The 1964 F Settlement and the 1987 F Settlement

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
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Text

[2020] JRC 142A

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, **Esq.**, Deputy Bailiff, **and** Jurats Olsen **and** Christensen

In the Matter of the 1964 F Settlement and the 1987 F Settlement

and

In the Matter of Article 51 of the Trusts (Jersey) Law as Amended ("The Law")

Advocate A. Kistler **for the Representors**.

Authorities

Trusts (Jersey) Law (as amended).

ERO & L Trusts [2008] JLR Note 17

Companies (Jersey) Law 1991

Lewin on Trusts, (20th Edition at 46–026)

In the matter of the 1964 E Settlement [2020] JRC 140B

Re S Settlement [2001] JLR Note 37.

Public Trustee v Cooper [2001] WTLR 901.

Kan v HSBC International Trustee Limited and others [2015] (1) JLR Note 31

Re S Settlement [2001] JLR Note 37

Trusts.

Deputy Bailiff

THE

1 On 25 th June, 2020 we made certain orders, having heard argument, in respect of the Representation of the Trustees. The Trustees are trustees of the 1964 F Settlement (the "64 Trust") and the 1987 F Settlement (the "87 Trust") together referred to as the "Trusts". We now give the reasons for our decision.

Background

2 The 64 Trust is a discretionary trust established on 9 th January, 1964. The 87 Trust is a discretionary trust established on 15 th October, 1987. Both were established by the settlor, T, for the principal benefit of his three children and remoter issue. The Principal Beneficiaries under the Trusts, all of whom have been appointed life interests in sub-funds under each of the Trusts, are the settlor's three children and two adult grandchildren.

3 The Trustees seek:

(i) Approval under Article 51 of the Law of a proposed reallocation of profits as a result of investment monies lent between sub-funds of the Trusts;

(ii) Approval under Article 51 of the Law of a proposed reorganisation and

simplification of the corporate structure underlying the Trusts, so as to merge the investment companies held by sub-funds in respect of each of the Principal Beneficiaries and

(iii) An order granting the Trustees a power to self-deal under section 57 of the Trustee Act 1925, an Act of the United Kingdom Parliament.

4 On the 28 th May, 2020, the Court made orders convening the Principal Beneficiaries and the Protector of each of the Trusts. The Protector under the Trusts have, inter alia, the power to remove the Trustees.

5 The Beneficiaries were convened on their own behalves and, where applicable, on behalf of their respective minor and unborn children. They have all written to the Trustees confirming that they have received documentation explaining the Trustees' application and that they support it both on their own behalves, and where applicable, on behalf of those whom they have been appointed to represent. The Protector (a corporate entity) has also written signifying its support. None of the Principal Beneficiaries or the Protector were represented at the hearing before us.

6 The Court, at the convening stage, was content not to convene certain persons with remoter interests under the Trust. These persons fall into three broad categories. First, spouses of the Principal Beneficiaries who may in future benefit from a surviving spouse trust. In fact, this is only applicable to one person, who is the husband of one of the Principal Beneficiaries (and in any event, the sole director of the corporate Protector). However, his potential benefit under the surviving spouse trust is limited to three years after the death of his wife, although this period may be extended by the Trustees. The interest of the surviving spouse is limited and would not be materially affected by the relief sought by the Trustees.

7 Secondly, there are persons who could theoretically benefit under the Trusts, but are highly unlikely to do so. These include descendants of the settlor's brother, who are first and second cousins of the Principal Beneficiaries. The Trusts were intended to benefit the direct descendants of the settlor and the class of such persons is large and growing.

8 Thirdly, there are other persons who currently have no interest under the Trust, but might benefit if the Trustees exercise powers to revoke certain instruments under the 64 Trust, or override powers of appointment under the 87 Trust so as to undo various deeds of appointment. This is extremely unlikely. Accordingly, at convening stage the Court appears to have taken the view, in accordance with the approach set out in *ERO & L Trusts* [2008] JLR Note 17 that the interests of the individuals in these categories were remote and that it was not appropriate in the circumstances for them to be convened to the hearing of this Representation.

Jurisdiction of the Court

9 The Royal Court has jurisdiction in relation to the Trusts pursuant to Article 5 of the Law as the Trustees are companies incorporated in Jersey, the trust assets (the shares in the underlying companies) are situated in Jersey, by reason of those companies being incorporated in Jersey, and the administration of the trust property is carried out in Jersey.

The governing law of the Trusts

10 Neither of the Trusts contains an express governing law clause. Accordingly, it is necessary to ascertain whether the choice of governing law can be implied in the terms of the Instrument creating the Trusts interpreted, if necessary, in the light of the circumstances of the case. Both Trusts were made in England by the settlor when he was resident in the United Kingdom, and the first trustees of both Trusts were also residents of the United Kingdom at the time. The trusts contain reference to an English statute, the Law of Property Act 1925. Further, the 64 Trust was varied by way of an order of the High Court of England on the 18 th May, 1976. We agree with Chancery counsel who has advised the Trustees, Nicholas Le Poidevin QC, that the terms of the Trusts, *"both unambiguously imply a choice of English Law"*.

11 The Trusts have been the subject of a significant number of Supplemental Instruments executed with respect to each over the years, and a consolidated version of both Trusts was exhibited to the affidavit, sworn on behalf of the Trustees. The overall effect of both Trust deeds as amended by the Supplemental Instruments is set out in the following Paragraph.

12 Both Trusts were established for the principal benefit of the three children of the settlor – L, M and N, and their remoter issue. N has two adult children, O and P. M has two minor children and L has no children. Both Trusts have been appointed into four sub-funds, one for L, one for M, one for N and one for N's children, O and P. The principal difference between the sub-funds under the 64 Trust and the 87 Trust is the ultimate default trusts under each. It is extremely unlikely that the default trusts will ever come into effect as they rely upon all the direct heirs of the settlor dying before the vesting date / vesting day. However if that occurs (and there are differences between the vesting dates / vesting days under each trust, although those differences are not material for this purpose) then under the 64 Trust the settlor's brother's children and remoter issue by his first wife stand to benefit, but under the 87 Trust the settlor's brother's issue by his first and second wives stand to benefit. The other differences between the Trusts are not material for the purposes of this application.

The trust funds of the Trusts

13 The Trustees of the Trusts were appointed in 1999 and 2012 respectively. Accordingly the Trustees have been co-Trustees of the Trusts since the 1 st January, 2012. The Trusts are

administered by a dedicated family office which administers the offshore wealth of the two branches of the Q family – the M branch and the N branch.

14 The Trustees indirectly hold a number of holding companies via a single nominee company. Under the existing structure, each Principal Beneficiary's sub-fund, or share of a sub-fund, is held wholly through the nominee all of the issued shares in a separate holding company. These holding companies in turn hold various assets that make up the trust fund of the Trusts. They are all Jersey companies. Accordingly, there are five holding companies under the 64 Trust and five holding companies under the 87 Trust. The assets of the Trust are substantial.

The reason for the application

15 We have been assisted by very comprehensive affidavits sworn on behalf of both of the Trusts by a director of both of the Trustees.

16 The Trustees are in receipt of advice to the effect that various transactions entered into affecting the Trusts have infringed the English law rule against self-dealing. There is no provision in the Trusts permitting self-dealing. The effect of the rule against self-dealing under English law will be considered at greater length below. But the starting point is that a transaction affected by the rule will automatically be set aside. In the circumstances of the self-dealing in this case, such setting aside would not be automatic, but the burden would be on the Trustees to establish that the conflict of interest that arose from self-dealing made no difference. This requires showing more than that the price, if any, was a fair one, but that the transaction was one that could have been made at arms' length.

17 The instances of self-dealing by the Trustees in connection with the Trusts have been categorised as “Category A Transactions”, “Category B Transactions” and “Category C Transactions”. The Category A Transactions consist of sales of assets between the Trusts and the U Trust, another P Trust. An example of such a transaction was the sale of two property companies by the Trusts to the U Trust in 2016. The sale was motivated by the desire of the beneficiaries to exit and enter property investments respectively and the price paid was fixed on professional advice. At company level the membership of the boards of the relevant companies was the same. At trustee level, whilst the trust companies were different, there was a substantial overlap between the membership of the boards of directors of each corporate trustee who played a key role in the sale.

18 Counsel has advised that such transactions are instances of self-dealing. The Trustees have not sought any orders from the Court in respect of these historic transactions.

19 As to the Category B Transactions, these are transactions between the 64 Trust companies themselves and between the 87 Trust companies themselves. They are not transactions between the 64 Trust companies on the one hand and the 87 Trust companies on the other,

and accordingly are wholly contained within the 64 Trust and the 87 Trust respectively. The transactions consist of sales and reallocations. An example within the 64 Trust was the sale of assets from one company to another in 2013, in respect of which the adult beneficiaries took independent legal advice and signed letters of consent. An example within the 87 Trust was the reallocation of assets held within an investment vehicle owned by the five 87 Trust companies. Reallocations were taken within the portfolio owned by this company in order to raise cash. If one sub-fund is short of cash and another has cash but is short of equities (i.e. underweight in accordance with the Trustee's investment allocation strategy) notional sales are made by the former to the latter, so that the former ends up with the cash, and the latter ends up with the equities. These reallocations are carried out at market value but are recorded internally as book entries. They are reallocations and not gifts.

20 Counsel has advised that such transactions are also instances of self-dealing but again the Trustees seek no order from the Court in respect of these historic transactions. To do so would be time-consuming and expensive, and the Principal Beneficiaries are content with no action being taken in relation to these matters. However the Trustees do seek the assistance of the Court in relation to the consequences of the Category C Transactions, in respect of which a reallocation exercise is proposed.

21 The Category C Transactions are loans which have been made between the 64 Trust owned companies and the 87 Trust owned companies since the year 2000. These loans were made on interest free, unsecured terms and are repayable on demand. They were made in order to allow funds to be pooled so as to facilitate investment. Loans have been made in both directions and currently all of the 87 Trust companies are indebted to their counterpart 64 Trust companies. The word *"counterpart"* is appropriate as the loans were only made between each Principal Beneficiary's pair of holding companies and not between holding companies relating to different Principal Beneficiaries. The total sum owed under these loans is several million pounds. Again, as a matter of English law, the inter-settlement loans are instances of self-dealing.

22 Mr Le Poidevin has advised that the Category C Transactions are instances of self-dealing on the basis that there has been commonality between the boards of Trustees and the relevant companies for the period during which the inter-settlement loans had been made. While the Principal Beneficiaries have not been disadvantaged by the inter-settlement loans, future beneficiaries whose interests are in the capital and not the income of the holding companies may, theoretically, have been disadvantaged. This is because the debtor company in each pair has benefitted from the capital growth of the investments, whereas the creditor company has not, and the creditor company has not received any interest. Although the beneficiaries of each of the two Trusts are substantially the same, the Trusts do have different terms and different dates upon which they are likely to terminate. It is quite possible that the Trusts may end at different times as the 64 Trust vesting date is different from the 87 Trust vesting day. One consequence of this is that the sub-funds under the two trusts may vest on a different date. Accordingly if one Principal Beneficiary were to die between the vesting day/date of the first Trust to vest and the vesting day/date of the

second Trust, then that first vesting Trust would have vested in the various Principal Beneficiaries in proportion to their sub-funds, and the beneficiary in question would have become absolutely entitled to their sub-fund. On their death, the fund will pass to their estate and potentially be beyond the reach of claims made under the Trust. If at some later point the second trust were to vest (the 87 Trust for the purpose of this example) then under the terms of the trust the relevant beneficiary or beneficiaries will at that stage be absolutely entitled to the sub-fund in question which would have been depleted as a consequence of the loans made. They may have difficulty in setting aside these transactions, by reason of prescription, the wide exoneration clause which exists under the Trusts and which is permissible under English law, and by reason of other complexities which would arise in pursuing claims against the Trustees.

23 The Trustees propose to remediate this issue to ensure that the potential disadvantage to future beneficiaries does not arise by transferring back to the disadvantaged holding company the profit made to date from investing the money lent.

24 The required balancing payments have been calculated. The aggregate figure for compensation is approximately £9,730,981. All the payments are to flow from companies in the 87 Trust to companies in the 64 Trust. The compensatory payments have been calculated by taking the total assets of each company prior to the loans being made, adding back in expenses, write downs and distributions, subtracting the loans paid, adding the loans received and calculating the percentage share of investment gains which has accrued to the recipient company by virtue of the interest free loans.

25 The Court was invited to approve the compensatory payment under Article 51 of the Law on the footing that for the Trustees to make the restitutionary payments without the Court's sanction would infringe the rule against self-dealing, or in the alternative that the restitutionary payments may be regarded as a momentous decision on the part of the Trustees.

26 Secondly, the Trustees seek the Court's approval for the proposed reorganisation of the Trusts. The Trustees wish to reorganise the Trusts in order to make the structure simpler to administer and more cost effective. As described above, each of the Principal Beneficiaries' interests is currently represented by two holding companies, one held by their respective sub-funds, or shares of sub-funds under each of the Trusts. The Trustees propose to merge the two companies held by each of the sub-funds attributable to each of the Principal Beneficiaries. This would mean that each sub-fund, (or in one case of the grandchildren P and O, their share of a sub-fund) would have a shareholding in one merged company proportionate to the values of the assets of the pair of holding companies prior to the restructuring, after the compensation payments referred to above have been made. In this way the number of holding companies set up to hold the sub-funds will fall from ten to five.

27 Further the restructuring will streamline the holdings. The Court was shown a structure chart illustrating the pre- and post-merger positions. The merger will be affected under Part

18 of the Companies (Jersey) Law 1991. The mergers will themselves be acts of self-dealing, although beneficial to the beneficiaries. As there is commonality between the boards of Trustees and the boards of underlying companies, the reorganisation will nonetheless require self-dealing on the part of the Trustees.

28 Thirdly, and finally, the Trustees seek to vary the Trust to provide for powers to self-deal. The Trustees seek this power in order to implement the proposed reorganisation of the Trusts described above and to allow sufficient flexibility in the future so as to permit transactions between the Trusts, and also with connected P Trusts, given the commonality of the directors of the entities which act as trustees.

29 The proposed terms of the self-dealing power for the Trusts is as follows:

> ***"(A) Subject to (B) below, the Trustees may enter into, procure or authorise any transaction with or between the following:***
>
> > ***(a) any of the Trustees (acting as trustee of this Settlement or any other Relevant Trust); and/or***
> >
> > ***(b) any trustee of a Relevant Trust (acting in such capacity); and/or***
> >
> > ***(c) any company of which any of the shares are held (directly or indirectly) in this Settlement or in any other Relevant Trust*** ,
>
> ***regardless of whether and even though any Trustee's fiduciary duty under this Settlement in respect of the transaction conflicts or may conflict with any other duties to which he may be subject*** .
>
> ***(B) The Trustees shall not enter into, procure or authorise any transaction mentioned in paragraph (A) unless they first obtain such professional advice as they consider necessary in order to satisfy themselves that the proposed terms thereof are at least as favourable to the beneficiaries of this Settlement as if it had been entered into with a third party at arm's length*** .
>
> ***(C) For the purposes of (A) above, a "Relevant Trust" means a trust established for the benefit of any child or remoter issue (including illegitimate issue) or the spouses, widows or widowers of any child or remoter issue (including illegitimate issue) of the Settlor or [S]."***

The rule against self-dealing

30 The English rule against self-dealing is explored in the opinion of Mr Le Poidevin. This is relevant as the Trusts are governed by English law and accordingly the Court is considering English law principles. The Court makes no finding as to the extent to which

the English rule in respect of self-dealing applies in Jersey and, in any event, so far as the extent of the English rule against self-dealing is concerned, the Court did not hear argument although the Court had full confidence in the opinion provided by Mr Le Poidevin in this regard.

31 Mr Le Poidevin says that the rule against self-dealing is concerned with a conflict between a trustee's interest and its duty. The core of the self-dealing rule is that a trustee is not allowed to purchase trust property. That is the rule even if there are independent trustees who approve of the purchase: the trustee must not put himself in a position where there was a conflict between his duty as such and his personal interest. If the rule is breached then, exceptional circumstances apart, the sale will automatically be set aside at the instance of a beneficiary even though the price is a fair one.

32 Although it is quite common for trust instruments to modify the rule against self-dealing, the Trusts contain no such provisions.

33 The scope of the self-dealing rule is, evidently, extensive. The rule extends beyond sales to other transactions such as loans and it also applies not simply where the trustee is acting on its own behalf but also where it does so as trustee of another trust. In other words a conflict between one duty and another is within the rule. Lewin on Trusts, (20th Edition at 46–026) says that it is well settled that a conflict between duties in different fiduciary capacities is within the conflict rule on which the self-dealing rule is based. The absence of personal advantage to the trustee does not exclude the rule. The rule also applies where the parties to the transaction are separate companies but there are one or more common directors or an element of common ownership.

34 To return to the core of the self-dealing rule (that the trustee is not allowed to purchase trust property), where a trustee sells trust property to a company wherein it is the sole shareholder, it is in substance a sale to itself and that sale may be set aside. Where the sale is to a company in which the trustee has a minor interest, it may be that the sale will not be set aside if it can be shown that a fair price was paid and there is no other objection; but absent such proof there is still an infraction of the rule. The transactions in the context of these Trusts are not directly within either of these examples but Mr Le Poidevin says that since the rule applies not only where the trustee has a personal interest but also where it has a conflicting duty as trustee of another trust, it seems to him to follow that the rule must equally apply to a transaction between a trustee acting as such and a company held by another trust of which he is also a trustee or between companies of which one is held by the first trust and the other by the other trust, at any rate in circumstances where the Trustees direct the affairs of the companies. The same must be true, though the Trustees are different companies, if there is an overlap in the boards of directors.

35 He expresses the view therefore that the self-dealing rule is not excluded merely because the parties to the transactions are trust owned companies rather than the Trustees themselves or because the assets dealt with were those of the trust owned companies and

were not themselves directly held trust assets. In the course of argument, counsel for the Representor accepted that it is not suggested, certainly for the purposes of this application, that the rule extends to transactions between trading companies owned by a trust where the underlying transactions would not be known about at trustee level – but this is not such a case.

36 It makes no difference, Mr Le Poidevin says, that the directors of the Jersey companies in question owed duties to those companies and not to the ultimate beneficiaries of the Trusts. The complaint which might be made would be against the Trustees for self-dealing and it would be made by a beneficiary. It would be a necessary part of such a claim, if the beneficiary sought to set aside the transaction under challenge, that a trust owned company benefitting from the transaction was bound by the rights of a disadvantaged beneficiary (by way of notice) and wrongdoing on the part of corporate directors would not be a necessary part of such a claim. Accordingly Mr Le Poidevin's view is that the relevant rules are those of trust law binding the Trustees and not those of company law binding the directors.

37 As to the remedy in these circumstances, the primary remedy is to have the purchase or other transaction set aside. When the transaction is less egregious there are indications from English case law that the transaction will not automatically be set aside but the burden will be on those seeking to uphold it to establish that the conflict made no difference. The English authorities are not consistent and it is not easy to draw a precise line as to whether or not a transaction would be set aside on particular facts.

38 As to the application of the self-dealing rule to the Trusts, Mr Le Poidevin expresses the view that the category A and category B transactions referred to above both fall foul of the rule against self-dealing. As to the category A transactions, his view is that these are clear instances of self-dealing as at company level the membership of the boards was the same and, at trust level, although the Trustees of the Trusts and the other P Trust were different corporate entities, there was a substantial overlap of the directors, and the boards played a pivotal role in the sales.

39 As to the category B transactions, they comprise sales or re-allocations of assets between two companies held within the 64 Trust or between companies held within the 87 Trust. The beneficiaries interested in each company under the respective Trusts were not identical, but at Trustee level and company level the membership of the boards were the same. Accordingly this constituted self-dealing.

40 The Category C Transactions comprise loans between companies held within the 64 Trust and the 87 Trust. The loans were interest free and unsecured. They benefited the borrower and not the lender. The loans were *“horizontally aligned”* in the sense that each loan was between a company representing the interest of a life tenant under the 64 Trust and the corresponding company representing that beneficiary's similar interest under the 87 Trust. On its face, the loan caused no prejudice to any given life tenant, but the capital beneficiaries of the two settlements, and the sub-funds between them are not identical and,

as set out above, there was in any event a risk of prejudice which might arise, for example, from the different vesting day/date. Mr Le Poidevin advises that these transactions were also clear instances of self-dealing: the membership of the boards of the companies and the membership of the boards of the corporate Trustees were similar or the same.

Section 57 of the Trustee Act 1925

41 As to the Royal Court's power to make an order under Section 57 of the Trustee Act 1925, we refer to the Court's recent judgment on not dissimilar facts *In the matter of the 1964 E Settlement* [2020] JRC 140B at paragraphs 33 to 56. For the reasons set out by the Court in that judgment, the Court was prepared to and did grant the variation of the Trusts proposed under Section 57 of the Trustee Act 1925.

Approval / sanction of the decision of the Trustees

42 That leaves the question of approval of the two decisions of the Trustees: the loan reallocation decision and the reorganisation. Although the principles relevant to the Court's discretion to approve these decisions are the same, the decisions that the Court made in respect of these two applications were different.

43 As to the principles, the blessing of momentous decisions pursuant to Article 51 of the Law was considered in *Re S Settlement* [2001] JLR Note 37. This case adopted the approach from the English case of *Public Trustee v Cooper* [2001] WTLR 901. In that case, Hart J said:

> ***"At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well)*** .
>
> ***…***
>
> ***(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.*** Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a ***family company.*** In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a

case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries .

(3) The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest. The cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in chambers in which adversarial argument is not essential, although it sometimes occurs. It may be that ultimately all will agree on some particular course of action, or at any rate will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under Category (2)), approving the exercise of discretion by trustees or (under category (3)), exercising its own discretion."

44 In this case the Trustees have said that the re-organisation is not momentous, but that the Trustees are conflicted because of the element of self-dealing. As to the compensatory payments to be made pursuant to the loan re-allocation, the Trustees have said that the decision may well be regarded as a momentous and, furthermore the Trustees are in any event conflicted owing to self-dealing.

45 As set out in *Public Trustee v Cooper* the key issue for the Court then to determine is whether the conflict is so significant that the trustee is simply unable to make a decision itself and must surrender its discretion to the Court, or whether the trustee can, notwithstanding the conflict, make the decision itself. Hart J explained as follows:

"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 trustees 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."

46 In this case the Court agreed with the Trustees that it would not have been necessary for the Trustees to have surrendered their discretion to the Court, notwithstanding the element of self-dealing in this case, as the Trustees had taken professional advice in relation to many of the affected transactions, appeared to have acted reasonably throughout and had the consent of all the adult principal beneficiaries in support of the application they had made, such beneficiaries being content to agree not to take any steps to disturb the relevant transactions, of which they are fully aware. The Trustees may now carry out the reorganisation regardless of the element of self-dealing, owing to the self-dealing power which the Court has granted. The Court also found it unnecessary to sanction this decision to reorganise for broadly the same reasons that it declined to accept the surrender of discretion. In addition, the Trustees' advocates said that it was not averred that the reorganisation itself was a matter that was *"momentous"* and accordingly the Court's jurisdiction to bless the decision on that basis was not engaged. Further, there is no personal conflict for the Trustees in this case, merely a conflict in respect of another trust or other companies within the same trust. This is not an uncommon situation and does not usually require an application to the Court if adequate measures to achieve fair dealing between the parties have been taken, as they have been in this case.

47 The compensatory payments sought to be made pursuant to the loan re-allocation exercise gave rise to different considerations. We were persuaded that the Court's approval was needed because it was being sought in order to address the consequences of self-dealing. We also felt that this was a matter of *"real importance to the Trust"* (the Court of Appeal's description of a momentous decision in *Kan v HSBC International Trustee Limited and others* [2015] (1) JLR Note 31. Accordingly the Court's jurisdiction to make an order is engaged by the fact that this is both a momentous decision and a decision which the Trustees cannot implement without self-dealing because the Trustees have a self-interest in the outcome. Furthermore, we regard it as a proper exercise of the Court's power to approve these transactions as they are designed to address the consequences of previous self-dealing over a substantial period, as described above.

48 The Court needed to be satisfied that the three limb test identified in *Re S Settlement* [2001] JLR Note 37 was satisfied, as follows:

(i) 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?

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

(iii) 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?

49 As to these three limbs:

(a) The Trustees have formed their opinion in good faith. The loan re-allocation exercise is proposed to address the historical imbalance which has built up between the funds of the 64 Trust and the funds of the 87 Trust. Although the Principal Beneficiaries will not be disadvantaged by these transactions, it remains a possibility that future beneficiaries could be disadvantaged if the imbalance were not addressed. The Trustees' decision is a genuine attempt to effect a re-allocation of investment returns and is therefore desirable.

(b) As to the second limb, the Trustees' decision is reasonable. The Trustees have applied themselves to the task of identifying a logical and fair basis to rebalance the profits made on investments and have produced an appropriate solution, which was fully explained to the Court.

(c) As to the third limb, the Trustees accept that the inter-settlement loans were instances of self-dealing and that the Trustees were subject to a conflict. However, the Court takes the view that it is not one of the circumstances when the Trustees should be required to surrender their discretion to the Court. The Trustees' determination of the equitable solution to rebalance the loans was not itself vitiated by any actual or potential conflict of interest which renders the Trustees incapable of forming that judgment. The Trustees have not gained personally from the self-dealing and do not stand to gain from the re-allocation exercise. The Trustees acknowledge that they and certain of their directors arguably have a personal interest in the re-allocation exercise in that it mitigates against the theoretical possibility of an action by potential beneficiaries in the future, or that the Trustees may be criticised for not having caused such claims to be pursued themselves. However, given that the beneficial classes in the corresponding sub-funds are substantially similar and given the support of the Principal Beneficiaries, the prospect that any such claim could in fact be made is remote and the prospect of any order for compensation is more unlikely still. Further it would not be in the interest of the beneficiaries for the inter-settlement loans to be re-examined in litigation at a future, possibly distant, date and, at that time, for there to be a risk that the loans in question be set aside. Finally, the Trustees have consulted with the Principal Beneficiaries and they have agreed with the proposed re-allocation and the Trustees have sought the Court's sanction prior to carrying it out.

50 Accordingly the Court determined to approve the Trustees' decision to remediate the inter-settlement loans.

51 The Court ordered that the exercise by the Trustees of their powers to procure the making of the payments set out in the schedule to the order made, on terms that:

> (a) each company receiving any such payment will thereupon release (i) its own directors and other officers and (ii) the company making the payment, and
>
> (b) each company making such payment will thereupon release (i) its own directors and other officers and (ii) the company receiving the payment from any liability arising out of the making of any loan by any such company to any other such company is approved. The Court also ordered that the making of the payments will constitute full restitution of any loss caused to any such company by making or leaving outstanding any such loan.

52 The terms upon which the Court exercised its power pursuant to Section 57 of the Trustee Act 1925 to vary the terms of the Trusts to include an authority to self-deal have already been set out at paragraph 29 above.