the jurisdiction of Jersey and is to be added as a party to the proceedings before the Matrimonial Court such that it will be bound by (and in any event intends to comply with) any orders directed at it which are within the jurisdiction of that Court*.
>
> *6.2.6 The Trustee considers that if, in due course, a substantial sum is to be made available to [B] from the Trust directly or indirectly in the context of the settlement of her financial remedy claim, or following a court order in those proceedings, it is unlikely that it would then be appropriate for her to remain a beneficiary in her own right on an on-going basis, not least since any resolution of the proceedings is likely to be on a "clean break" basis*.
>
> *6.2.7 The Trustee noted that paragraph 64 of the draft judgment provided by the Court on 21 November 2019, seems to suggest that the Court may regard any application to add [B] now as unnecessary*.
>
> *6.2.8 It is, and always has been, the Trustee's understanding that [C] intended that [B] should receive support from the Trust in the event of his death.*

> Accordingly, the Trustee has confirmed to [B] that, in the event of [C's] death prior to the resolution of [B's] financial remedy claim, it will consider whether it is appropriate to add [B] as a beneficiary of the Trust in her own right at that time, in order to allow it to provide such support. The Trustee has also indicated to [B] that it would likely consider such addition to be appropriate in those circumstances. It was noted that this continues to be the trustee's position, without fettering its discretion to consider this issue afresh if and when it arises. In this respect, it was noted that Collas Crill, on behalf of [D] (as [C's] delegate) has made clear that [D] would not seek to exercise his power of veto (i.e. he would not withhold Relevant Consent under clause 9 of the Trust instrument) but would rather seek the guidance of the Court if these circumstances arise.
>
> *6.2.9 The Trustee has considered whether [B's] position in respect of her ability to benefit from the Trust would be in jeopardy should [C] predecease the conclusion of the matrimonial proceedings, as a consequence of the interplay between the statutory provisions contained within the Matrimonial Causes (Jersey) Law 1949 and the Trusts (Jersey) Law 1984 (as amended).* In circumstances where the Trustee has communicated to [B] that should the situation arise, it would likely consider it appropriate to find a suitable mechanism to ensure that [B] can receive such support from the Trust, the Trustee does not think that this issue warrants the addition of [B] as a beneficiary at this time."

26 The conclusion was that [B] would not be added as a beneficiary in her own right *"at this time"*.

27 In paragraph 6.2.7 of the minute, reference is made to paragraph 64 of the draft judgment of the Bailiff of the 21 st November, 2019. In that judgment, the Bailiff indicated that he had asked for further written submissions concerning the parties' understanding of [B]'s status as a beneficiary should she be pre-deceased by [C]. He said at paragraph 64:

> *"I do not need to make a determination of [B's] status as a beneficiary of the Trust in the event that [C] predeceases her.* There has been a clear indication from both the Trustee and from [C's] delegate that the Trustee should be minded to add [B] as a beneficiary and the delegate would not stand in the way of that should the Court believe it to be the appropriate action to take. Should the circumstances remain unchanged, therefore, it seems likely that in the eventuality that [C] predeceases [B] she would become a beneficiary of the Trust in a capacity other than as a spouse."

28 We note in respect of D that on C's death he will cease to be his delegate, but Advocate James has confirmed in his written submissions for the hearing before the Bailiff that he is also named as executor and trustee of C's wills of worldwide estate and will therefore be the personal representative who has to give the Relevant Consent.

29 The matrimonial proceedings are some way off completion with a final hearing likely to take place well into next year.

Submissions

30 Advocate Sinel sought an order that B's name be added to Schedule 3 of the instrument of trust of the A Settlement as a named beneficiary and that Erinvale be ordered to produce and execute such documentation as is necessary in order to achieve that objective. He said that the reasoning set out by Erinvale in its minute showed that it had taken into account irrelevant factors and failed to take into account relevant factors in that:

> (i) The views of the other beneficiaries are irrelevant to the exercise of the discretion in question. It is no surprise that their opinions were to not add B.
>
> (ii) C's original intention to ensure that B received nothing, or very little, from the A Settlement is irrelevant but is mentioned as a consideration.
>
> (iii) It is irrelevant to consider whether it is appropriate for B to remain a beneficiary *'on an ongoing basis'*, given that she only wishes to protect her current status as a beneficiary for the time being until she receives a payment in settlement of the divorce ancillaries.
>
> (iv) The interpretation of the draft judgment is incorrect and therefore irrelevant. In any event, the judgment was still in draft form and the Bailiff had expressed the view that it would be helpful to hear further argument before finalising it.
>
> (v) Having expressly stated that it would not bind itself or fetter its future exercise of discretion, what the trustee may or may not do upon the death of C is irrelevant.
>
> (vi) It has failed to consider that as things stand the matrimonial court is immediately disempowered upon C's death.
>
> (vii) It has failed to consider the effect on B if she were to lose rights under the A Settlement.

31 He further submitted that L and M had a financial interest in the assets of the A Settlement and were therefore conflicted, and that neither had any prior experience as trustees. He said that C had established the A Settlement in order to retain control of the assets within it and otherwise to defeat claims upon his assets. Erinvale, he said, had failed to take this into account. In short, he submitted that Erinvale was partial, conflicted and unfit.

32 There was evidence, he said, of malice on the part of C and the directors, all long-standing colleagues of his, and of a plan that B would get nothing. That malice was evidenced, he said, by her inclusion as a beneficiary as a spouse, rather than in her own right, the letter of wishes which suggests provision materially below what any Matrimonial Court would

award her and the threat of Erinvale to “turn off the tap” in terms of discharging her legal fees.

33 Advocate Sinel put this scenario to the Court:

(i) C dies before the ancillary relief claim is finalised, upon which B would cease to be a beneficiary.

(ii) She requests Erinvale to add her as a beneficiary and Erinvale makes inquiries of other beneficiaries, the majority of whom would not wish her to be added. D does not consent to the addition and Erinvale concludes that she should not be added without providing any reasons for the decision.

(iii) B issues proceedings before the Court whose first inquiry is likely to be why, given Erinvale's indication which did not amount to a guarantee, B did not bring proceedings (such as the representation) before C's death, while she was still a beneficiary, albeit one whose status was dependent on C. The Court might be tempted to conclude that she had not taken steps adequate to protect herself and she must rely on some sort of estoppel if she wished to obtain protection after the horse had bolted.

34 In essence, Advocate Sinel submitted that B makes the application for the following reasons:

(i) in order to preserve the jurisdiction of the Matrimonial Court and to conserve matrimonial assets;

(ii) to preserve her rights in the A Settlement in the event of C's death;

(iii) in order to continue to have access to information about the A Settlement until the divorce is finalised, at which point she will receive a payment in respect of her financial settlement and thereafter cease to be a beneficiary of the A Settlement;

(iv) she will need to be a beneficiary in any event in order to receive the distribution referred to C's letter of wishes; and

(v) so that she has an independent right in the B Settlement and equal standing as a beneficiary, not predicated on C.

35 Advocate Lincoln relied upon the detailed reasoning for the decision of Erinvale set out in the minute above. Erinvale had not surrendered its discretion to the Court and the decision could not, he said, be described as perverse or one which no reasonable body of trustees could have arrived at.

36 Erinvale had not taken into account irrelevant factors or failed to take into account relevant

factors and in particular:

(i) the views of the other beneficiaries were manifestly relevant;

(ii) C's intentions or wishes as set out in the letters of wishes were manifestly relevant and there is no evidence to suggest that he wished to ensure that B received nothing. To the contrary very substantial provision was intimated for her in his letters of wishes;

(iii) it was relevant to consider whether it was appropriate for B to be and remain a beneficiary on an ongoing basis;

(iv) the interpretation of the draft judgment of the Bailiff (which has since been handed down) was correct and the view of the Court as to her status was relevant;

(v) whilst no trustee could fetter the future exercise of its discretion, its views as to what it may do in the future upon the death of C's were relevant;

(vi) it manifestly had considered the possibility of the matrimonial proceedings abating on C's death and her loss of status as a beneficiary — paragraphs 6.2.8 and 6.2.9 of the minute.

37 The suggestion that there was some temporal limitation to B's request was not the way the request had been framed by B and was not consistent with her application to be added as a beneficiary and the order formally being sought from the Court.

38 The assertion that Erinvale should have sought the consent of D to B's addition as a beneficiary was misconceived as it would only seek that consent if it had decided to appoint her as a beneficiary in her own right.

39 The involvement of L and M in companies owned by the A Settlement long pre-dated the creation of the A Settlement and had been fully disclosed. They were uniquely well placed, he said, to understand the mechanics and operation of the A structure and eminently qualified to act as directors of Erinvale. L is a chartered accountant and qualified (non-practising) lawyer. M is a qualified investment manager, with historic JFSC principal person status by virtue of his employment as a director in two regulated trust companies over eight years. Neither was conflicted in relation to this decision.

40 There was no evidence to support the allegation that it was Erinvale's intention to ensure that the Matrimonial Court loses jurisdiction over the divorce and that B should receive nothing. Erinvale had always sought, he said, to act in the best interests of the beneficiaries as a whole and had at all times remained neutral in the very difficult circumstances where two of its beneficiaries were divorcing. It had continued to support both C and B financially. B received £3,000 per month directly from the A Settlement and another £2,000 per month from the A Settlement via C, a total of £5,000 per month. In addition, Erinvale was paying

her legal fees, the running costs of the Property 3, her flights and travel and her medical expenses. To date she had received some £1 million, the majority being in discharge of her legal costs. These monies were accounted for by way of loan to her for English tax reasons.

41 It was the case that Erinvale was seriously concerned with the level of legal fees that had been incurred by all the parties and discharged out of the trust fund – we were told that they amounted to some £2.75 million to date. Erinvale was particularly concerned with the issuing of the representation in the Samedi Division, which it viewed as both unnecessary and misconceived and in any event Erinvale was now a party to the matrimonial proceedings and would therefore be bound by any decision properly made by the Matrimonial Court.

42 In his letter of 5 th December, 2019, to Advocate Sinel, Advocate Lincoln expressed the concern that these legal fees were significantly eroding the trust assets that might otherwise be available for distribution to B and the other beneficiaries. Notice was given that before Erinvale would meet any other further legal fees both B and C should provide budgets outlining the proposed costs up until resolution of the matrimonial proceedings. On receipt of this information, it was Erinvale's intention, depending upon how reasonable the proposed budgets were, to place a cap on any further legal fees to be borne by the trust. Should either party disagree with any decision taken in respect of those budgets, then Erinvale would consider making an application under Article 51 of the Trusts (Jersey) Law 1984 (“the Trusts Law”) and have its decision relating to the proposed budgets blessed. In respect of the representation, he gave notice that Erinvale was no longer willing to pay invoices from B which relate to duplicative and pointless applications. In particular, Erinvale was unwilling, at that stage and without an order of the Court, to fund costs of her application to be added as a beneficiary. The purpose, he said, in raising these issues and putting forward these proposals was to protect and enhance the interests of all of the beneficiaries, including B. It was simply not in B's interests any more than those of the other beneficiaries for costs to continue to be racked up as they had been to that date. Needless to say, Advocate Sinel objected to the suggestion that B's legal fees should be constrained in this way.

43 Advocate James, for C, acting through his delegate D, submitted that the factual matrix put forward by Advocate Sinel was misleading and unsupported by the evidence. There was no scheme to ensure that B received nothing, in particular a scheme that would be dependent upon C's own death. When divorce proceedings were issued by C, he and D stepped down as directors of Erinvale in favour of M and L so that decisions could be made independently. C had agreed that no decree absolute would be applied for until the ancillary relief claim had been completed. C had, Advocate James said, disclosed evidence which went beyond the normal requirement for disclosure in matrimonial proceedings in order to allow the matrimonial proceedings to proceed swiftly. D had confirmed that in the event of C's death and the need for Relevant Consent to B's appointment as a beneficiary, he will not stand in the way of her being added as a beneficiary in her own right.

The Law

44 Much to the Court's surprise, Advocate Sinel made no reference in his skeleton argument to the well-established principle of non-intervention by the Courts, and in particular, to the case of *S v Bedell Cristin* [2005] JRC 109, a case in which a beneficiary he represented had sought an order that the trustee make an interim distribution to her. Indeed, he put forward the same arguments in the case before us that he had put forward in *S v Bedell Cristin* and which had been roundly rejected, namely that:

(i) The jurisdiction of the Court under Article 51 of the Trusts Law has no limit;

(ii) The principle of non-intervention under English law can be distinguished as the Chancery Division had developed its supervisory jurisdiction over many centuries and where the self-imposed limitations described in Lewin on Trusts may well be applicable. There were no such limitations under Article 51.

45 Article 51 of the Trusts Law is in these terms:

"Applications to and certain powers of the court

(1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit .

(2) The court may, if it thinks fit –

(a) Make an order concerning –

(i) the execution or the administration of any trust ,

(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise ,

(iii) a beneficiary or any person having a connection with the trust, or

(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;

(b) make a declaration as to the validity or the enforceability of a trust;

(c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration."

46 The jurisdiction under Article 51 was not, he said, a jurisdiction of last resort and could be exercised to override a settlor's expressed intentions and re-write dispositive terms. B runs a very real risk, he said, of being dispossessed of important information and ultimately, an interest in the assets of the A Settlement and the Court should not permit that situation to persist.

47 We again reject those legal arguments. Whilst the Court's jurisdiction under Article 51 is wide, it must be exercised on a sensible and principled basis. At paragraph 19 of the judgment of Sir Michael Birt, then Deputy Bailiff, in *S v Bedell Cristin*, the Court set out this passage from Lewin under the heading ***"Control by the Court"***.

"29–87 Where power discretionary

Where a power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, bona fide and uninfluenced by improper motives;

"It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly"…

29–100

Impropriety and like cases

Apart from enforcing the trustees' duty to consider the exercise of discretionary powers and actually to exercise powers which they are required to exercise, the court will interfere with the exercise or non-exercise of powers on a number of other grounds, as follows:

> ***(1) Trustees must act only within the terms of the power.*** They must of course confine the exercise of a power of appointment to the class of objects identified by the donor and otherwise in accordance with the trust instrument but the principle goes further than that: they must exercise a power for the purpose for which it was conferred. Thus a power of advancement or a similar power is not properly exercised if the purpose of the payment is not to benefit the recipient but to benefit someone else and a power to amend the rules of a pension scheme could not be exercised to enable a holding company to retain a surplus on a sale of its subsidiary. The rule against committing a fraud on a power is a branch of the same principle .

(2) Consistently with that principle, the court will interfere if trustees are actuated by caprice or spite. Where trustees had power to raise up to a moiety of the corpus of settled share and to apply it for the benefit of the testator's daughter in such manner as they should think fit, one was willing to exercise the discretion but the mother spitefully declined because the daughter had married without her consent; the court decided to exercise its control over the discretion of the trustees and ordered them to raise out of the corpus of the settled share a sum sufficient to pay the legacy duty on the share, as the daughter had sought .

(3) Similarly, the exercise of a power pursuant to an underhand bargain, or otherwise corruptly or partially, will attract the intervention of the court .

(4) Trustees must not act perversely, i.e. they must not take a decision to exercise their powers which no reasonable body could arrive at. But the discretion to exercise a power is that of the trustees, not that of the court, unless they have surrendered their discretion to the court: thus a decision not perverse in that sense cannot be challenged merely because the court would have reached a different decision. [emphasis added]

(5) Trustees are also bound to act fairly in exercising their powers by holding an even hand between all the beneficiaries: but it is thought that a challenge for want of fairness could succeed only if it could be brought under one of the other heads discussed in this paragraph .

(6) Where a discretionary power is exercised in a manner dangerous to the trust the court will interfere. Thus it will do so where there is an investment, or a failure to change an investment, on a security which is hazardous or insufficient .

(7) A trustee will not normally be able to exercise a fiduciary dispositive power conferred on him in his own favour, unless he has been authorised to do so by the terms of the trust or has been placed in a position of conflict by the settlor or the terms of the trust .

(8) The exercise of a power on the part of the trustees may be vitiated if, though they have considered the matter without impropriety, they have failed to take into account considerations which they should have taken into account or have taken into account considerations which they should not have taken into account. Thus if the trustees have purported to exercise a power of advancement by way of settlement in ignorance of the fact that significant limitations contained in the settlement were

> void for perpetuity, the entire exercise of the power is invalid. The rule is not limited to cases where the exercise of the power is partially ineffective by reason of some other rule of law or some limit on their discretion but applies to any failure of the kind stated. But the court cannot interfere unless it is clear that had they had a proper understanding of the effect of their act they would not have acted as they did; it seems not to be enough that they would have realised that what they were doing was to some extent unsatisfactory. Nor, it seems, can the rule operate so as to invalidate the appointment of a new trustee. Moreover the rule operates to invalidate a purported exercise of a power by trustees; it does not apply in the converse case, so as to permit the court to treat them as having exercised a power which they have not in fact exercised on the ground that the failure to exercise it was caused by a misapprehension and that they would have done so if properly informed."

48 The judgement then continued at paragraphs 22 and 23:

> ***"22. … Although the wording of Article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order as Mr Sinel submits, the jurisdiction of the Court must be exercised on a sensible and principled basis. A settlor does not choose the Court as a trustee, he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If Mr Sinel's argument were to be accepted, the effect would be to constitute the Court as a trustee. That is not the Court's role. The court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders it discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do)*** .
>
> ***23. We are not to be taken as approving every part of paragraph 29-100 of Lewin which we have set out above. We have not analysed or heard argument on every sub-paragraph in detail. But in our judgment the paragraph provides a helpful guide to the sort of circumstances in which the Court is likely to intervene in relation to a trustee's decision where the trustee has not surrendered its discretion. We draw particular attention to paragraph (4). The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at. All of this is consistent with the fundamental concept of trust law which is that the discretion of a trustee is conferred upon that trustee and the beneficiaries have to live with the decision of that trustee unless it is vitiated by one or more of the sort of circumstances set out in Lewin."***

49 The position in Jersey reached by the Court in *S v Bedell Cristin* is in essence also that reflected in the current edition of Lewin (20th edition) at 30–104:

> ***"Where a power is given to trustees to do or not to do a particular thing at their absolute discretion, the court will not restrain or compel the trustees in the exercise of that power, provided that their conduct is informed, bona fide and uninfluenced by improper motives:***
>
> > ***'It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly'***
> > .
> >
> > ***'The principle is both that the court will not interfere before the trustees have acted to compel a particular exercise of the power and, except as stated, that after they have acted it will not overturn their exercise of the power.*** The mere fact that the court would not have acted as the trustees have done is no ground for interference. The settlor has chosen to entrust the power to the trustees, not to the court.'"

50 We agree with Advocate Lincoln that this continues to be the position in trust law in Jersey and indeed, ought to be wholly uncontroversial. It has been followed in at least two further Jersey decisions, namely *Garnham v PC* [2002] JRC 050 at paragraph (67) and *Re HHH Employee Benefit Trust* [2015] JRC 193 at paragraphs (11) – (12) and it was followed in the judgment of the Bailiff in this case (*B v Erinvale PTC Limited and Ors* [2020] JRC 174).

51 Advocate Sinel referred to a number of cases concerning the Court's power to appoint and remove trustees and in particular to the case of *RBC Trust Company (Jersey) Limited v E and Fifteen Others* [2010] JLR 653, where in that context, Sir William Bailhache, then Deputy Bailiff, said this at paragraphs 13 and 14:

> ***"13 Article 51 confers a general discretion on the Court to make orders in relation to a trust if it thinks fit.*** This gives statutory recognition of the Court's equitable jurisdiction in relation to trusts. It is a wide and vibrant jurisdiction. The power to appoint new trustees existed prior to the enactment of the Law, as is apparent from the most cursory search of the Tables des Décisions. There is nothing in Article 51 which provides any straitjacket to the powers which are there set out. This is by contrast with other language which appears elsewhere in the Law – such as, for example, Article 16(1) which provides "subject to the terms of the trust, a trust must have at least one trustee" .
>
> ***14 We have no doubt at all that the Court's power to appoint a trustee is a wide equitable power which is not constrained by the shackles for which Advocate Thompson contended."***

52 These observations of Sir William Bailhache were made in the context of the Court's power to appoint new trustees and did not purport to address the principle of non-intervention in decisions of trustees as established in *S v Bedell Cristin*, a case that was not referred to.

53 Advocate Sinel went on to place reliance on the Privy Council decision in *Schmidt v Rosewood Trust Limited (Isle of Man)* [2003] UKPC 26, a case which was concerned with the rights of beneficiaries to seek disclosure of trust documents and which he said trumps all. He referred the Court to this passage from the judgment of Lord Walker at paragraph 51:

> ***"51 Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts.*** The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain will depend on the court's discretion…."

54 This does not assist Advocate Sinel. In the exercise of the Court's inherent jurisdiction to supervise the administration of trusts, it will intervene ***"if necessary"***, but in deciding whether it is necessary to intervene the Court must act on a sensible and principled basis.

55 Advocate Sinel referred to the power vested in Erinvale to vary the A Settlement pursuant to clause 22 of the trust instrument and suggested that the Court could exercise those powers and make B a beneficiary in her own right by way of variation. However, that is a power that is vested in Erinvale as trustee, not in the Court, and there has been no surrender of discretion by Erinvale. In any event Erinvale has the power to appoint her a beneficiary in her own right under Clause 9 of the trust instrument, subject to the Relevant Consent, and has decided not to exercise that power; it is that decision which is challenged before the Court and in which the Court is asked to intervene. The power to amend contained in the trust instrument has no bearing on the issue.

56 In terms of conflict, the rule is that a trustee must not put himself in a position where there is a conflict or possible conflict between his interest and duty, which has the effect of rendering the transaction voidable (see Lewin 20th edition at paragraph 46-001). In *Public Trustee v Cooper* 20th December 1999, trustees sought the blessing of the Court of their decision to accept an offer for the purchase shares in a brewery, when one of the trustees owned shares in the brewery in his own right. Hart J explained the rule in this way:

> ***"In considering the law applicable to this question, one starts with the classic statements of the equitable principle to be found in such judgments as that of Lord Cranworth LC in*** *Aberdeen Railway Company v Blakey* (1854) 1 Macq. 461 ***at 471 and of Lord Herschall in*** *Bray v Ford*

[1896] AC 44, 51 to 52 ***which, with other, more modern citations to the same effect, are conveniently collected in the judgment of Lindsay J in the In*** *re Drexel Burnham Lambert Pension Plan* ***case, to which I have already referred.*** As put by Lord Herschell, it is that:

> ***'It is an inflexible rule of a court of equity that a person in a fiduciary position … is not, unless otherwise expressly provided … allowed to put himself in a position where his interest and duty conflict.*** … I regard it (that is this rule) rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.'

The principle has generated certain well known rules applicable to specific commonly encountered situations .

…

One must, however, beware of supposing simply because the principle has bred these particular rules, that on every occasion on which the principle can be invoked in areas outside the ambit of the specific rules some similarly rigid rule either exists or should be crafted. There is in fact a surprising lack of English authority on the consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist. The relative absence of authority certainly suggests that there is no iron rule that, where such action has taken place, a beneficiary is entitled ex debito justitiae to have it set aside. Equally, one would expect to find, in the absence of such an iron rule, that, where such action is challenged on such grounds, the onus would be thrown upon the trustee to demonstrate that the conflicting interest or duty has not in fact operated in a vitiating way .

In some areas of our law the existence of conflicts of this kind is recognised and managed by a variety of devices, ranging from requiring the affected person to declare his interest to requiring him to abstain from participation in the relevant decision-making process. In the law of private (i.e. non – charitable) trusts, where unanimity of decision making is required, such devices are difficult to transplant. The beneficiary is entitled to the decision of all his trustees but, at the same time, he is entitled to require that the decision is made independently of any private interest or competing duty of any of the trustees."

57 He then went on to address how such a conflict can be successfully managed:

> ***"Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory,***

successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries .

Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court .

Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustee to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict."

58 *Public Trustee v Cooper* has been cited in numerous cases in Jersey (see, for example, *In the matter of the VR Family Trust* [2009] JLR 202) and the principles set out in that case apply equally to trustees in this jurisdiction. In this case, there is one corporate trustee and the decision was therefore taken by the three directors. It was not in dispute that in taking the decision these principles applied to each of those directors.

59 As for Advocate Sinel's suggestion that the Court had the power to vary the A Settlement, pursuant to Article 51 of the Trusts Law and its inherent jurisdiction, this was wholly unsupported by any authority. On the contrary, the Court held in the case of *In the matter of the IMK Family Trust* [2008] JLR 250 that the Court had no general jurisdiction to alter the terms of a trust under Article 51 or its general supervisory jurisdiction (paragraph 65).

60 In conclusion the Court agrees with Advocate Lincoln that in the context of this case, it falls upon B to challenge the decision of Erinvale, which has not surrendered its discretion, not to add her as a beneficiary in her own right, by showing:

(i) That the decision is one which no reasonable trustee could have arrived at, or

(ii) In taking the decision it failed to take into account a relevant consideration or took into account an irrelevant consideration.

61 To the extent that any of the directors had a conflict of interest, Erinvale has to satisfy the Court that the decision had not in fact been influenced by that conflict.

Decision

62 In our view, the evidence put forward by Advocate Sinel does not support the assertion that there is malice on the part of the directors and a plan to ensure that B received nothing. On the contrary the evidence shows that:

(i) She had been made a beneficiary of the A Settlement from the outset as C's spouse.

(ii) In his two letters of wishes, C made it clear that he wished £4 million to be set aside for her benefit in addition to her having the use of the Property 3. If the A Settlement as a whole is regarded by the Matrimonial Court as a financial resource of C, then B may feel she can achieve an award in excess of that provided for in the letter of wishes, but on any analysis, the provision set out in the letter of wishes is substantial.

(iii) She is being financially supported by Erinvale to the extent cumulatively to date of some £1 million.

63 Erinvale's concern as to the level of fees being incurred as expressed in Advocate Lincoln's letter of the 5 th December, 2019, referred to above is not evidence of malice. It would be a matter of legitimate concern to any trustee.

64 Save as set out below, the Court agrees with Advocate Lincoln's response to the claim that Erinvale had taken into account irrelevant factors and failed to take into account relevant factors. The minute of 10th January 2020 sets out the background to the request that B be added as a beneficiary in her own right accurately and, having determined its powers under the trust instrument, then set out the factors that it considered relevant in particular, all of which we agree were relevant to be taken into account. As for the two matters that Advocate Sinel alleged Erinvale had failed to take into account, namely that as things stand, the Matrimonial Court is immediately disempowered upon C's death and the effect on B if she were to lose rights under the A Settlement, it is correct that in paragraph 6.2.9 of the minute Erinvale can say that it has considered the position of B in this respect, but for the reasons set out below we do not think it has truly taken her position and concerns into account and given them sufficient weight. As for the Bailiff's draft judgment, the very guarded interpretation put upon it by Erinvale was not unreasonable.

65 It was mooted in discussion as to whether C's moral and legal obligations to B as his wife had been considered by Erinvale, but the divorce proceedings form part of the factual background to this application and the whole purpose of B's claim for ancillary relief is to

determine what those obligations are. In the meantime, his current financial obligations to her were already being discharged by Erinvale.

66 As to the merits of the decision, it is important that the Court keeps clearly in mind the jurisdiction it is exercising. We say this because the order of 16th April 2020 that this matter should be dealt with as a standalone *cause de brièveté* was issued under the joint headings of the two sets of proceedings. Furthermore, Advocate Sinel's skeleton argument stated that the application was made both under Article 51 of the Trusts Law and Article 27 of the Matrimonial Causes Law, which gives the Court jurisdiction to vary, *inter alia*, post nuptial settlements. Advocate Sinel argued that the A Settlement was a post nuptial settlement and should be varied by the Court by adding B as a beneficiary in her own right. The skeleton argument was devoted in equal parts to both applications, Advocate Sinel stating in conclusion that B was not concerned which jurisdiction the Court exercised, but he said that both could be exercised, or at least one.

67 The objection to this approach is that the Court has a very different role under each jurisdiction, as explained by Sir Michael Birt in the case of *Re the H Trust* [2006] JLR 280 where he said at paragraph 14:

> ***"In this respect it is important to note that the roles of the two courts are very different.*** The Family Division is concerned to do justice between the two spouses before it. It is sitting in a matrimonial context and its objective is to achieve a fair allocation of assets between those spouses. It has no mandate to consider the interest of the other beneficiaries of any trust involved. Conversely, this Court is sitting in its supervisory role in respect of trusts, as is regularly done in the Chancery Division of the High Court. This court's primary consideration is to make or approve decisions in the interests of the beneficiaries. It is therefore a very different focus from the Family Division."

68 In our view, these different roles would dictate that in practice it would be very difficult, if not impossible, for one court to exercise both jurisdictions at the same time. Advocate Sinel had to accept that procedurally the Court was seized only with the application under Article 51 of the Trusts Law as made clear in the order of 16 th April, 2020, so the Court was not concerned with doing justice as between C and B, but with the interests of the beneficiaries of the A Settlement.

69 From the perspective of the A Settlement, there are competing interests as between the beneficiaries which have to be balanced and Erinvale submits that it has done that impartially and reached a reasonable conclusion for the reasons set out in the minute, but in particular:

(i) B is currently a beneficiary;

(ii) She is currently receiving substantial financial support;

(iii) Erinvale had given the clear indication that she would be appointed a beneficiary in her own right should C die before the decree was made absolute and this without fettering the future exercise of Erinvale's discretion as trustee. It was essentially a question of timing with Erinvale not being prepared to appoint her *"at this time"*. As to the principle that trustees should not fetter the exercise of their powers, see Lewin 20th edition at paragraph 29–095.

(iv) D had made it clear that he would not seek to exercise his power of veto as delegate or personal representative i.e. he would not withhold the Relevant Consent under Clause 9 of the trust instrument. He would rather seek the guidance of the Court if there was an application to appoint her as a beneficiary in her own right. We note in this respect that in the event of C's death and D being unable or unwilling for any reason to take on the role of his personal representative, we have no information as to who would take on that role and what his or her attitude to the granting of the Relevant Consent might be.

70 Carefully worded as the minute of the directors is, the Court is troubled by the conclusion reached. If Erinvale's discretion had been surrendered to the Court, it would have appointed B a beneficiary in her own right for a number of reasons:

(i) It is not in dispute that in 2012, some fifteen years into the marriage, C settled all of his free assets, which appear to have been substantial, into the A Settlement. It controlled, therefore, the means by which he and his wife were and are supported financially.

(ii) The marriage has now broken down and the A Settlement represents the only means by which B can be supported financially and the only means by which any order of the Matrimonial Court against C can be met. Her status as a beneficiary is accordingly of vital interest to her.

(iii) In view of her husband's age and state of health she faces the very real prospect of his dying before the *decree absolute* is pronounced, in which case she would cease to be a beneficiary and the matrimonial proceedings would abate. She would have no status at all in the A Settlement, the only source of financial support. If that were to happen we venture to suggest that it would be unlikely that Erinvale would cease the current level of financial support they are giving her because she was no longer a beneficiary, leaving her with no money on which to live, and so it would most likely seek to appoint her a beneficiary in her own right so that she could continue to be supported.

(iv) However why would a reasonable trustee leave her in this state of uncertainty, something which is of understandable concern to her? Is this the way for a trustee holding the family assets to treat a wife of some 23 years and mother of one of the settlor's children? We do not think so.

(v) What disadvantage is there to the other beneficiaries in her being appointed a beneficiary in her own right now? We think none. She is already a beneficiary as a

spouse with the same rights as them for example to information and to be considered for distributions.

(vi) What advantage is there to the other beneficiaries in her not being appointed a beneficiary in her own right, other than the chance that if their father dies before the decree absolute, she will cease to be a beneficiary? Is that an advantage to them that can properly be balanced against her interests? We think not.

(vii) From the point of view of the other beneficiaries the reality is that she is being supported by the A Settlement now and will need to be supported indefinitely or until she can become financially independent. For this she needs to be a beneficiary in her own right on an ongoing basis, so why not confirm that status now? We can see no good reason to delay it.

71 The key reason put forward by Erinvale for not appointing her a beneficiary in her own right was one of timing. It was prepared to appoint her but not now. Despite the indication given that it would appoint her in the future should C die, the fact is that a trustee cannot fetter the future exercise of its discretion and there was the possibility of her appointment as a beneficiary in that eventuality being opposed by say the Intervenors or issues arising as to the obtaining of the Relevant Consent. She would then be an outsider to the trust and would face the prospect of having to fund an application as an outsider to be readmitted into the beneficial class. The financial implications to her could not be more serious. Why allow the wife of the settlor of some 23 years and mother of one of his children, in her late sixties and with no other means of support, to be put into that position when it was the settlor's clear intention as per the letters of wishes that she should be supported by the trust that holds all of the family assets?

72 In essence the Court could find no good reason for not appointing her a beneficiary in her own right now and every good reason to do so, namely to secure her position within the beneficial class of the A Settlement able to receive whatever is decided should be distributed to her in the future and to assuage her understandable concerns over the current uncertainty as to her status. Her own need to be in the beneficial class in her own right far outweighs the interests of the other beneficiaries in allowing the current uncertainty as to her status to continue.

73 The Court is very aware that the test for intervention is high, but it has concluded that despite the reasons carefully set out in the minute and for the reasons we have set out above the decision not to appoint B a beneficiary in her own right was a decision that no reasonable trustee would make.

74 Although the Bailiff in his draft judgment set out above, seemed to suggest that the Court may regard an application to appoint B as a beneficiary as unnecessary, his observations were made in the context of his considering the legal status of B as a beneficiary of the A Settlement should C die. He did not have before him her application to be appointed a beneficiary in her own right and indeed at the time of his draft judgment, no formal decision

had been made by Erinvale.

75 Turning to the issue of conflict, the Court was concerned that M and L did have a personal interest in their respective capacities as employees of, and in the case of M, a shareholder in companies within the trust fund, and that there could be circumstances in which that personal interest could conflict with their duties as directors of Erinvale. As Hart J said in *Public Trustee v Cooper* in the context of the facts of that case:

> ***"There is no rule that a trustee who owns shares in a company in which the trust also invests is absolutely debarred from taking part in decisions about the trust investment.*** This is, however, clearly an area in which great caution needs to be exercised. Often the existence of the personal shareholding will be recognised as immaterial. On other occasions, it may be actually or potentially significant or be capable of being viewed as such."

76 Advocate Sinel submitted that B represented an existential threat to the A Settlement, and we could appreciate that an application for a substantial payment to be made to her directly or indirectly out of the trust fund could have implications for the companies within the trust fund in which they are interested. They did not see that personal interest as creating a material conflict as no mention is made of it in the minute, and we are satisfied that it was not a significant factor which influenced the decision for the following reasons:

> (i) B was already a beneficiary as C's spouse and her appointment as a beneficiary in her own right had no financial implications to the trust fund.
>
> (ii) There was a clear recognition that it was C's wish that she should receive substantial support from the A Settlement in the event of his death.
>
> (iii) The issue was seen by them as one of timing, in that they did not agree to her appointment in her own right *"at this time"*.
>
> (iv) The third director, Alice Dumoitier, who it would be fair to regard as the professional trustee amongst them, had no conflict of interest and agreed with the decision.

77 In relation to this last point, paragraph 49 of the representation asserted that Alice Dumoitier was also conflicted because of the fees charged by Equiom for the administration of the A Settlement and she regarded C as *"the client"*. This was not pursued at the hearing, and in our view, is not sustainable. In this context, Hart J said this again in the context of the case of *Public Trustee v Cooper*:

> ***"Had the whole body of trustees been exposed to individual conflicts of a similar nature, I think I might have been inclined to at least a provisional view that the proper course would be for them to have surrendered their discretion to the court, and the mere fact that the settlement contemplated or must have contemplated the possibility that its trustees might have***

such personal shareholdings would not by itself have dissuaded me from that provisional view. That is not, however, this case."

78 We conclude, however, that on the evidence, the decision of the directors not to appoint B a beneficiary in her own right was not influenced by the personal interest of M and L in companies within the trust fund and was made independently of that private interest.

Conclusion

79 For all these reasons, we will intervene in the administration of the A Settlement by setting aside the decision of Erinvale not to add B as a beneficiary in her own right at this time. Because we have found that the only reasonable decision would have been to appoint her as a beneficiary in her own right, we have no doubt that Erinvale will now appoint her without delay and without the need for any further intervention on our part. It follows from what we have said that D should provide the Relevant Consent to her appointment.