The A Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Fisher, Milner
Judgment Date:	26 March 2012
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Text

[2012] JRC 66

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner**, **and** Jurats Fisher **and** Milner.

IN THE MATTER OF THE REPRESENTATION OF INVESTEC CO-TRUSTEES (JERSEY) LIMITED AND IN THE MATTER OF THE A TRUST

AND IN THE MATTER OF ARTICLES 51 AND 53 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED).

Between
Investec Co-Trustees (Jersey) Limited
Representor
and

John Kidd
First Respondent

and

C, D, E and F
Second Respondents

Advocate E. C. P. Mackereth **for the Representor**.

Advocate J. D. Kelleher **for the First Respondent**.

Advocate F. B. Robertson **for the Second Respondents**.

Authorities

Re S 2001/154.

Lewin 18th edition.

In re Y Trust [2011] JRC 135.

Public Trustee -v- Cooper (2001) WTLR 901.

Jones -v- Firkin-Flood (2008) EWHC 2417.

Letterstedt -v- Broers (1884) 9 App Cas 371.

Trust — representor seeks the Court's blessing of its decision to widen the class of beneficiaries of the A Trust.

THE COMMISSIONER:

1 The representor ("Investec") seeks the Court's blessing of its decision to widen the class of beneficiaries of The A Trust to include the remoter issue of the settlors. Investec has not surrendered its discretion to the Court and the application is therefore brought under the second category of cases set out in *Re S Settlement* 2001/154, namely where there is no doubt about the trustee's powers and how it has decided to exercise them but it is a particularly momentous decision.

2 The application is made against a background of hostility between the second respondents, who are the named beneficiaries of The A Trust (referred to at the hearing and in this judgment as "the siblings") on the one hand and Investec and John Kidd, who is the protector of the A Trust ("John Kidd") on the other.

3 In a two day hearing evidence was adduced by way of affidavit:-

There was no application to cross-examine any of the deponents.

(i) On behalf of Investec from Michael David Crouch and Dale McNutt (both officers of Investec), from Christopher Edward Lloyd (an original trustee of The A Trust) and from G (a former employee of the settlors).

(ii) On behalf of the siblings from each of them.

(iii) On behalf of John Kidd from himself and from Robert Antony Clifford (a former officer of Investec).

4 Notwithstanding the hostility between the parties, this is an administrative application, in which a central question relates to the wishes of the settlors and in particular whether it was their wish that The A Trust should be inter-generational.

5 We have taken all of the evidence adduced before us into account for the purpose of addressing the issues before us, even if we do not make express reference to every part of it.

Procedural History

6 Investec brought its representation before the Court on 14th January, 2011, and initially it sought the Court's approval for it to remain in office, to refuse to distribute the trust fund to the siblings and to approve the proposed decision to widen the beneficial class by including the settlors' remoter issue. The matter came before the Bailiff for directions on 24thFebruary, 2011, at which time the siblings had prepared a draft cross summons seeking the removal of Investec as trustee. Investec conceded that its representation should proceed in relation to the third matter only (the decision to widen the class) and the Bailiff directed that this matter should be heard first on the basis that if the siblings succeeded in their arguments against the widening of the class, then the removal summons would go away. The representation was amended to this effect on the 30th March, 2011. The siblings did not issue their cross summons and on the 20th October, 2011, filed a representation seeking the removal of Investec and John Kidd from both The A Trust and the B Trust. This removal application is due to be heard before the Court on 23rd April, 2012, – 1st May 2012.

The A Trust

7 The A Trust was executed on 12th December, 1996, with the original trustees being the Regent Trust Company Limited and Christopher Edward Lloyd. The settlors were Mr and Mrs H. It is a discretionary trust save that the settlors were named as the first life tenants entitling them to the income of the trust fund during their joint lives and the life of the survivor of them. No other beneficiaries were named save for charities generally. There is

the usual power to add beneficiaries. The consent of the protector is required for the exercise of the trustee's dispositive powers and the power to add and exclude beneficiaries. The protector has the power to appoint and dismiss trustees.

8 On 22nd January, 1999, Investec Trustees (Jersey) Limited was appointed co-trustee and became the sole trustee on 8th November, 2001. The company was also named as the executor of the wills of Mr and Mrs H and in order to avoid conflict following their deaths, Investec Co-Trustees (Jersey) Limited (the representor) was appointed trustee on 14thAugust, 2007. For convenience we will refer to both companies as “Investec”. We will come to the affidavit evidence as to the settlors' intentions in a moment, but it is helpful to have regard first to the documentation held on file by Investec and its predecessors as trustee. In doing so, we are concerned with evidence as to whether the settlors intended the assets of the A Trust to be enjoyed by the siblings on the death of the settlors (as the siblings maintain) or whether it was their intention that they should be enjoyed by the wider family with the assets “ *cascading down to future generations”* as maintained by Investec and John Kidd. We will at the same time summarise how the issue of the settlors' wishes arose on the death of the settlors.

Background

9 In the mid-1990s, the settlors were contemplating taking up tax residence in Guernsey (they had been resident there from time to time before that). They consulted Theodore Goddard in Jersey, of whom Christopher Lloyd was senior partner and Robert Clifford a partner. The trust business of Theodore Goddard was acquired by Investec Bank in December 2000 and Robert Clifford became its chief executive officer in March 2001. Robert Clifford resigned from the Investec Group in March 2009.

10 Mr H was a successful property developer with substantial assets including valuable real estate in Guernsey. He and his wife had four children, comprising one son and three daughters (the siblings) and there are thirteen grand-children and two great grandchildren. Of the siblings three are resident in the United Kingdom and one in Barbados.

11 Robert Clifford recalls that based on Guernsey tax advice, Mr and Mrs H were advised to establish two Jersey trusts. The first, the A Trust, would be funded with their existing Guernsey assets and sufficient of their other assets to cover their financial needs during their respective lifetimes as residents of Guernsey. His file note of his meeting with the settlors on the 20th August, 1996, summarises that advice:-

> “ *The essence of the advice received from Guernsey was that if Mr and Mrs H became resident in Guernsey by spending more than 90 days a year in Guernsey then they would be liable to tax on their worldwide assets.* If Mr and Mrs H established Trusts for the benefit of their family or others from which they were excluded prior to becoming Guernsey resident then there would be no tax on the trusts established in Guernsey.

Discussing the basic principles with Mr and Mrs H and advising that I saw at least a dual structure.

The first part of the structure would be a Trust to hold all of the Guernsey assets together with sufficient cash and investments to ensure that Mr and Mrs H had more than sufficient for the rest of their lives. The only disadvantage of settling assets in the Guernsey Trust would be that income arising from those assets would be liable to Guernsey income tax. Suggesting that an initial sum of capital could be settled in the Guernsey Trust. This capital sum should be sufficient to produce an income which, when added to the income from [ ] Hotel, was sufficient to provide for Mr and Mrs H. In addition the Trust could own non income producing assets, such as plots of land or cars, which could be sold as necessary in order to top up the cash held in the Guernsey structure if required.

The second structure would be a Trust to own the remainder of Mr and Mrs H's worldwide assets. Mr and Mrs H would be excluded from the Trust."

12 What he refers to as the first structure became the A Trust and the second structure the B Trust. That the siblings and their respective families were ultimately intended to benefit from both trusts is clear from the outset but it would seem that at this stage equality of benefit between the siblings and their families was an issue for the settlors, as the file note goes on to record the following in relation to what was clearly to be the A Trust:-

" *Mr and Mrs H giving me the information in relation to their family to enable me to prepare the attached family structure plan.* It being clear from discussions that they did not anticipate that each of the four children in their families would benefit equally. Asking Mr and Mrs H to consider this in further detail.

Turning then to deal with the Guernsey structure [the A trust] it being agreed as follows:-

The Trustees would probably be CEL and RAC as for the other Trust.

Beneficiaries would be Mr and Mrs H who should have joint life interests. The wider family should not be named as beneficiaries in order to prevent them having access to Trust accounts during Mr and Mrs H's lifetimes. The Trust should be set up in such a way to enable the assets to be appointed to the Jersey Family Settlement [the B Trust] after the death of the survivor of Mr and Mrs H."

13 On 21st October, 1996, John Kidd spoke with Brian Hamblin of Theodore Goddard, whose file note records the following:-

" *John Kidd returned BH's call of 21st October, 1996.*

He said he had had a good meeting with Mr and Mrs H and everything is going OK. What they regard as significant and perhaps a worry is the availability of the

> Trust accounts to the beneficiaries, not only during their lifetime but even after it during the lifetime of the Trusts. They believe if the beneficiary (sic) should become aware of the funds available in the Trust then this will cause “mayhem”.

14 The two trusts were executed on 12th December, 1996, at a meeting attended by the settlors, Christopher Lloyd and John Kidd, amongst others. As previously mentioned under the A Trust the settlors were designated the life tenants which entitled them to the income on which Guernsey Income Tax would be paid. No other beneficiaries were named, apart from charities generally, because they did not want the wider family to have access to the accounts during their lifetimes at least. The B Trust named the siblings and the settlors' remoter issue and their spouses as beneficiaries and the settlors were excluded. The assets ultimately settled into both trusts were substantial. We were informed that each trust has assets conservatively valued today at some £30M.

15 Paragraph 7 of the file note of the meeting records the following in relation to the settlors' wishes:-

> " *7. John [John Kidd] explained that Mr and Mrs H'ss wishes were that the B trusts income should be accumulated during their lifetime and following their deaths that income from both trusts (but not capital) might be distributed to their issue.”*

16 It is relevant that this file note also records the intention of the settlors to settle into the A Trust the substantial assets then held in a Liechtenstein foundation known as the K Foundation. A letter from the administrators, UBS, dated 28th September, 1989, and the regulations of the Foundation show that under the terms of that structure on the death of Mr and Mrs H, the assets were to be divided between the settlors' three daughters, to the exclusion of their son.

17 On 10th February, 1997, Theodore Goddard sent John Kidd a diagram of the trusts, which contained the following note:-

> “ *The A Trust is a Jersey Life Interest Settlement, the income of which Mr and Mrs H, as life tenants, are entitled by right.*
>
> *Capital can be paid to them as and when required.* Upon both deaths the assets will be held for a discretionary class of beneficiaries, being members of Mr and Mrs H's family.”

18 The question of preparing letters of wishes was regularly raised by the trustees, as shown by the correspondence. In his lengthy letter of advice to the settlor of 16th June, 2000, Robert Clifford stressed the importance of there being a note of the settlors' mutual wishes with regard to what should happen to the trusts in the future, a subject he was well aware they found “extremely difficult”.

19 Robert Clifford's file note of 5th July, 2001, shows him pressing again for a letter of wishes and agreeing to prepare several different suggestions, so that the settlors could consider it further. There was a reference to Mr H showing him a document from UBS whereby each of his three daughters received one third each of the assets of the K Foundation on his death, which he agreed to take into account in the options being prepared.

20 Robert Clifford then prepared a list of questions for consideration by the settlors, including the following:-

> " *1. Do you want to treat all the structures in the same way (i.e. have only one "pot") in which children and others have an overall interest?*
>
> *2. Do you want to set aside any particular structures as a future safety net or point of last resort?*
>
> *3. Is there any relevant difference between the Trusts holding property and the Trusts holding liquid assets as far as future beneficiaries are concerned?*
>
> *4. Do you want to make any provision for children/grandchildren now? Put another way are you prepared to give away or set aside assets now for children and others such that you will no longer be able to benefit from them?*
>
> *5. Do you want children to have an entitlement to a capital sum or sums at any time or times – if so what should that time (or those times) be? Before, on or after death or at certain ages?*
>
> *6. Should others such as grandchildren have an entitlement to capital at any time or times?*
>
> *7. Do you prefer to make income rather than capital provision for your beneficiaries or some of them?*
>
> *8. Is there a maximum or a minimum entitlement that you would wish to see individual beneficiaries have?"*

21 A draft letter of wishes was prepared which in relation to the A Trust was in the following terms:-

> " *We have initial life interests in the Trust, which are established primarily for our benefit during our lifetimes.* Only after the death of both of us should you consider using any funds for the benefit of our family.
>
> *We attach a family tree showing how we think the family should benefit from the Trust Fund and the income thereof on a percentage basis.* As you will see our intention is that not all our children are to benefit equally."

The family tree placed each sibling with their named children in four separate boxes. The percentage to be applied to each family, including both the sibling and their respective children, was left blank for the settlors to complete.

22 These documents were discussed at a meeting on 8th November, 2001, attended by Robert Clifford, John Kidd, the settlors and C and her husband (C being one of the siblings). The file note (which the parties agreed refers in error to the meeting being held on the 24th October) records the following:-

> " *Producing Letters of Wishes in relation to the B Trust and explaining that at some point in time a decision would need to be made with regard to the extent to which various family members would benefit.* Mr and Mrs H seemed unwilling to make a decision in relation to the amount or timing of any benefit. Explaining with JK that the Trustees and John Kidd would therefore take the view that each of the four children was to benefit in equal shares from each of the B and A Trusts (in the latter case only after the death of the survivor of Mr and Mrs H) unless we receive an indication of wishes to the contrary. This was clearly understood by Mr and Mrs H who said that they would think about it. They were quite content for the Trustees to take that view unless they expressed any other view themselves. Copies of the Letters of Wishes (which were not signed) are attached."

23 It was at that meeting that it was agreed that the assets of the K Foundation would finally be transferred to the A Trust and that Robert Clifford would arrange the documentation. It also referred to Mr H appearing confused at various points and we will return to this.

24 A further meeting was held on 8th February, 2002, in which the final documentation for the transfer of the assets of the K Foundation was signed. There is no file note of this meeting on Investec's files but John Kidd refers to it in his affidavit to which we will come shortly.

25 Mr H died on 13th July, 2003, and Mrs H on 12th November, 2005. Mrs H (who we presume had inherited Mr H's free estate) had bequeathed the freely disposable portion of her personal estate to the A Trust, the siblings receiving their *légitime.* Dale McNutt explains in his first affidavit that after taking legal and tax advice, Investec was keen to help the siblings inherit the estate of Mrs H which they could do largely tax free, if the trustee of the A Trust renounced its inheritance. It was initially the intention, he said, to add the siblings and the remoter issue as beneficiaries, but it was decided to postpone the addition of the remoter issue so that when Investec renounced the inheritance, its only beneficiaries would be the siblings, i.e. that the class of the family beneficiaries would match the class of beneficiaries that would benefit from the renunciation. Thereafter, he said, the remoter issue could be added.

26 At a meeting on 20th April, 2006, between Investec and Ernst & Young, it was advised that it was not tax efficient to amalgamate the two trusts and that in relation to the settlors'

wishes, Robert Clifford is noted as making this contribution:-

> " *3. RAC [Robert Clifford] joined the meeting and commented that it was known that Mr and Mrs H had wanted to treat the four children equally and that obtaining such confirmation in writing in the form of a letter of wishes had been difficult as there were certain difficulties for the settlors in communications with their children. RAC confirmed that there were file notes that would support that it was the wish of the settlors for the children to be treated equally and that it was their wish that the Trust continue for future generations.*
>
> *4. RAC briefed EY [Ernst & Young] as to the intentions of the Trustees to present to the beneficiaries within the next couple of weeks a structured plan based upon the report from EY."*

27 A meeting was then held with the siblings on 12th June, 2006, and a PowerPoint presentation entitled " *The H Family – The way forward"* made by Investec to the siblings set this out as one of the objectives:-

> " *To continue to support the family in the long term in line with the wishes of the settlor".*

And under the heading " *Mechanics – subject to advice"* to *"appoint the "children and remoter issue of the settlors as discretionary beneficiaries of the A Trust."*

28 The note of the meeting shows that these proposals were accepted in principle by all of the siblings, subject to some fine tuning and feedback. This was followed up with a letter dated 27th October, 2006, from Investec to the siblings which reiterated the objective of supporting the family in the long term in line with the wishes of the settlors and which sets out as one of the proposals (subject to legal and tax advice) " *to preserve and enhance the balance of the trust funds for the benefit of the current and future generations of the family"*.

29 On the 15th February, 2007, E (one of the siblings) wrote to Investec on behalf of the siblings referring to the meeting on the 12th June, 2006, in which she said the siblings had received " *a detailed explanation of the Trust's affairs"* but asking for a copy of the trust deed and the latest financial statements so that they could better understand the position. In a second letter of the same date she asked for copy correspondence between Investec and its advisers and questioned what to the siblings seemed to be Investec's presumption that its proposals had been agreed. Investec were concerned at this comment as it thought matters had been agreed in principle and asked for details of what part of its proposals were acceptable and what were not. However it declined to provide the documentation requested until the siblings had been appointed beneficiaries.

30 Matters progressed in that Investec produced a Re-Structuring Report in April 2007 which was circulated to the siblings and their advisers. It set out a number of actions it proposed to take (including the making of substantial distributions out of the B Trust) but nothing

relevant to the addition of the remoter issue to the A Trust.

31 E responded positively by letter dated 15th June, 2007, asking *inter alia* for her husband and children to be added as beneficiaries to The A trust in addition to herself. By letter dated 19th June, 2007, D (one of the siblings) also responded positively and asked that his children be added as beneficiaries to the A Trust in addition to himself.

32 The file note of a meeting held on 25th June, 2007, with the siblings shows them agreeing to the strategy in relation to their mother's estate and says this in relation to the A Trust:-

> " *A"*
>
> *Following the appointment of the four family children as part of the variation of the Estate, it was agreed to add no further beneficiaries at this time.*
>
> *Once up to date accounts had been prepared and calculations of relevant income and stockpiled gains further consideration would be given to the appointment of additional beneficiaries, including the suggestion that the trust be held for the thirteen grandchildren."*

33 On 1st August, 2007, John Kidd emailed Dale McNutt following a meeting with some of the siblings in London saying this:-

> "… *..we should adhere to the principle that the family should not be involved in any way in the administration or management of the Trusts or any of their assets which was a principle which you said you agreed with and that you would make sure happened.*
>
> *I believe that it is fundamentally against the Settlors wishes for the Beneficiaries to be involved in the management of the Trusts or their assets and I believe if you allow even a slight chink of an open door in this respect to the Beneficiaries it will cause you the most immense problems in the future.*
>
> *I have no difficulty in you keeping the family aware of the actions which are being taken and the policies in connection with the assets but to allow them to be involved in the management and decisions is I believe quite wrong.*
>
> *The Trustees are custodians of the Trusts for the whole of the H Family and the Beneficiaries.* Because of the length of time that the Trust Fund will survive many of these Beneficiaries are not in existence."

34 On 12th September, 2007, the siblings were added as beneficiaries of the A Trust. They also signed deeds of assignment and indemnity in favour of Investec in relation to the Guernsey estate of Mrs H.

35 At a meeting between Robert Clifford, John Kidd and a representative of the siblings, (amongst others) on 13th September, 2007, Robert Clifford and John Kidd reiterated the view that in the absence of a written letter of wishes, the default position of Investec would be a " *25% share per child, subject to the trustee's discretion".* John Kidd was again of the strong opinion that it was the wish of Mr H that no member of the family should be involved in the management of the properties and that in his view the trust capital should be distributed one fifth to each generation plus one fifth of any large gain on individual transactions.

36 On 25th September, 2007, Investec wrote to the siblings on the restructuring, setting out how it had decided, after considering the points made by the siblings and their advisers, to take the matter forward in relation to both trusts. The decisions taken were extensive but none are relevant for the purposes of this judgment. We note however from the file note of the meeting held with the siblings and their representatives on 15th October, 2007, that taking these decisions had upset the siblings, who felt that Investec had been high handed and that their wishes did not matter. Reference was made to the siblings not trusting Investec. It clearly started out as a heated meeting, but then calmed down and substantial areas were covered in discussion, although nothing relevant to the addition of the remoter issue to the A Trust.

37 Investec held a meeting with Ernst & Young on 16th January, 2008, from which it is clear that further advice had been taken on the strategy in relation to both trusts, with consideration of the possibility of the B Trust being for the siblings and the A Trust for the grandchildren, but it was clear no firm decision had been taken. The file note records that the relationship between Investec and three of the siblings was “pretty good at the moment”.

38 According to the affidavit of Dale McNutt, the focus then moved to dealing with the practicalities of Mrs H's estate in respect of which a number of issues had arisen (and which are, apparently, the subject of an application for directions to the Guernsey Court). Thus in relation to the trusts matters had reached a standstill.

39 In the spring of 2010, Investec sought another meeting with the family which at their request was put back to 13th October, 2010. Either before or at the end of that meeting, in which a number of matters had been discussed as set out in the agenda, the siblings asked for a recess. They then returned and presented Dale McNutt with the following letter:-

> “ *To the trustees of the A Trust*
>
> *We, the undersigned beneficiaries of the A Trust (the “Trust”), have agreed in principle that the trustees should exercise their discretion to distribute the entirety of the Trust's assets to the four of us, once a modest, negotiated payment to charity commensurate with that made to date has been paid.*
>
> *This agreement is subject to our taking advice regarding the tax implications related to this decision and, in order that we may consider these issues to effect*

an orderly distribution, we therefore request an undertaking from you that you will:-

Release to us all historical information regarding the Trust by 12 November, including but not limited to accounts and valuations, and cooperate with the beneficiaries' legal and financial advisors;

Take no dispositive acts in relation to the Trust without all four beneficiaries' agreement; and

Make no material changes to the management of the Trust's underlying assets without all four beneficiaries' agreement."

40 The letter had been signed by each of the siblings and there was a place for it to be signed by Investec. According to the affidavit of E the siblings required a substantive response before 22nd October, 2010. Dale McNutt informed them that he was unable to make a decision at that meeting, but, in the meantime, agreed that there would be no structural or other changes to the A Trust. The siblings wrote to Investec on 20th October, 2010, confirming their wish that the trust be terminated and distributed to them.

41 Dale McNutt wrote to the siblings on 22nd October, 2010, by email saying that the trustee did not consider it appropriate to exercise its discretion in the manner outlined in their letter, although it would consider reasonable requests for equalisation among the four families. He then went on to say this:-

" *We agreed not to make any changes whilst we considered your letter of request and as we have now done so, for the avoidance of doubt this agreement no longer applies.* We have been considering planning for future generations and we were going to raise this matter with you before you handed over your letter. However because of its contents it was felt inappropriate to do so at that time. One of the matters currently under consideration is to add the remoter issue of the Settlors to the discretionary class of beneficiaries and we will endeavour to keep you advised in this respect."

42 D responded that day stating that the siblings had lost faith in the trustee and its running of the A Trust. Consequently, he said the alternatives were either to wind up the trust as requested or for Investec to retire in favour of trustees in whom the siblings have confidence. He asked for complete and unreserved confirmation that it would not take any steps in relation to the trust without consulting the four siblings. By email dated 3rd November, 2010, Dale McNutt informed the siblings that the trustee had consulted with John Kidd as protector and advised him that it was not its intention to resign but it would continue to fulfil its role as trustee.

43 The siblings then consulted Withers, who in a letter dated 10th November, 2010, asserted *inter alia* that this was the first time that Investec had mentioned expanding the beneficial

class and that they could only conclude that this was solely a reaction to the siblings' unanimous request that the trust be wound up. That in their view cast serious doubt upon the propriety of Investec's decision. It was in the view of Withers the latest in a long line of reasons why the siblings had lost trust and confidence in Investec which they summarised as follows:-

> " *This reaction to a perfectly reasonable request by the Beneficiaries is the latest in a long line of reasons why the Beneficiaries have lost all trust and confidence in you.* You have not conducted your duties transparently, have treated the Beneficiaries in a condescending manner, have not provided regular information, are running the Trust at an unacceptably high level of expense and, more generally, are not running the Trust for the benefit of the Beneficiaries. Your liquidation just over a year ago of the funds held by Rainbow Zest Limited and failure to either reinvest the funds in any way or appoint an investment manager is extraordinary, to say the least."

Withers concluded as follows:-

> " *If you exercise your discretion to expand the beneficial class of the Trust we will issue immediate proceedings (1) seeking to set aside the decision and (2) for your removal.*
>
> *Please confirm by close of business Friday that you will not take any material steps in relation to the Trust, including but not limited to expanding the class of beneficiaries, failing which the Beneficiaries (who are instructing Jersey advocates) will issue proceedings in the Royal Court of Jersey for your removal."*(their emphasis)

44 Dale McNutt responded on 11th November, 2010, confirming that as trustee, Investec would not add beneficiaries or make any other material changes to the terms of the trust without giving the siblings seven days' notice of its intention to do so.

45 By email dated 24th November, 2010, Withers asked Investec for historical information in relation to the A Trust to enable them to advise the siblings on the tax implications of an orderly distribution to them. In his email of 3rd December to Withers, Dale McNutt reiterated that Investec would not be distributing the entirety of the trust fund to the siblings nor retiring, but at the same time making it clear that it would provide the information being requested. This position was reiterated in an email of 15th December, 2010.

46 By letter dated 24th December, 2010, Dale McNutt responded substantively to Withers' letter of 10th November, 2010, pointing out with reference to some of the same documentation referred to above that this was not the first occasion on which the addition of the remoter issue had been canvassed. He also enclosed a copy of the trustee's (fuller) version of the agenda for the meeting held on 13th October, 2010, which, under the heading " *Future"* said " *VAB for Grandchildren, Great-Grandchildren etc".* He pointed out that there were specific Guernsey succession reasons for adding the siblings as a

preliminary step but the objective had always been to benefit the family in the long term across generations.

47 Investec then brought its representation before the Court without prior notice to the siblings. They were, of course, convened but the Court declined to convene the remoter issue or to appoint persons to represent them.

48 In its amended representation Investec seeks the Court's approval of its " *proposed decision to widen the class of beneficiaries of the VAB Trust to include the remoter issue of the Settlors at an appropriate time in the future"*. On the 9th September, 2011, Investec resolved formally to add the remoter issue subject to the Court's approval, such addition to take place in short order following such approval. It is that decision that we are invited to bless.

The wishes of the settlors

49 Christopher Lloyd, in his affidavit, explains that he had come to know Mr H through his chairmanship of the Le Riche Group, in which Mr H was a shareholder and they shared an interest in vintage cars. As a consequence, he got to know him well. He remembers the difficulty that his firm had in trying to get the settlors to address the matter of their letter of wishes. From their many discussions he thought they had an understanding about what they did not want to happen to their assets. He explains that they were somewhat uncomfortable about their wealth and did not want to simply pass it on to the next generation. The siblings had had some money whilst the settlors were alive and he recalled the settlors feeling that the siblings had not made good use of that money. They wished their wealth to be tied up in a tax efficient way so that it could multiply and be available for future generations in emergencies or by way of support for the purchase of homes and, he thought, education. They certainly did not, in his view, intend for their wealth to be relied upon by the siblings for their livelihood. In his view, it would have been wholly out of character for the settlors to allow their children to benefit from their wealth without provision being made for future generations.

50 G had worked for Mr H for over 20 years (and still works for a company owned by the A Trust). Until 2001, she had acted as his personal assistant and was therefore privy to many of the conversations in relation to the two trusts. She feels very strongly that the settlors would not have wished for the A Trust to be distributed to the siblings without provision being made for the grandchildren.

51 Robert Clifford says in his affidavit that in his dealings with the settlors, they drew no distinction between the two trusts when it came to their substantive intentions following their death, both trusts being intended ultimately for the long term support and benefit of their family over generations to come. Notwithstanding his best efforts, he was unable to get them to sign a letter of wishes, caused in part by a strained relationship between Mr H and his son D.

52 Robert Clifford explains that the reference to each of the “four children” benefiting in equal shares in his file note of the meeting of 8th November, 2001, is a reference to the lineal descendants of each sibling so that each branch of the family would be treated equally. He concludes by saying that in his opinion neither Mr nor Mrs H contemplated the trustees of either of the trusts distributing large capital sums to the siblings. What they did contemplate was that “ *the trust funds of both Trusts would be utilised to benefit each of the four branches of the family equally over generations to come; in the first instance by the trustees and the first generation of beneficiaries cooperating to discuss and agree the best way ahead”.*

53 John Kidd is an English solicitor, now retired. He first started acting for Mr H in 1969 and their relationship spanned almost 40 years. It was clearly very close. He has been protector of both trusts from the outset.

54 He explains in his affidavit Mr and Mrs H's relationship with their children and their doubts and reservations as to their children's business abilities. He explains in particular the difficult relationship with D, who had worked for Mr H for a number of years until the relationship broke down. Mr H was clearly a strong character who did not really let Mrs H express her views, although she did so after his death. They both held strong views that their children should not be given substantial sums of money because they should learn to provide for themselves and their families by their own endeavours as the settlors had done and not by an inheritance. This also included their grandchildren and their issue.

55 In the early days of the trusts, the thoughts of Mr and Mrs H appeared, he said, to consider the exclusion of D and his family from the trusts, but as time went on, they appeared to accept that the trustee should exercise its discretion to divide everything between the four families and their children equally. They did not want any member of the family to have a large sum of capital.

56 John Kidd referred to a meeting which took place on 8th February, 2002, for Mr and Mrs H to sign the documentation for the transfer of the assets of the K Foundation into the trust. He says it was the most intense meeting that he had ever attended in the whole of his professional life and is firmly etched in his mind. Whilst Mr H's head realised that settling these assets was the right thing to do from the taxation point of view, his heart had difficulty with it. The pros and cons were gone over repeatedly. C and her husband were present throughout that meeting. John Kidd says that when the meeting was ending, he and Robert Clifford again raised the issue of the letter of wishes and again reiterated what had been said many times before, that in the absence of such a letter, the trustee would, subject to its overriding discretion, broadly divide the two trusts between the four families and the remoter issue. He felt that this was accepted by Mr and Mrs H and that consequently, a letter of wishes was unnecessary. It was the last time that he remembered the issue being raised before Mr and Mrs H both died.

57 John Kidd, whose consent as protector is needed for the addition of beneficiaries, approves Investec's decision to add the remoter issue, based on his knowledge of the background of The A Trust and his understanding of the settlors' wishes. He concludes his affidavit by saying this:-

> " *My decision is not based on any prefixed ideas which I have developed as to who should benefit from the trusts without reference to the views of the Settlors or the needs of the family.* On the contrary, my decision is strongly influenced and based on my honestly held belief and understanding of Mr and Mrs H's wishes and I strongly believe that I would be betraying both Mr and Mrs H's wishes and the trust they reposed in me to carry those wishes through if I acted to the contrary."

58 None of the siblings deposed to any direct conversations they may have had with the settlors as to their wishes in respect of the A Trust which, in the circumstances, is understandable. In their affidavits, sworn in May 2011, they rely in the main upon a literal interpretation of Robert Clifford's file note of the meeting on 8th November, 2001, that " *each of the four children was to benefit in equal shares".* There is nothing, they say, prior to that to give any reliable indication of the settlors' wishes.

59 Medical evidence adduced by E in her affidavit of 30th January, 2012, cast doubt upon the capacity of Mr H in the autumn of 2001 and spring of 2002. He was, unfortunately, alcohol dependent and according to a letter from his general practitioner of 12th November, 2001, had developed a " *severe confusional state with agitation".* A CT brain scan showed that there was " *cortical and central atrophy but no focal lesion was identified*." Atrophy of the brain due to chronic alcohol abuse was a significant condition contributing to his death on 13th July, 2003.

60 In her affidavit sworn on 31st January, 2012, C, who attended the meeting on 8th November, 2001, (and it would seem the meeting on the 8th February, 2002,) expresses her concern as to her father's ability to make truly informed decisions. She says that he was confused and had a short memory span. Robert Clifford's file note of a meeting he held with the settlors on 25th October, 2001, refers to Mr H being rather confused, although he did communicate his wishes in relation to a number of matters. Robert Clifford's file note of the meeting on 8th November, 2001, also refers to Mr H being confused at various points, but that both Robert Clifford and John Kidd formed the impression that he understood what he was doing. Investec had found on file a letter from his general practitioner dated 25th October, 2001, saying that he had seen him that day and he was fit to sign documents, although it is unclear the context in which that letter was requested.

61 Mr Robertson submitted that it was inappropriate for Investec to treat its own "default" view of the settlors' wishes as paramount and overriding. The fact is that no letter of wishes was ever written and therefore there was no positive indication ever provided by the settlors. In these circumstances, he said, Investec should have regard to the wishes of the siblings alone.

62 In our view the absence of a letter of wishes makes it important for the good ongoing administration of the A Trust for the wishes of the settlors in establishing and settling the funds into it to be determined. We make the following observations in particular from the evidence before us:-

(i) The primary purpose of the A Trust was to provide for the settlors during their lifetimes without interference from the siblings. For that reason, the settlors were the only named beneficiaries.

(ii) The original plan was to set up the A Trust in such a way as to allow its assets to be appointed to the B Trust on the death of the survivor of the settlors, as made clear in the file note of 20th August, 1996. The B Trust was, of course, inter-generational being established for the settlors' children and remoter issue (and their spouses).

(iii) When the two trusts were executed on 12th December, 1996, the settlors expressed the wish, through John Kidd, that following their deaths the income from both trusts but not the capital might be distributed to their issue.

(iv) The settlors did have doubts and reservations as to the business abilities of the siblings.

(v) In the discussions that subsequently took place in relation to their wishes, it was implicit, in our view, that the A Trust, like the B Trust, would be inter-generational. The issue with which the settlors had great difficulty in grappling with was whether there should be an equal division between the families, in particular whether D and his family should be excluded. This is clear from the documents prepared by Robert Clifford which in our view were reflective of the discussions he was having with the settlors. In the end, we find that they did accept the “default” position of Investec and John Kidd, namely, that there would be equality between the siblings and their families.

(vi) The reference in the file note of the meeting of 8th November, 2001, to “ *each of the four children was to benefit in equal shares”* has to be read in context and we accept the interpretation placed upon that note by Robert Clifford (its author) and John Kidd that it was not indicative of an intention on the part of the settlors that the siblings should benefit on the death of the survivor of them to the exclusion of the remoter issue. It was concerned with equality between the siblings and their respective families.

(vii) Each of the trusts had or was intended to have very substantial assets, which in itself raises a presumption that it would have been the intention of the settlors that those assets would cascade down for the benefit of future generations.

(viii) The last will of Mrs H, in which she left her disposable estate to the A Trust rather than directly to her children, is evidence that she continued to regard the A Trust as an inter-generational trust up until her death.

63 Taking into account all the evidence presented to us, we find that it was the intention of the settlors that the A Trust would be inter-generational, with assets cascading down to future generations. Such a finding is consistent with the documents we have seen and the evidence of all those involved with them at the time, in particular Christopher Lloyd, Robert Clifford and John Kidd. We reject the suggestion that it was ever the intention of the settlors for the siblings to benefit from the whole of the trust fund. It would have been the expectation of the settlors that (unless its assets were tipped into the B Trust as originally envisaged) the siblings and the remoter issue would have been added to the beneficial class following the death of the survivor of them. These wishes of the settlors are not, of course, binding on the trustee from time to time of the A Trust, which must exercise its powers in accordance with the circumstances as they exist at the relevant time, but in exercising those powers it is bound to take into account the settlors' wishes as we have found them to be (see Lewin 18th edition paragraph 29–151).

64 Whilst we note the evidence as to Mr H's health in late 2001/early 2002, we are in no position to find that he lacked capacity, either to express his wishes or sign documents. We place some store on the evidence of Robert Clifford and John Kidd that despite his being confused at times, he understood what he was doing. There was no suggestion from any one subsequent to those meetings that he lacked capacity – indeed, the matter was first raised by the siblings in January of this year, some ten years after the event.

65 The UBS letter written in 1989 in relation to the K Foundation and its division between the three daughters does not affect our view. As early as 1996 it was the intention of the settlors to transfer the assets out of that structure into the A Trust, which is, of course, a discretionary trust.

Addition of remoter issue

66 Bearing in mind the specific requests from at least two of the siblings in 2007 that their children should be added to the class of beneficiaries and that we are in any event concerned only with adding the descendants of each of the siblings in a manner which is consistent with the B Trust, it might be wondered why the decision of Investec as approved by John Kidd to add the remoter issue has caused such controversy. It is, however, fiercely opposed by the siblings and because of that, we are amenable to regarding it as a "*momentous"* decision, warranting an application to the Court. Indeed, Withers had made it clear that if the decision had been taken and implemented, the siblings would have challenged the same before the Court.

67 The siblings submitted that we should not bless the decision (which being subject to our prior approval would then fall away) on a number of grounds. Before we come to them, however, Mr Robertson sought to counter the suggestion that the siblings were after the assets. He referred us to paragraph 49 of E's first affidavit where she says that their primary motive was to ensure that the funds held for them as beneficiaries were properly managed, not only for their benefit, but so that they could continue to support and assist their children.

The siblings say they had become discontented with the performance of Investec over a range of issues as summarised in Withers' letter of 10th November, 2010. Of particular concern was a refusal to make an anticipated distribution to C and the liquidation of the entire investment portfolio implemented through 2009 – 2010. We have not gone into the detail of these complaints as they form the subject matter of the removal proceedings.

68 That management was the siblings' prime motivation is supported by their affidavits, in which they set out their aspirations in relation to the funds if they are appointed to them, all of which involve the assistance of their children. Indeed, D and E want their share transferred to an inter-generational trust they had established in Jersey in 2008.

69 As against that, there is no correspondence from the siblings or their advisers prior to the 13th October, 2010, meeting that we have seen which sets out these complaints and gives Investec notice of the level of discontent that they apparently felt. It seems clear to us that the letter handed to Dale McNutt at the meeting came as a complete surprise to him at the end of what he thought was a routine annual meeting with the siblings. Mr Robertson submitted that to the siblings this seemed an elegant way of parting company with a trustee they had no confidence in. In our view, it was a most unfortunate way in which to deal with the matter, because it gave the unavoidable impression that they wished to get their hands on the funds, which was contrary to the wishes of the settlors. If concern over management was the real motive, then why not say so.

70 It is true that the siblings then shifted their ground towards seeking the retirement of Investec but their opposition to the addition of their own children as beneficiaries raises a question mark over their motivation. As Mr Kelleher put it, what reason could there be against adding their own children as beneficiaries other than that they perceived it as an impediment to obtaining a distribution in their favour by any new trustee.

71 We now turn to the grounds put forward by Mr Robertson on behalf of the siblings against our blessing the decision. Our responses to those grounds have been informed by the submissions of both Mr Mackereth and Mr Kelleher which we will not set out separately.

72 The first ground was that Investec was not properly informed and had misunderstood the nature and strength of the settlors' wishes. Much of the argument here related to the wishes of the settlors which we have dealt with above and will not repeat. In our view, Investec and John Kidd were properly informed as to the wishes of the settlors and were right to have regard to them.

73 However, Mr Robertson submitted that Investec failed to consult with the grandchildren to see if they wanted to be added and did not take into account any tax or legal implications to their being added. The grandchildren have subsequently been consulted. Three have retained a firm of lawyers in Jersey in relation to the removal proceedings which they will be opposing and they all agree to be added. Of the remaining ten, one asked not to be

added and the remaining nine asked not to be added " *at this time"*; in other words by Investec. We assume that they will be supporting the removal application.

74 It seems to us that the grandchildren are inevitably influenced by whether they should or should not support their parents in the removal proceedings. We do not know what they were told about the wishes of their grandparents, but if it is made clear to them that it was their grandparents' wish that this trust should be inter-generational, then it seems to us unlikely in the extreme that any of them, absent this dispute, would resist being included within the beneficial class. It is true that Investec did not take advice on the tax or legal implications of their being added, but they are already beneficiaries of the B Trust and Mr Robertson conceded that there are no tax or legal impediments to their being added to the class of beneficiaries of the A Trust.

75 The second ground was that the decision to add the remoter issue was inherently unreasonable. This involved an examination by Mr Robertson of the strategy of Investec as it evolved and as reflected in the various reports and meeting notes. Particular exception was taken to the suggestion, as reflected in Investec's agenda for the November 2010 meeting, that the A Trust could be for the remoter issue and the B Trust for the siblings. The A Trust is liquid and the B Trust illiquid. The proposal was, he said, irrational, as it is the siblings who, approaching retirement, require funds. These were shifting sands, said Mr Robertson, and formed an unsafe base to take the decision to add the remoter issue.

76 We do not regard the evolving strategy as evidence of irrationality. Three of the siblings live in the United Kingdom and it is clear that careful tax planning is required as to how best to structure the two trusts. The siblings have been added as beneficiaries of the A Trust for the purpose of that trust renouncing its share of Mrs H's estate, but it was clearly the first stage of a process that consistent with the wishes of the settlors would have taken into account the interests of the remoter issue and, absent a consensus following tax and legal advice to divide the two trusts otherwise, would have led to the remoter issue being added. The letter from the siblings requesting the distribution of the entirety of the trust fund to them put at risk the interests of the remoter issue.

77 The third ground was that Investec was unfit to act as trustee. This involved an examination of the allegations made by the siblings of the conduct of Investec before and after the decision. Reliance was placed upon the decision of the Court in the case of *In re Y Trust* [2011] JRC 135 where at paragraphs 36 and 37 the Court accepted that the three questions set out in *Re S Settlement* were rather limited when reference was had to the judgment of Hart J in *Public Trustee -v- Cooper* (2001) WTLR 901 and the case of *Jones -v- Firkin-Flood* (2008) EWHC 2417. In the latter case Briggs J added to the category of cases in which the Court may feel sufficiently uncertain about the propriety of a trustee's discretionary decision that it declines to bless it, without at the same time prohibiting it, a case where the trustees had demonstrated a general unfitness to act by conduct prior to the taking of the decision in question. Briggs J found, as a matter of fact, not merely a number of isolated breaches of trust by the trustees but rather a total abdication of their duties by all of them. Quoting from paragraph 240 of his judgment:-

" ***240. At the outset, they failed to appraise themselves of the nature and extent of their duties. They failed to prepare, or to have prepared, estate or trust accounts. They failed to meet to consider whether in the interests of the beneficiaries it was appropriate to leave the Trust property as they received it, in the form of shares in private companies producing no dividends, or to consider whether the beneficiaries' interests required them as controlling shareholders to request, and if necessary impose, a dividend policy. They never considered as Trustees whether the benefits in salary and in kind which Ian arranged, as a director, to be provided to his siblings and to himself were appropriate. Ian's view was that in voting himself and his wife remuneration and in arranging for ex gratia payments to be made to Daniel, he was acting as a director, and not as a trustee."***

78 The problem for Mr Robertson is that these allegations against Investec are disputed and form the subject matter of the removal proceedings. Whilst we have had the allegations of the siblings summarised to us, we have not heard the case of Investec, other than its denial of any impropriety or breach of duty. We cannot therefore make any finding that Investec is unfit to act as trustee.

79 A slightly different point arises in that assuming a trustee is fit to act, should it make any material decisions when such a broad spectrum of the beneficial class, in this case all four of the named beneficiaries, have asserted a loss of confidence in it? Any decision taken by a trustee in that situation is likely to lead to controversy. It has long been recognised that even where a trustee has acted properly, friction with the beneficiaries which prevents them from working harmoniously together, may lead to the trustee being advised to resign. Quoting from the judgment of Lord Blackburn in *Letterstedt -v- Broers* (1884) 9 App Cas 371 at 386, 387:-

" ***In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule beyond the very broad principle —-that their main guide must be the welfare of the beneficiaries.*** Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety… It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate, is not of itself a reason for the removal of trustees. But where the hostility is grounded on the mode in which the trust has been administered …it is certainly not to be disregarded. …If it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground he refuses to do so, it seems to their lordships that the court might think it proper to remove him."

80 We have considered whether in the circumstances prevailing in this case, Investec should have made any decision at all in relation to the beneficial class, pending the outcome of the removal proceedings. In this case we have concluded that it was right to do so for the following reasons:-

(i) There was no letter of wishes.

(ii) Any new trustee and protector would have had no personal knowledge of the settlors and their intentions.

(iii) Investec was part way through a process that would have led to the remoter issue being added as beneficiaries or their interests being taken into account in some other way.

(iv) The letter signed by the siblings showed that on its face they were seeking to have all of the funds appointed out to or for their benefit, contrary to the wishes of the settlors.

(v) Retiring or being removed from office and leaving the four siblings as the only named beneficiaries with no letter of wishes raised the possibility that the interests of the remoter issue may not be taken into account by any future trustee or protector as the settlors would have wished.

(vi) The decision was subject to the approval of the Court so that any concern as to the propriety of its actions could be ventilated by the siblings. We find no impropriety on its part. Its motivation is the protection of the interests of the remoter issue in accordance with the settlors' wishes.

81 The siblings have approached Sanne Trust Company Limited and R & H Trust Co (Jersey) Limited who have agreed to take office as trustee and protector respectively should Investec or John Kidd resign or be removed. They have indicated in writing that they understand that there is a considerable body of evidence on the issue of whether the remoter issue should be added which, upon their appointment, they would wish to consider, but they did not want their decision fettered or influenced by the decision of Investec even if approved by the Court. It was submitted by Mr Robertson that we should leave them free to deal with this issue by not blessing the decision.

82 We disagree. These two companies have not been appointed and may never be appointed. They therefore have no status in the matter. Leaving that aside a considerable sum in fees has been incurred in this application which, ordinarily, stands to be payable out of the trust fund. The application therefore represents a considerable investment on the part of the trust. The suggestion is that a new trustee and protector (assuming they are appointed) should invest further no doubt considerable time and incur no doubt considerable costs at the expense of the trust fund, considering the issue afresh. They will do so knowing that the addition of the remoter issue was something which was vehemently

opposed by the siblings (with whom they currently have a relationship) and any similar decision in relation to the remoter issue may involve them in a further application to this Court. By not blessing the decision, we would therefore be passing on to the new trustee and protector a potential source of on-going friction.

83 The Court has the benefit of those who were closely connected with the settlors before it together with all the relevant documentary evidence and there being no letter of wishes is in a position to determine authoritatively what the wishes of the settlors were and to ensure that the beneficial class reflects those wishes. If it blesses the decision the new trustee and protector (again assuming they take office) will start in office with this issue of potential friction clarified. In our view, the efficient and satisfactory execution of this trust going forward requires this issue to be clarified now.

84 The fourth ground was that the decision was premature in that issues have been raised by the siblings as to the capacity of Mr H when assets were transferred into the A Trust, in particular the K Foundation, and whether he was acting under the undue influence of Robert Clifford. The siblings have also raised concerns over the title to the remaining assets purportedly held in the A Trust, which Mr Robertson submits are of fundamental importance. It would be unjustifiable, therefore, he says, for Investec to enlarge the beneficial class while these issues remain unresolved.

85 We are not going to go into the details of these allegations, all of which have arisen in affidavits sworn by E and C in January of this year and which appear to us to have the potential of giving rise to a claim upon the assets of the trust. To the extent that the trust does not have title to these assets they would probably fall back into the estate of Mrs H and therefore into the hands of the siblings. These issues, raised so belatedly, open the door to the suggestion that having failed to obtain a distribution of the trust fund to them, the siblings might be contemplating obtaining those assets through an attack upon the trustee's title to the same. Until now, Investec has been looking into these matters and responding to the many requests of the siblings for information as to the trustee's title. We question whether it should continue to do so, bearing in mind the possibility that they might use this information to mount a hostile attack upon the trust.

86 Dale McNutt has deposed that even if the assets derived from the Karibo Foundation are discounted, there is a rump of £12M within the A Trust. We think it unlikely in the extreme that the A Trust will be found to have no material assets at all in which case a decision to add the remoter issue to the beneficial class would be pointless, but as it is, they are simply being added to the beneficial class of the trust and will be entitled (along with the siblings) to be considered for benefit from the assets of the trust as they may be from time to time. We do not regard this as a ground for not blessing the decision.

87 The fifth ground is that the decision will create significant difficulties for any new trustee or protector. Mr Robertson submitted that blessing the decision to add the remoter issue would give the unavoidable impression that the Court had determined that it would be appropriate

for the remoter issue to receive some benefit in the future. A future trustee, he argued, would doubtless feel uncomfortable if it took the decision to divide the trust assets in some other way and indeed it may only feel comfortable to do so with the further blessing of the Court. Blessing the decision creates the worst of both worlds, namely it does not play any positive role in determining who should actually benefit from the trust, but it creates an unnecessary perception that the freedom of future trustees to deal with the trust fund in the way they consider appropriate has been constrained by the Court, potentially generating a further application and yet more needless expense.

88 As made clear above, we take the opposite view. It would be quite inappropriate for the Court to seek to influence how the trustee exercises its powers in the future and we do not seek to do so. The Court is simply being asked to bless a decision to add beneficiaries and doing so in no way constrains the trustee or places a fetter over the future exercise of the trustee's discretionary powers. It simply means that when exercising its powers, the trustee has to take into account the interests of the remoter issue as well as the siblings in the same way it already has to do in the B Trust and indeed in the same way trustees routinely do in family settlements which in our experience will often have remoter issue contained within the beneficial class. Taking into account the interests of the remoter issue accords with the wishes of the settlors as we have found them to be. Thus, we think that blessing the decision will avoid difficulties for any future trustee and aid the efficient and satisfactory execution of the trust.

The protector

89 In relation to John Kidd, we note with some discomfort that, as we understand it, the first time the siblings communicated their concerns as to his conduct as protector of the A Trust was in E's affidavit of 17th May, 2011, which was sworn after he had made clear his support for the decision of Investec. Mr Kelleher informed us that this had been a very difficult time for John Kidd, who had no wish to upset the siblings. The fact is, however, that he knew the settlors well and is clear as to their wishes. For our part, we are satisfied that in giving evidence to this Court as to the wishes of the settlors and consenting to the addition of the remoter issue, subject to our blessing that decision, John Kidd is acting properly and in good faith.

Conclusion

90 Turning to the three questions we need to consider under the second category of cases set out in in *Re S Settlement* we conclude that:-

> (i) Investec has formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to add the remoter issue to the beneficial class.
>
> (ii) We are satisfied that the opinion which Investec has formed is one at which a reasonable trustee, properly instructed, could have arrived; and

(iii) We are satisfied that the opinion at which Investec has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision.

91 Accordingly we grant Investec's application and bless its decision to add the remoter issue of the settlors to the beneficial class of the A Trust.