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Caroline Garnham v (1) PC

Jurisdiction:	Jersey
Judge:	The Bailiff:
Judgment Date:	13 March 2012
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Text

[2012] JRC 50

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, **Esq**., Bailiff, **and**Jurats Tibbo**and**Crill.

IN THE MATTER OF THE ESTATE OF C

Between
Caroline Garnham
Representor
and
(1) PC
Respondents
(2) AC
(3) MC

(4) LC
(5) Alan Binnington
(6) Mrs C
(7) BNP Paribas Jersey Trust Corporation Limited

Advocate J. M. P. Gleeson **for the Representor.**

Advocate A. D. Robinson **for the First and Second Respondents.**

Advocate J. S. Dickinson **for the Third and Sixth Respondents.**

Advocate N. M. Sanders **for the Seventh Respondent.**

Authorities

Williams Mortimer and Sunnucks on Executors, Administrators and Probate 19th Edition.

S -v- L, E and Bedell Cristin Trustees Limited [2005] JRC 109 .

S -v- L, E and Bedell Cristin Trustees Limited [2005] JLR N 34 .

Cowan -v- Scargill [1985] 1 Ch 270 .

Re Haasz 21 DLR (2d) 12 .

Re Billes DLR (3d) 512 .

Administration of Estates Act 1925.

Kane -v- Radley-Kane [1999] Ch 274.

Re Lepine [1892] 1 Ch 210 .

In Re Chapman [1896] 2 Ch 763 .

Public Trustee -v- Cooper [2001] WTL 901 .

Estate — application by the representor seeking directions in capacity as one of the executors.

The Bailiff:

1 This is an application by the Representor ("CG") seeking directions in her capacity as one of the executors of the estate. The point at issue is whether a disputed debt said to be owed to the estate should be investigated and, if appropriate, collected by the executors or whether it should be assigned to the 99% residuary legatee for that legatee to investigate

and collect if it thinks fit.

2 However, behind that apparently short issue for consideration lies a story of a complex history, a divided set of executors, conflicts of interest, strong family feelings and a dispute as to the role of the Court on such an application. The executors are split on the issue with the First and Second Respondents being in favour of assignment, the Representor and the Fourth Respondent being neutral and the Third Respondent being against. As to the residuary legatees, the 99% legatee is in favour but the 1% legatee is against.

3 The Court has been provided with 23 files of material including very lengthy affidavits and affirmations. The parties have gone back into the history of this matter in enormous detail and it is clear that the administration of the estate has given rise to strong feelings amongst the parties. The Court has read and considered all the documents to which it has been referred. However, they range far and wide and we propose to confine ourselves in this judgment to those aspects which we consider relevant for our decision.

The factual background

4 The deceased (to whom we shall refer as “the testator”) was a successful businessman. Most of his life was based in Hong Kong but he moved to Singapore in the mid 1990's, although he remained domiciled in Hong Kong. He was married for some 51 years to the Sixth Respondent (“Mrs C”). They had eight children and those who are party to these proceedings are as follows, namely PC, the third child and eldest son, AC the fourth child and other son, LC the eldest daughter and MC the seventh child.

5 On 30th June 2001 the testator executed the will that was to govern the bulk of his estate (“the Will”). He appointed PC, AC, MC and LC as executors together with not more than two of the partners of Simmons and Simmons, which was the firm of solicitors which had advised him for many years and of which CG was a partner. By clause 2.3, the executors were also appointed as trustees of the Will. By clause 2.5 he said that it was his wish that his trustees should consult amongst others Sir David Wilson of Simmons and Simmons on all matters pertaining to the powers and discretions vested in the trustees.

6 The relevant clauses of the Will provided as follows:-

> *“4. Administration Trusts*
>
> *I GIVE all my property of whatever kind and wherever situated not by this my Will or by any Codicil to it otherwise effectively disposed of (including any entailed or other property over which I shall have at my death a general power of disposition by will) to my Trustees upon trust to pay out of such property or its proceeds of sale my funeral and testamentary expenses my debts any legacies given by this my Will or any Codicil to it and any tax or duty payable on or by reason of my death which is attributable to any gift in this my Will or any Codicil*

to it which is made free of such tax or duty and to hold the balance thereof ("my residuary estate" which expression shall include the assets for the time being representing the same) upon the trusts and with and subject to the powers and provisions declared and contained in this my Will.

5. Residuary Estate

5.1 My Trustees shall hold my residuary estate UPON TRUST to divide into the percentage share indicated (or to treat it as being so divided) which percentage shares shall be held upon the trusts and subject to provisions contained in this clause.

5.2 The shares shall be held as follows:

(A) As to ONE PER CENTUM (1%) of my residuary estate for my wife absolutely and

(B) As to NINETY NINE PER CENTUM (99%) to the Trustees of the Settlement known as "the General Distribution Settlement" dated 16th April 1993 and made between (1) myself and (2) BNP Jersey Trust Corporation Limited ("the Settlement") to be held by them upon the trusts and subject to the powers and provisions declared and contained in respect of the P Fund of the Settlement.

7. Administrative powers

In the management and administration of all assets falling to be invested or held under the trusts of this my Will or any Codicil to if [sic] my Trustees shall have the powers which are lawfully capable of being conferred on trustees to the same effect as if such powers were expressly conferred by this my Will and specified in full and the Trustees may exercise or omit to exercise all or any of such powers as my Trustees think fit if they were absolute beneficial owners of such assets."

7 There was a standard charging clause for any professional executor or trustee and clause 12 provided that the trust powers and provisions of the Will should be governed by the law of England and Wales.

8 It is at this stage convenient to set out relevant details of the General Distribution Settlement ("GDS"). BNP Paribas Jersey Trust Corporation Limited ("BNP") was the original trustee and remains as such. The testator had already contributed very substantial assets to the GDS during his life. It is a discretionary settlement but his last letter of wishes indicates that he wished the assets of the P Fund (which includes the 99% of the residue to be received from his estate) to be dealt with as follows. In essence he wished a fixed amount of income to be paid out annually until 2040, at which time the capital would be distributed. The capital is to be distributed in the same percentages as the income payments are being made at that time. The percentage interests under the letter of wishes are as follows:-

(i) 27.25% to family members

(ii) 16.25% to individuals who are not family members

(iii) 51.5% to the charity pool

(iv) 5% to the charity management committee

9 The letter of wishes indicates that, as non-family members die, their share shall accrue to the charity pool. Similarly the charity management committee's 5% accrues to the charity pool in 2040. Save for Mrs C, the share of any family member dying before 2040 passes to his or her children *per stirpes* but should any family member die without issue, his or her share will accrue to the charity pool. Mrs C's share passes to the charity pool on her death.

10 As to the allocation between family members, the result of the letter of wishes is that the interests of those before the Court in the P Fund are as follows:—Mrs C 10%, PC 3%, AC 3%, LC 2% and MC 1.5%.

11 The testator died on 10th December 2001. It took some time to ascertain the nature and extent of the estate given its complexity and the fact that it was spread around many jurisdictions, but on 17th October 2002 CG, PC, AC, LC and MC took out a grant of probate in Jersey. CG was a partner in Simmons and Simmons at the time although she subsequently moved to the firm of Lawrence Graham, where she remained as at the date of the hearing. Since reserving judgment, the Court has been informed that CG has ceased to be a partner of Lawrence Graham and has taken new employment. She will cease to practice law as an English solicitor. However, she is of the opinion that her new role does not preclude her from continuing as executrix and she intends to so remain until administration of the estate has been completed.

12 Unfortunately, problems arose in connection with the Will. In particular, there was an issue as to the validity of clause 6, which dealt with certain substantial assets. Not only was there an issue as to whether the trusts declared by clause 6 were valid, but also whether the clause 6 assets were potentially liable to Australian tax because one or more of the executors was resident in Australia. The result of this was that PC and AC refused to vest the clause 6 assets in the executors, which led in due course to MC and LC instituting proceedings in March 2004 before this Court to compel the vesting of the clause 6 assets in the executors. Various other proceedings were also instituted but these were compromised at a hearing before this Court on 11th June 2004. Nevertheless, those proceedings and the stance and approach taken by the various parties led to a lack of trust and confidence between PC / AC on the one hand and CG on the other. It is clear from Advocate Robinson's submissions to us that PC and AC felt that CG had sided with MC and taken certain actions behind their back. As against that, it is clear that CG was in a difficult position because PC and AC were not handing over substantial trust assets. She therefore had to consult with her other executors as to what was to be done. Having considered the material put before us by Advocate Robinson, we do not think that CG is to be criticised for

her actions in consulting with the executors other than PC and AC and taking advice on the appropriate course of action. There was also a division between MC and LC on the one hand and PC / AC on the other.

13 Shortly after the proceedings before the Royal Court, a family meeting was held in London on 20th June 2004. It was on this occasion that, for the first time, PC disclosed that during his lifetime the testator had transferred ownership of a BVI company ("SDL") to PC and AC. No reference had been made to this previously by PC and AC when a list of the assets of the estate was compiled. PC also explained that the testator had originally made a loan to SDL in order for it to purchase several properties in Singapore. Some of these properties had subsequently been transferred out of SDL as gifts but the loan had not been formally written off before the testator died. However PC and AC were of the opinion that there was no loan due from SDL to the testator's estate as the whole transaction was intended to be a gift. PC subsequently confirmed in September 2004 that this was his and AC's stance.

14 We shall summarise the position in relation to the loan to SDL ("the SDL claim") in a little more detail later in this judgment but it is this alleged asset which is the subject of the current application before the Court. Should the executors be directed to continue to investigate the SDL claim and, if appropriate, institute proceedings against SDL to recover it or should the claim be assigned to BNP as 99% residuary beneficiary, leaving BNP to investigate and, if thought fit, take action to recover the alleged loan from SDL?

15 What is of course abundantly clear is that AC and PC, as owners of SDL, have an acute conflict of interest in relation to the investigation of the SDL claim and any proceedings which may be instituted against SDL as a result. If the claim were to succeed, the value of SDL would be reduced by the amount of the outstanding loan. We should add that there is no dispute that the amount of the original loan was approximately Singapore $21 million, which we were told at the hearing is the equivalent of approximately £10 million.

16 Following the disclosure by PC, certain investigations were undertaken. In particular, Boodle Hatfield (solicitors for PC / AC), with the agreement of the lawyers for the other executors, sent a standard letter to a number of potential witnesses seeking answers to various questions in relation to the SDL loan. The replies of the various witnesses have been referred to throughout as 'the Statements' and we shall do likewise. This process took place in the latter part of 2005. It seems it was proposed at that stage that legal advice from the BVI and / or Singapore should be taken in relation to the SDL claim but this does not appear to have been followed through at that time.

17 At this point, each of the executors was separately advised by a leading firm of English solicitors. BNP, as 99% residuary beneficiary, raised concerns about the cost of this process in January 2006. Eventually, in June 2006, Advocate Alan Binnington ("AB") was appointed as administrator of the estate on behalf of the executors and Mourants were appointed as legal advisors to the estate.

18 Nothing much seems to have happened for a while in relation to the SDL claim but the administration of the estate progressed in other respects.

19 In July 2007, MC raised the issue of a conflict of interest and AB replied on 23rd July indicating that PC / AC would be excluded from discussion concerning the merits of any claim against SDL. However, he went on to say that, at present, correspondence in relation to that and other matters was taking the form of information gathering rather than discussion of the merits, with the implication that PC / AC could be included in that exercise.

20 In July 2008 AB produced a report on the outstanding issues in relation to the administration of the estate, including the SDL matter. He referred to the Statements, which, he said, appeared to support the contention that it was the testator's intention to waive the debt due to him by SDL and to transfer the share in SDL for the benefit of PC / AC free of debt, but also pointed out that no documents relating to any waiver of the loan had been found. He also referred to the fact that SDL's accountant had indicated that he had simply maintained a ledger in respect of the SDL matter privately for the testator, but that when PC had approached him in early 2002 querying why the ledger still reflected the existence of a loan, he (the accountant) had suggested that this was an oversight and had cancelled the ledger by destroying it. AB raised the question of whether the executors wished to take legal advice in Singapore and BVI concerning the SDL claim.

21 CG responded to this by e-mail dated 10th July in which she urged her co-executors to join with her in resolving the outstanding matters, so that the administration of the estate could be completed. She then said that she was putting forward suggestions as to how any impasse might be resolved. In relation to SDL, she recalled that in 2005, draft instructions had been prepared to send to lawyers in Singapore but that these had not apparently been sent. She thought it might have been worthwhile to obtain such advice. She went on to say:-

> *"Again, given the family involvement in this, in the absence of any consensus among my co-executors as to how the matter should be resolved, I consider that the loan could be appropriated / assigned to the GDS at its outstanding value for the purpose of division of the estate between the GDS and [Mrs C]."*

Following MC's initial response, CG sent a further e-mail in which she repeated that, in an impasse situation, she did not consider it unreasonable to suggest that the loan could be assigned to the GDS and that for the purpose of division between the GDS and Mrs C, the loan would be taken at its outstanding value. AB responded by e-mail the next day in which he commented on a number of matters and said in relation to CG's suggestion of an assignment:-

> *"As PC / AC are conflicted and this issue involves beneficiaries of the GDS, I would agree that this may be an appropriate way of dealing with the matter.* It would then be for the GDS to decide whether or not it wished to request repayment"

22 However, this suggestion was rejected by MC, who also recorded Mrs C's objections. The matter does not appear to have been taken any further at that stage.

23 In October 2008 AB prepared a draft set of instructions to Singapore lawyers about the SDL matter. These instructions were originally to include the Statements. However, MC indicated that she did not agree to the Statements being included as she felt that they were not reliable. PC and AC, on the other hand, wished the Statements to be included. On 5th December 2008, CG agreed to MC's suggestion so that the matter of obtaining the Singapore advice could proceed with the minimum of delay and further expense.

24 The matter was discussed further at an executors' meeting on 16th December 2008. At that meeting PC noted that there was only a conflict in the decision making process over SDL but this did not prevent PC / AC from making comments. They both strongly disagreed with the exclusion of the Statements.

25 On 22nd December PC registered his strong objection to the omission of the Statements from the instructions to the Singapore lawyers. He went on to say that he and AC would regard any advice coming from the lawyers as flawed and they reserved their position over the reimbursement of costs in relation to the seeking of such advice.

26 At a further meeting of the executors on 30th March 2009, it was noted that the Singapore advice was still awaited. Discussion took place as to PC / AC's conflict of interest in the SDL matter and the note of the meeting records that it was noted that when the Singapore advice was received, it would be circulated to LC, MC and CG only. The decision as to whether PC / AC should receive a copy of the advice would be left to the other three executors to decide.

27 We have recounted this episode in some detail because it is clear that the decision to omit the Statements from the instruction to the Singapore lawyers exacerbated the ill feeling and distrust between PC / AC on the one hand and MC / LC and CG on the other.

28 Meanwhile, BNP, as 99% residuary legatee, had become increasingly concerned about the slow rate of progress, the divisions between the executors and the expenses which were being incurred as a result. It had been hoped to have a meeting at which all the executors would be physically present – the meetings referred to earlier were all by telephone conference call – but it appeared that even this could not be agreed. In the circumstances, Mr Kenyon, the responsible officer at BNP, arranged to meet with each of the executors individually over a period of weeks in the latter part of 2009 and circulated what has been referred to as BNP's ‘position paper’ on 14th January 2010. This recorded the outstanding matters, including a discussion of the SDL claim. The main plea from BNP was that all these matters should be brought to an early conclusion so that the estate could be wound up. In relation to the SDL claim, it regretted the fact that the Statements had not been provided to the Singapore lawyers. It envisaged the possibility of having to seek the

directions of the Court and urged all parties to provide all necessary information with a view, perhaps, to counsel's opinion being obtained.

29 On 16th February 2010, CG, MC and LC, as three of the executors of the estate made formal demand on SDL for repayment of the SDL loan. This demand was made because of concerns about any claim becoming time barred. On 20th April 2010, PC responded as a director of SDL denying that any loan was outstanding.

30 In the light of this, on 15th June 2010, CG, together with LC and MC sought advice about the SDL claim from counsel, namely Robert Hildyard QC as leading counsel and Orlando Fraser as junior counsel. The instructions to counsel and counsel's advice were not and have not been disclosed to AC / PC because of their conflict of interest but have been made available to the Court as attachments to CG's third affidavit. The Statements were among the material supplied to counsel. Leading counsel advised that CG should consult him as professional executrix, independent of LC and MC. In broadest detail, leading counsel said that in order for him to advise, it would be necessary to seek further documentary evidence (if it existed) and obtain further legal advice from other jurisdictions. It would also be necessary to obtain affidavit evidence from certain individuals. Counsel also advised that, in the absence of any advance agreement from the other executors that the costs of these further investigations should be funded by the estate, a preliminary Beddoe application to the Royal Court would be appropriate in order to obtain approval for the expenditure.

31 Following the conference, CG wrote to all the executors explaining that counsel had advised that further investigations were necessary and seeking their express confirmation that the fees and expenses of her firm and of counsel would be met out of the estate. She further explained that, if this was not forthcoming, counsel had advised that it would be necessary to make an application to this Court. MC and LC gave the required confirmation but PC and AC did not.

32 CG wrote to BNP, as residuary legatee, on 29th July 2010 in order to update BNP on the position. BNP replied on 30th July expressing some concern that CG was not sharing her enquiries with PC and AC as well as the other executors before going on to say that as 99% residuary beneficiary, it was keen to see progress made and to avoid any application to the Royal Court. It therefore indicated that it would be willing to provide an undertaking that it would authorise reasonable costs in obtaining further information regarding the SDL claim to be paid out of its share subject to seeing the instructions to counsel and his opinion, details of the enquiries which would be made, copies of further instructions to counsel and any subsequent advice. There then followed various exchanges between BNP and CG with CG seeking to ensure confidentiality in what she supplied to BNP. In particular, it is clear that she wished to ensure that details of counsel's advice were not passed by BNP to PC / AC. During the course of this correspondence CG provided her firm's (Lawrence Graham) invoice for the period April – July 2010 in the sum of £94,269.72 and BNP indicated on 19th August that it would agree to terms upon which the information provided would not be disclosed to any third parties (except for their professional advisers)

without CG's prior consent. CG also insisted she must remain free to act in what she considered to be the best interests of the estate as a whole and it would not therefore be appropriate for her to allow BNP to be involved in the day to day conduct of the work undertaken in relation to the SDL claim.

33 On 31st August PC / AC confirmed that they would not sign off on the Lawrence Graham invoices. Accordingly reliance on an undertaking from BNP was the only alternative to a Beddoe application if work on investigating the SDL claim was to continue.

34 Following further exchanges of correspondence, BNP agreed on 24th September to settle the July invoice 'in whole or in part' and to consider future invoices in relation to the SDL matter on a case by case basis. It also reserved the right to apply for any invoices (including the July invoice) to be taxed. It gave an undertaking not to disclose instructions to counsel, the supporting documents and any opinions from counsel to any third party, although it reserved the right to disclose such information to its legal advisers and to a costs draftsman with regard to assessing the reasonableness of the costs.

35 Following this letter, CG consulted junior counsel on 8th October. As well as a review of progress in relation to the merits of the SDL claim, counsel advised on the issue of costs. He said that the July invoice should be presented to BNP for payment but that it was clear that it would be necessary to go to the Royal Court to seek directions in relation to further costs being incurred. Junior counsel also advised that, in the light of BNP's expressed wishes, MC and LC should be re-involved as executors in the seeking of advice in relation to the SDL claim. Following this conference, CG wrote to BNP on 14th October seeking payment of the July invoice and advising BNP of her intention to make a Beddoe application to this Court in relation to payment for future work.

36 There then followed various exchanges of correspondence during the course of which, unfortunately, the relationship between BNP and CG deteriorated. This culminated in a letter of 14th January 2011 from BNP to CG which dealt with a number of topics but for present purposes we would refer only to two:-

> *"The Trustee will then use its powers to bring this matter to a conclusion in an appropriate manner in light of the relevant evidence.* The Trustee will of course undertake to appoint 1% of any value which is eventually recovered in respect of this loan to Mrs C, as the 1% residuary beneficiary. We realise that this would entail continuing with investigations and research and obtaining supporting advice. However, we believe that the Trustee will be in a better position to resolve this issue in an appropriate manner, not least because the Trustee has always made its position clear that all relevant evidence must be considered, not merely evidence carefully selected to support a particular conclusion, and indeed the Trustee's ability to handle this matter in a more timely and cost effective manner for the benefit of the beneficiaries."

(i) BNP said that it had instructed its lawyers Baker & Mckenzie to commence taxation proceedings in the High Court in respect of the July invoice and raised the possibility of referring future invoices to taxation as well.

(ii) It requested the executors to consider appropriating the chose in action representing the SDL claim to BNP as part of its 99% residuary entitlement to the estate. It explained its reasoning as follows:-

37 In her detailed response of 2nd February 2011, CG indicated that she would consider the proposal to assign with her fellow non-conflicted executors and with counsel, but that she was so far not persuaded by the reasoning that BNP gave for such an assignment. It is also clear from the correspondence and indeed from submissions which Advocate Gleeson has made to this Court that CG was not impressed with BNP's suggestion of a taxation in England when she had been intending to make an application concerning her costs to this Court. She also considered that it involved a breach of the confidentiality undertaking which BNP had given (see para 34 above).

38 CG arranged a third conference with leading and junior counsel on 24th February 2011 in order to consider whether or not it was appropriate to agree to BNP's request for an assignment of the SDL claim.

39 All parties have seen the attendance note of the third conference. CG indicated during the conference that she was opposed to an assignment on the grounds that it was the executor's role to investigate and get in the assets of the estate and she felt that BNP would not have the experience or requisite knowledge of the relevant events to really assist the process. Leading counsel then summarised the reasons pointing in favour of an assignment and those against and it was also noted that MC and Mrs C were against an assignment. LC's position was not clear although it was thought more likely that she would be against it. The outcome of the conference was summarised at paragraph 11 of the note as follows:-

> *"Leading counsel noted that, having considered all the arguments, and as it appeared that MC, LC (tbc) and Mrs C were against the assignment of the chose, his advice was that [CG] should inform BNP that it was the view of the non-conflicted executors that it was inappropriate to assign the chose to BNP.* However, BNP should be informed that all possibilities would be put before the Jersey Court in the context of a Beddoe application."

40 Following the conference, CG wrote to BNP on 14th March 2011 informing BNP that the majority of the non-conflicted executors, namely MC and herself, did not agree to the assignment but that LC was adopting a neutral position. She went on to say that she would also now, in accordance with counsel's advice, be making an application to this Court for approval for the non-conflicted executors to continue investigating the SDL claim and seeking an indemnity for past and future costs in relation to that work.

41 On 17th March Baker & Mckenzie issued the taxation proceedings in England on behalf of BNP. This provoked heated correspondence between CG and BNP but we need not refer to it.

42 Following further unsuccessful correspondence and discussions, CG presented her Representation before this Court on 25th March convening her fellow executors and AB together with Mrs C and BNP as residuary legatees.

43 The matter came before this Court on 14th April 2011 at which time argument was heard on the question of fees and expenses, as CG's firm Lawrence Graham had substantial outstanding fees and disbursements in relation to the SDL matter. There were also counsel's fees and fees of CG's Jersey advocates. In a short *ex tempore* judgment of that date, the Court made what it described as a 'cash flow' order. In other words, it ordered that payment in full be made of fees which had been outstanding and 60% of more recent fees but on the basis that the payment was without prejudice to whether the sums were ultimately properly due or not. In relation to the question of assignment, the Court said this at paragraph 5 of its judgment:-

> ***"We would like to say this.*** What we have here is a disputed asset of the estate. A suggestion has been made recently that this disputed asset should simply be distributed in specie to the residuary legatees, although we take the point that the suggestion was only to BNP, not to BNP and [Mrs C] who between them are one hundred percent residual legatees. It does seem to us therefore that what we have at present is a dispute as to who should investigate the SDL loan and collect it if thought fit. Should it be the executors or should it be the residuary legatees? We have to say that this appears to be a somewhat wasteful and unproductive exercise. This is clearly going to be an expensive application and all that is being argued about is which of two professional organisations should carry out the work to investigate and if necessary collect the SDL claim. Now, we do accept that we do not know all the facts and in particular we have read of some suggestion that BNP may be vulnerable to removal at the instance of those who have a conflict of interest in this matter. Therefore, we do emphasise that nothing we say is in any way determinative, because we have not heard the facts. But one starts at any rate from the proposition that it is not unreasonable to suggest that, where you have a disputed asset, distributing it to the residuary legatees in specie to make of the asset what they will, is not an unreasonable suggestion. So we merely say that in case it is of any assistance. We do emphasise that we do not know the full facts and there may well be particular matters which militate in a different direction, but we make those observations in case they help."

44 It is clear that following that judgment, CG reflected further on the position. We have been referred to much subsequent correspondence between the parties, but we think it necessary only to refer to the following.

45 On 18th May 2011 Advocate Gleeson (on behalf of CG) wrote to Advocate Sanders (on behalf of BNP) indicating that CG thought it appropriate to engage further with BNP on the question of assignment in the light of the hearing on 14th April, notwithstanding that she understood that MC and Mrs C remained strongly opposed to any assignment. Advocate Gleeson asked for clarification as to what steps BNP would take if the SDL claim were to be assigned to it. It is fair to say that for some time thereafter BNP was very reluctant to give any indication of what it would do. It did this on the basis that it did not consider it was any function of the executors to enquire as to this. Nevertheless, eventually on 5th August Advocate Sanders set out the steps which BNP would take. In practice these steps are very similar to those which CG had described as being necessary in paragraph 15 of her second affidavit.

46 A second issue addressed following the April hearing was the question of whether any assignment might be subject to legal challenge. Leading counsel had expressed concern about this at the third conference. This was in due course resolved by means of confirmations given by PC and AC by letters dated 20th and 22nd June 2011 first, that they would procure that SDL would not raise any technical challenge to the assignment and secondly, that they would procure that SDL would be party to the assignment to agree to be bound by it. These confirmations were subsequently enshrined in a consent order dated 24th June. Thus that issue appears to have been resolved.

47 In the light of the observations of this Court in April concerning the expense of litigating about which of two fiduciaries should investigate the claim, of the articulation by BNP of the steps it would take to progress the matter, and of the steps taken to ensure the validity of any assignment, CG filed a skeleton argument on 9th August in relation to a hearing on 10th August indicating that she no longer opposed assignment of the SDL claim to BNP, although she remained of the view that the SDL claim needed to be investigated and she remained willing to do so if the Court so ordered.

48 We should add at this stage that CG has been strongly criticised for the fact that, although in July 2008, as set out as para 21 above, she had suggested the possibility of an assignment of the SDL claim, she made no mention of this in the affidavit which she filed in support of her Representation. She explained this in her fourth affidavit sworn on 4th November. She apologised for this omission, but said that she did not recollect the 2008 exchange at the time of the preparation for the 2011 Representation and that this was not entirely surprising given the countless e-mails, letters, phone calls and meetings during the course of the administration of the estate. In the Court's opinion, it is unfortunate that the review of the files for the preparation of the Representation did not disclose the 2008 e-mail. It is equally unfortunate that CG did not recollect that, at one stage, she had taken the opposite view in relation to the assignment issue. But the Court accepts that these were genuine errors made in good faith and does not consider the omission relevant to the issue which it has to decide or to any issue as to costs.

49 We should add that another criticism made by PC / AC of CG is that, in a letter of 2nd

February 2011 to Baker & Mckenzie (representing BNP) she said in relation to the non-inclusion of the Statements when seeking the advice of the Singapore lawyers " *The instructions were provided to D & N in the bona fide belief that D & N had all relevant material to provide such advice.* It was only subsequent to receiving that advice that any question was raised by PC and AC, or by your client in the Position Paper, that the extra witness statements should have been sent to D & N – although it is not stated how the advice given is consequentially flawed, or would otherwise have been different." This statement was clearly incorrect in two respects. First, CG had wanted to send the Statements to D and N and had only been persuaded not to because that was the only way to obtain such advice in the face of the opposition of MC. It was not correct therefore to say that it was genuinely believed that the Singapore lawyers had all relevant material despite the omission of the Statements. Secondly, it was clear that PC and AC expressed their opposition to the non-inclusion of the Statements prior to the advice being sought. CG gave her explanation for these two errors in her fourth affidavit. The errors were unfortunate but again we acquit her of any deliberate intention to mislead either BNP (at the time of the original letter) or the Court (when she referred to that letter in her second affidavit).

50 We think that the only other matter to which we need to refer is that on 31st October 2011, BNP refined its assignment proposal by saying that it would accept the inclusion of the SDL loan in the estate accounts at its full value and an interim *in specie* distribution of the loan at that value. In other words Mrs C would receive out of the estate a compensating amount of 1% of the face value of the loan i.e. approximately £100,000. Thus she would receive the benefit of that sum even if the SDL loan turned out to be wholly unrecoverable. Prior to that, the suggestion had been that BNP would account for 1% of whatever it recovered. If it did not recover anything, Mrs C would receive nothing. In those circumstances one could understand the argument that Mrs C preferred to place recovery of the loan in the hands of the executors (in whom she said she had confidence) rather than in the hands of BNP (in whom she said she did not). But following the refined proposal, assignment of the SDL claim could not prejudice Mrs C financially as the 1% residuary legatee.

The SDL claim

51 That concludes our summary of the history of the matter up to the date of the hearing, so far as we consider it relevant. However, we should briefly describe the position in relation to the SDL claim in a little more detail, although we do not think it necessary to consider the matter in great depth because the issue for us is not whether the SDL claim is valid but whether it should be investigated and pursued (if appropriate) by some of the executors or by BNP. Nevertheless, so far as relevant, the position seems to be as follows.

52 SDL was incorporated in the BVI in 1994 and was wholly owned by the testator. On 12th July 1995 the testator, as the sole director of and on behalf of SDL, sent a letter to himself acknowledging receipt of a loan from him to SDL in the sum of Singapore $21,519,165.09. No reference was made to any governing law or jurisdiction applicable to the loan letter. The loan letter stated that the loan was to enable SDL to purchase seven properties in Singapore which were described in the loan letter and which are referred to individually as

Property 1 to Property 7. The loan letter said that the loan was repayable by quarterly payments until the full sum was repaid. It appears that one or more of the properties were let and an agent known as Belforte acted as the testator's manager for rentals in respect of the properties. On the same date as the loan letter, the testator, as a director of SDL, instructed Belforte to pay 90% of the net income received from the properties to the testator on a quarterly basis.

53 On 4th October 1999 the testator effectively transferred by way of gift (there was a nominal payment of US$1) the entire share capital of SDL (comprising only one share) to another BVI company. That company is owned by AC and PC and it executed a declaration of trust in respect of the SDL share in favour of PC and AC. Thus SDL became beneficially owned by PC and AC as joint owners. On the same date, AC and PC became the directors of SDL in place of the testator. According to the lawyer who acted for the testator in relation to the transfer, the testator asked at the time how he could expunge SDL's outstanding loan from him. She drew up a draft deed of release to achieve this, which is in the papers before us, but no executed copy has ever been found.

54 In 2001, two of the properties were transferred to Mrs C and a third property to the sister of Mrs C. The board resolution of SDL suggests sales at particular prices but there is also evidence to suggest that these were intended by the testator to be transfers by way of gift.

55 The evidence from Belforte is that only Singapore $308,000 was paid to the testator in respect of rental payments. The issue therefore is whether the testator waived the whole loan, or simply that part of the loan reflected by the properties which were transferred out of SDL or whether the loan has not been reduced at all other than by, perhaps, the quarterly payments which were made.

56 Counsel instructed by CG have not yet advised definitively on the SDL claim. The Court has been provided confidentially with an opinion obtained by MC as to the merits of the SDL claim from Mr Lynton Tucker and Mr Simon Adamyk of counsel. We also, at his request, heard from Advocate Dickinson on this aspect in the absence of Advocate Robinson. However, we have to say that we do not think that the opinion or the submissions made by Advocate Dickinson in the absence of Advocate Robinson take us any further. We accept that there is an issue as to whether the SDL loan has been wholly or partially waived or repaid and that there are arguments which can be made each way. However we do not need to go further than that and are not in a position to assess the merits of the SDL claim.

57 The testator died in 2001 and probate was granted in 2002. There is no dispute that all the debts and taxes have been paid and, subject to finalisation of the SDL claim and some other fairly minor matters, the estate may be distributed. Indeed interim distributions have already taken place.

The shape of the dispute

58 CG, as one of the executors, has applied to the Court for directions. Whilst initially she was asking the Court to approve a particular decision (namely not to assign the SDL loan), she is now neutral and therefore seeks the direction of the Court as to what should be done. LC's position as executor is similar.

59 PC and AC, supported by BNP as 99% residuary beneficiary, contend that the Court should direct the executors to assign the SDL claim to BNP, leaving BNP to investigate and, if appropriate, collect it.

60 MC, supported by Mrs C as 1% residuary beneficiary, argues that the SDL claim should not be assigned. It should be left to the executors to investigate and, if appropriate, collect it. However, she accepts that, if this were to occur, the Court would need to give directions as to how this should be done because of the conflict of interest on the part of PC and AC. She submits that the Court should direct that either CG, MC and LC or alternatively CG alone should be authorised and directed by the Court to have the conduct of the investigation and possible collection of the SDL claim to the exclusion of (in the former case) PC and AC or (in the latter case) the four other executors.

61 Before considering the rival contentions, the Court must first identify its correct role.

Role of the Court

62 All parties were agreed that, although the Will was expressed to be governed by English law, the Court's decision in this case falls to be decided under Jersey law. That is because this case is not concerned with the interpretation of the Will; rather it is concerned with directions as to how the executors appointed by this Court should act. That is a matter which all parties agree is governed by the *lex fori*.

63 However, there is disagreement between the parties as to the approach which the Court should take. All the parties other than MC and Mrs C submit that the Court is faced with deadlock. It must therefore resolve that deadlock by deciding whether, in its opinion, the SDL claim should be assigned to BNP or not. MC and Mrs C, on the other hand, submit that the Court's role is more restricted.

64 All parties accept that, just as in the case of trusts, the Court has a general supervisory jurisdiction in relation to estates. Executors may seek directions from the Court as to how they should act in a particular case. The position is conveniently summarised in Williams Mortimer and Sunnucks on Executors, Administrators and Probate (19th Edition) ("Williams") at para 60–01:-

> ***"Where problems or disputes arise in the course of administration that cannot be resolved by agreement, it may be necessary to seek the assistance of the court.*** The cases fall broadly into two classes. The first is

> where the representatives do not know how to act and need the directions of the court. This may be because the legal or factual position is unclear, and there are minor, unborn or unascertained beneficiaries, so that the representatives are unable to protect themselves by obtaining the consent of their beneficiaries. The representatives will therefore bring proceedings to have the matter determined. Or it may be because there is disagreement between the beneficiaries who hold conflicting views on what is to be done, so that the representatives are unable to act with safety without the protection of a court order. Again, the representatives (usually) will bring proceedings to have the matter determined, but sometimes a beneficiary will take the initiative and bring the proceedings. …"

65 The parties to these proceedings except MC and Mrs C ("the other parties") take the position that that is all that is being done here. CG has sought directions from the Court as to whether or not the SDL claim should be assigned and, although she initially wanted approval of a decision not to assign, her stance is now neutral and she is therefore simply seeking a decision from the Court, as is LC. In those circumstances the other parties agree that the Court may give directions in accordance with what it considers to be the best course of action.

66 The other parties further rely on the fact that there is deadlock on the issue of assignment in that the executors cannot agree. PC / AC wish to assign, CG and LC are neutral and are asking the Court to decide and MC opposes assignment. The other parties argue that, where there is deadlock, the Court has jurisdiction to resolve the deadlock and cast the deciding vote.

67 MC and Mrs C on the other hand submit that assignment of an asset *in specie* to a legatee is the exercise of a permissive power. The duty of the executors is to gather in the assets. In the case of a debt, that means collecting the debt. There is merely a power to distribute an asset *in specie*. It is a well known principle that the Court will not intervene to compel the exercise of a permissive power unless no executor (or trustee), directing his mind to relevant considerations and disregarding irrelevant considerations, would reasonably fail to do so – see for example *S v L, E and Bedell Cristin Trustees Limited* [2005] JRC 109 at para 23 and [2005] JLR N 34. They submit that the effect of the split amongst the executors in the present case is that the permissive power has not been exercised, because unanimity is required. The Court can only intervene and direct assignment if satisfied that the decision not to assign is one to which no reasonable body of executors could come.

68 The Court was referred to three cases in relation to the question of deadlock. First, we were referred to *Cowan v Scargill* [1985] 1 Ch 270. In that case, the trustees of the pension scheme of the National Coal Board consisted of five appointed by the Board and five by the National Union of Mineworkers. A dispute arose as to the investment of the assets of the pension scheme because the union trustees objected to investments in oil or overseas as a matter of principle. Eventually the board trustees began proceedings against the union trustees asking the Court for directions as to whether the union trustees were in breach of their fiduciary duties in holding up the adoption of an investment plan put forward by the

investment advisers to the fund. The Court in due course held that the union trustees were in breach of their duties because the power of investment should be exercised to produce the best financial return rather than having regard to personal or moral reservations about particular investments. However, in passing, mention was made of the situation of deadlock. At page 273, the submissions of counsel for the board trustees are recorded as follows:-

> ***"The Court will intervene to direct the manner in which the power given to trustees should be exercised where***
>
> > ***(a) the power is sought to be exercised on improper grounds or for improper purposes;***
> >
> > ***(b) there is a refusal or failure to exercise it at all, or***
> >
> > ***(c) there is a deadlock which cannot be effectively broken in any other way."***

The union trustees' position on this aspect is recorded at 275 as follows:-

"The defendants accept the 13th proposition, as to the Court's intervention. The Court has power to intervene in circumstances of utter deadlock but, with equality of voting power the concept of deadlock built into the scheme ought not to be disturbed."

69 Sir Robert Megarry V-C touched upon the matter at 297 although making it clear that his remarks were *obiter*:-

> ***"Before I part with the case, there are certain other matters that I should mention.*** They do not affect what I have to decide, but they have plainly been bones of contention that have disturbed the smooth running of the scheme, and I do not think that I should pass over them in silence. First, there is the general question of deadlock. Mr Scargill placed much emphasis on the provisions of the scheme which established five trustees from each side and no casting vote: the concept of deadlock was built into the scheme, and ought not to be disturbed by the court. Initially he appeared to be arguing that the court had no jurisdiction to resolve any deadlock unless it was so complete that the affairs of the trust had been brought to a standstill; but by the end of the hearing he had accepted that the court had jurisdiction to resolve any deadlock. I therefore need not discuss in *Re Billes* (1983) 148 DLR (3d) 512 , ***which supports this view in relation to investment by trustees.***
>
> ***Despite Mr Scargill's emphatic submissions, I can see no particular significance in the so-called deadlock provisions.*** In an ordinary trust, the trustees can do nothing unless they are unanimous: a majority cannot prevail over a minority, and so the opportunities of a deadlock are even greater than under the scheme, where a majority suffices. Certainly I can see nothing in the so-called deadlock concept to affect the jurisdiction of the court."

70 We were referred next to *Re Haasz* 21 DLR (2d) 12, a decision of the Ontario Court of Appeal. In that case a testator empowered his will trustees ' *at their sole discretion to convert into money all or any of my estate; or to retain all or any of my estate in the form of asset in which it may be at my death.'* A dispute arose as to whether shares in a substantial company should be sold and the executors were divided on this. It was accepted that unanimity was required. The Court of Appeal held that it had jurisdiction to intervene and directed that the shares be sold. However the reasons of the judges do not appear to have been identical. Laidlaw JA held that there was a duty to sell with a power to postpone the sale on a temporary basis with the result that the duty should overcome the power in the circumstances. However he also said this at 16:-

"Three of the trustees … are resolved to now convert the shares in question into money. The other three trustees … are resolved that the shares should not now be sold. There is deadlock which appears to be unbreakable without the intervention of the court. Nevertheless, counsel for the appellant maintains that in the absence of any evidence of bad faith on the part of any of the trustees opposing the sale of the share, the court should not intervene. I cannot agree. The powers given by the testator to the trustees cannot be exercised unless the court intervenes. It is of course well settled that discretionary powers vested in trustees must be exercised by their unanimous act and the Court should not interfere with the proper exercise of their discretion. The court should not substitute its discretion for that of the trustees acting properly under the powers possessed by them. <u>But, in the instant case, the court does not interfere with the exercise of the discretion of the trustees: it does not substitute its discretion for that of the trustees.</u> It simply compels the trustees to exercise their power. … it compels unanimous action of the trustees in the exercise of their discretion and enables the estate to be administered in the best interests of the beneficiaries. The intervention by the court in the circumstance in the case is therefore justified and proper." (emphasis added)

71 The reasoning of Morden JA was somewhat different. He accepted the general principle that the Court could not easily intervene in the exercise of a power. Thus at 19 he said this (omitting the authorities):-

> ***"It is well settled that in their execution of their powers, absolute and discretionary, executors must be unanimous.*** Broadly speaking where executors agree in the exercise of a discretionary power conferred upon them by the will, the Court will not interfere with or overrule their unanimous decision so long as they act **bona fide** ***and fairly as between the beneficiaries … I must say that if in the administration of this estate the executors had been unanimous in deciding to sell or to retain the Erie shares, then in the absence of evidence of bad faith or unfairness to or as between the beneficiaries, the Court would not, at the instance of a beneficiary, interfere with the exercise of their discretion.*** However that is not the situation here. The executors do not agree upon either the sale or the retention of the shares."

He went on to accept that, where there was a trust for sale with power to retain, then, in the absence of unanimity, the imperative trust for sale had to be executed. However, he concluded that the terms of the will in that case did not impose a duty to sell with the power to retain. The relevant clause conferred two equal powers upon the executors, namely a power to sell and a power to retain. He held that in those circumstances, because there was deadlock, the Court had to intervene and direct the exercise of one or other power.

72 LeBel LJ gave a short judgment to the effect that, as the executors were deadlocked and unable to agree upon the exercise of the discretion given to them under the will, the Court had the right to end the deadlock because its intervention was required in the interests of the residuary beneficiaries. He did not clarify whether he was agreeing with Laidlaw LJ, Morden JA or neither of them. However the Court was unanimous in deciding that it could intervene and directed a sale.

73 The observations of Morden JA were applied in *Re Billes* DLR (3d) 512. The facts in that case were fairly similar in that the executors were not unanimous as to whether shares forming part of the estate should be retained or sold. Holland J summarised the position as follows at 520 —521:-

> ***"The testator, Billes, in my opinion, conferred an absolute power on his executors to convert as well as an absolute power to retain.*** They must do either and must be unanimous in whatever course is chosen. Here they are not in unanimous agreement on either course and deadlock exists and this gives rise to the court's jurisdiction and, indeed duty to intervene and 'cast the deciding vote'. In my opinion, Morden JA in *Haasz* ***correctly stated the consideration for intervention to be that as long as the trustees continue to fail to discharge their duty the intention of the testator will be frustrated with the result that the beneficiaries may suffer."***

74 Advocate Dickinson seeks to distinguish these cases. He says that the Court is not faced here with two powers. It is faced with a duty on the part of the executors to gather in the assets of the estate with only a power to distribute assets *in specie*.

75 There is no dispute that executors have power to appoint assets to the beneficiary of an estate *in specie* with the consent of that beneficiary. In England, such power is now dealt with by statute (see S41 Administration of Estates Act 1925) but it is clear from cases such as *Kane v Radley-Kane* [1999] Ch 274 at 281 *et seq* and *Re Lepine* [1892] 1 Ch 210, CA, that there was a common law power to like effect. We agree that executors have a similar power under the law of Jersey.

76 However, Advocate Dickinson submits that there is a duty on executors to collect the debts of a deceased. He refers to the following passage from Williams at para 6–14:-

> ***"It is the duty of a personal representative, after a grant has been made to***

him, to collect and get in the real and personal estate of the deceased and also to administer it according to law. …

In brief, the duty to collect and call in encompasses the getting in of debts owed to the estate, the calling in of other assets and their conversion into money. The duty to administer according to law carries with it a duty to preserve and protect that estate once it has been collected and got in. In performing these duties, a representative must act with due diligence."

77 However, that observation has to be understood in context. In our judgment, the essence of an executor's duty is to gather in the assets (in the sense of getting title to and control of the assets), pay the funeral and testamentary expenses and the debts (including taxes etc) of the estate and then distributing the estate to those entitled under the will. Clearly, the executor is under a duty to convert sufficient of the assets into cash to pay the expenses, debts and any pecuniary legacies from the estate. However, once that has occurred, we do not see that there is a duty to convert further assets into cash, with only a power to retain assets and distribute them in kind. In our judgment the duty is simply to distribute the estate and there is power to make that distribution in cash and a power to make it in kind.

78 Support for this view is found in the English case of *In Re Chapman* [1896] 2 Ch 763. In that case the deceased had owned a number of mortgages and at the date of his death, many of them were in default. Although the terms of the will are not described in the report, it seems clear that the executors were also constituted as trustees and that the residuary estate was to be held on the trusts specified in the will. Neither the executors nor the trustees had realised the mortgages and losses had been incurred. The main part of the judgment related to whether either the executors or the trustees were liable for the losses incurred as a result of not having realised the mortgages during the year of administration following the deceased's death. However, in passing, two of the judges made useful observations on the duty of executors in this respect. Thus Lindley LJ at 773 said:-

"These, however, are merely general observations, and it is necessary to examine more closely what the duties of the trustees were at various periods, and to ascertain whether and in what respect there was any failure to discharge those duties. The same persons being executors and trustees, it will be convenient to consider their duties, first, as executors, and, secondly, as trustees, as if the same persons did not fill both characters.

Under such a will as this, the duty of the executors was simply to call in the testator's unsecured debts, and to convert into money so much of his personal estate as was necessary to enable them to pay his funeral and testamentary expenses, and his debts and pecuniary legacies, and to hand over to the trustees whatever personal estate was not wanted for those purposes. No doubt, speaking generally, it is the duty of executors to get in debts due to their testators; but it was no part of the duty of the executors as such to realise mortgage securities of their testator not wanted for the above-mentioned purposes; see *Orr v Newton* ; ***and the executors were not, as***

executors, guilty of any devastavit in not realizing such securities."

79 Lopes LJ said at 778:-

> ***"As I have said, the trustees and executors were the same persons, and it was faintly urged that they, as executors, ought to have realised these real securities at the end of a year after the testator's death.*** That is easily disposed of: it cannot be seriously contended that it was the duty of the executors to realise mortgages created by the testator himself, when their realisation was not required for any testamentary purpose, and when the securities themselves were not in any peril."

80 These observations seem to us consistent with the interests of the beneficiaries in the administration of an estate. Take a case where the residuary estate includes the contents of the testator's home. On Advocate Dickinson's argument, the executors are under a duty to sell those contents and turn them into cash with only a power to distribute them *in specie* even if they consist of family heirlooms or other contents of sentimental value. On his argument, a single executor can veto and prevent the distribution of these contents *in specie* because the exercise of the power requires unanimity. The Court cannot intervene unless the decision of the dissenting executor reaches the high threshold of being a decision to which no reasonable executor could come.

81 We do not think that that can be right. The better approach is that executors have a duty (once the administration of the estate is complete in the sense of getting title to the assets and realising sufficient to pay the debts and liabilities and any pecuniary legacies) to distribute the residuary estate to those entitled under the terms of the will but with power to do so either in kind (with the consent of the relevant beneficiary) or by converting the asset into cash and distributing cash.

82 In relation to a chose in action such as a debt owed or allegedly owed to the testator, it will no doubt usually be the case that the executors will be expected to collect that debt and turn it into cash because the beneficiaries are unlikely to be content to receive it in kind. The executors must exercise one power or the other and if they cannot exercise the power to distribute in kind, they must then exercise the power to convert into cash. However, the fact that in most cases the executors will probably have to undertake the task of collecting debts owed to the deceased does not alter the underlying legal analysis, namely that the duty is to distribute the estate in accordance with the will and that, in the absence of anything specific in the will, that duty may be fulfilled by distributing in kind or in cash and the executors have equal power to do both.

83 If that analysis is correct, then the position in the present case is similar to that in *Re Haasz* and *Re Billes*. As described at paragraph 57, all liabilities of the estate have been settled and it is now a question of distribution of the residuary estate to those entitled under the will. There is deadlock because the executors are not unanimous in either direction and

cannot therefore exercise the power to assign the SDL loan *in specie* or exercise the power to investigate and collect the SDL loan and turn it into cash. In those circumstances, it is the Court that must break the deadlock by directing the executors to follow whichever course the Court thinks is preferable in the interests of the beneficiaries of the estate. We should add that, in this context, the expressions 'legatees' and 'beneficiaries' may be used interchangeably.

84 Even if the above analysis is wrong, we think that, on the facts of this case, the Court has jurisdiction to intervene and direct the executors to follow the course which the Court considers to be in the best interests of the beneficiaries of the estate.

85 In the first place, contrary to the assertion of Advocate Dickinson, this is not the case of a beneficiary seeking to compel executors or trustees to exercise a permissive power. BNP has not brought this application; CG has. This is a case where, in effect, two of the executors are asking the Court for directions. Advocate Gleeson said that CG was not surrendering her discretion to the Court; but, in reality, it is hard to distinguish her position and that of LC from an executor who does surrender her discretion. CG has brought an application to the Court seeking its direction on the question of assignment. Whatever may have been her original position, she is now neutral i.e. she has not decided in favour of or against assignment. She is asking the Court to decide the matter. LC's position is the same. We cannot see any real difference between a surrender of discretion and what CG and LC are doing in this case.

86 The extract from Williams cited at para 64 above makes it clear that the assistance of the Court may be sought where the executors do not know how to act and need the directions of the Court. That is exactly the situation here so far as CG and LC are concerned. They do not know how to act and are neutral and they seek directions as to how they should act in circumstances where the other three executors are divided. In our judgment, it would be singularly unhelpful for the Court to decline to assist by exercising its jurisdiction to give directions. It seems to us that this is just the sort of situation where the supervisory jurisdiction of the Court can be of real assistance in safeguarding the interests of the beneficiaries of an estate.

87 Secondly, we consider that the Court's jurisdiction where there is deadlock is wider than that contended for by Advocate Dickinson. In support of this assertion we would refer to the following:-

> ***"Accordingly, trustees are generally required to act unanimously in the exercise of their powers; a majority is not entitled to bind the trust against the opposition of a minority.*** A majority – or for that matter a minority – can, however, insist that a trust be executed. Thus where A, B and C are trustees of property with a power of sale, A and B cannot insist on selling if C bona fide opposes the proposal. On the other hand, where there are trustees for sale but with a power to postpone the sale, there must ordinarily be a sale unless all three agree to exercise the power of postponement. The same applies to other

powers. **Where the affairs of the trust are deadlocked in any particular respect, the Court has jurisdiction to resolve the deadlock**." (emphasis added).

Cowan is given as the authority for the statement in the emphasised passage.

> ***"One must, however, beware of supposing, simply because of the principle as bred in these particular rules, that on every occasion on which the principle can be invoked in areas outside the ambit of the specific rules some similarly rigid rule either exists or should be crafted.*** There is a surprising lack of English authority on the consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist. The relative absence of authority certainly suggests that there is no iron rule that, where such action has taken place, a beneficiary is entitled **ex d ebito justitiae *to have it set aside.*** Equally, one would expect to find, in the absence of such an iron rule, that, where such action is challenged on such grounds, the onus would be thrown upon the trustee to demonstrate that the conflicting interest or duty has not in fact operated in a vitiating way.
>
> ***In some areas of our law the existence of conflicts of this kind is recognised and managed by a variety of devices, ranging from requiring the affected person to declare his interest to requiring him to abstain from participation in the relevant decision-making process.*** In the law of private (i.e. non-charitable) trusts, where unanimity of decision-making is required, such devices are difficult to transplant. The beneficiary is entitled to the decision of all his trustees but, at the same time, he is entitled to require that the decision is made independently of any private interest or competing duty of any of the trustees. When 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."

(i) Although his remarks were *obiter*, we consider that Megarry V-C was also of this view by reference to his remarks in *Cowan v Scargill* quoted at para 69 above. That case concerned a power of investment. It is clear that Mr Scargill was arguing that deadlock was built into the structure (because five trustees were appointed by each side) and therefore the court should be very slow to interfere to break any deadlock. Megarry V-C dismissed this contention and pointed out the prospects of deadlock were greater in the ordinary case where trustees had to be unanimous. In our judgment, when he stated on the 10th line of the passage we have quoted "…that by the end of the hearing he had accepted that the Court had jurisdiction to resolve any deadlock", Megarry V-C was clearly agreeing that that was the correct position, which was also consistent with how the board trustees had put their case (see para 68 above).

(ii) This also appears to be Lewin's understanding of the observations in *Cowan*. At para 29 – 62 Lewin states:-

(iii) We accept that, where executors (or trustees) unanimously exercise their discretion not to exercise a permissive power, the Court cannot interfere save on the very limited grounds described earlier. But that is not what has occurred here. The executors have not decided not to exercise their power; they are divided and have reached no decision. In this context we endorse the observations of Laidlaw LJ in Haasz (in the emphasised passage at para 70 above) and of LeBel LJ (described at para 72 above). Advocate Dickinson argues that, where unanimity is not achieved, this must be taken as a decision that the power is not to be exercised. But that would be to allow the views of one dissenting executor to override the views of all the other executors. By dint of a very technical view, it would have the effect that, although all but one of the executors (or trustees) wished to exercise a permissive power, the dissenting view must prevail and the executors (or trustees) must be treated in law as having exercised their discretion not to exercise the power. This would be a fiction and in our judgment it must be open to the Court to exercise its supervisory jurisdiction in such circumstances so as to safeguard the best interests of the beneficiaries if it thinks that the majority are right and the dissenting executor (or trustee) is wrong.

(iv) The executors are deadlocked because, without the intervention of the Court, the administration of this estate cannot proceed. MC does not agree to an assignment and therefore that course cannot be followed unless the Court so directs. PC and AC, on the other hand, do not agree to the executors investigating and possibly collecting the SDL claim and therefore the executors cannot follow that course unless the Court gives directions to enable them to proceed without the participation of PC and AC. There is therefore real deadlock in that the Court must intervene and give directions

one way or the other as no one can proceed without such directions.

(v) The extent of the deadlock is shown by the fact that the executors could not even agree to pay the fees of Lawrence Graham and CG had therefore to have recourse to the Court to resolve this deadlock as described at para 43 above.

(vi) Advocate Dickinson argues that there is not really any deadlock because the views of PC and AC should be ignored as they have a conflict of interest. If the Court were to authorise CG, MC and LC (or just CG) to investigate and if necessary pursue the SDL claim, there would be no deadlock. We accept that there is a strong conflict of interest on the part of PC and AC so far as the investigation and / or collection of the SDL claim is concerned. We also accept that there is a conflict of interest – albeit a lesser one – as to the question of assignment, as this will determine the identity of the person charged with the responsibility for investigating and / or collecting the SDL claim. The Court undoubtedly has power to remove an executor or a trustee because of a conflict of interest and could therefore remove PC and AC altogether as executors if necessary. However, no one has contended for that and it would seem to be a disproportionate remedy given that they have no conflict of interest in relation to the rest of the administration of the estate. Given that the Court has power to remove them altogether, we are satisfied that it also has power to impose a less drastic solution by excluding them from investigation and / or collection of the SDL claim and authorising the remaining executors (or some of them) to undertake that exercise for and on behalf of the executors as a whole. However, until the Court grants such relief, there is deadlock even though PC and AC have a conflict of interest. In this respect we agree with the observations of Hart J in *Public Trustee v Cooper* [2001] WTL 901 at 933 C. Having referred to rules which had been developed to deal with certain specified types of conflict of interest, he went on to say:-

88 In our judgment the Court must carefully scrutinise the decisions made by PC and AC because of their conflict of interest but, given particularly that the proposal for assignment is supported by BNP as 99% residuary legatee, the fact that they have a conflict of interest does not, in our judgment, mean that they can simply be ignored and that there is no deadlock amongst the executors.

89 For these reasons, we conclude that the role of the Court in these proceedings is to reach its own decision as to whether the SDL claim should be assigned or not; and in reaching this decision, it must have regard to what it considers to be the best interests of the residuary beneficiaries. We therefore turn to consider the submissions on this aspect.

The contentions

90 We have read carefully the very lengthy written documentation produced to us as well as considering the oral submissions. What follows is a brief summary of the submissions which we consider to be most relevant.

91 BNP, supported by PC / AC, submitted as follows:-

(i) The executors could not function effectively as a body as they were at war. There was a considerable level of distrust and disagreement between MC (sometimes with LC) on the one hand and PC / AC on the other. Furthermore PC / AC had lost confidence in CG.

(ii) This has resulted in the administration of the estate taking an inordinate amount of time and costing an excessive amount. The administration of the estate was still not complete some 9 years after the grant of probate. The fees and costs charged to the estate exceeded US$10 million and CG's fees in respect of the present proceedings exceeded £800,000 up to 25th August 2011.

(iii) These costs were being borne as to 99% by BNP. BNP was not willing to have to pay further large sums for litigation in respect of the SDL claim in circumstances where it would have no control over the investigation and any consequent proceedings. If the SDL claim were assigned, BNP would at least be in control of the costs to be incurred in investigating and / or pursuing the claim.

(iv) Sadly, it was not only the relationship between PC / AC and CG which had broken down. As a result of the quarrels over fees and other matters described earlier, CG no longer commanded BNP's confidence.

(v) Assigning the SDL claim would enable the estate to be wound up in early course which would be entirely beneficial. If the claim were not to be assigned, the administration of the estate would continue very slowly and at great expense because of the fact that the executors could not function properly as a body by reason of their deep divisions and the ill feeling which had been engendered. This would not be in the interests of the beneficiaries of the estate.

(vi) BNP was in a position to act dispassionately in investigating and if necessary, pursuing the SDL claim. It had been chosen by the testator as trustee of the GDS and had acted as such for some 7 years before his death. It was fully aware of its fiduciary duties and it was of note that Mrs C and MC were both beneficiaries under the GDS and could therefore be expected to hold BNP to account in respect of how it proceeded concerning the SDL claim.

(vii) The fact that CG had undertaken work and investigations already into the SDL claim was not a reason to leave the matter with the executors. The fruits of such work could be used by BNP.

(viii) The fact that assignment to BNP was the obvious way of dealing with the matter was supported by the fact that this had been CG's reaction in July 2008 (as summarised at para 21 above). It was clear that CG did not pursue the idea further only because of MC's objection.

(ix) Mrs C, as 1% residuary beneficiary, could not be prejudiced following the refinement of BNP's proposal on 31st October 2011 when it agreed to accept the

inclusion of the SDL claim at its full value and to accept an interim *in specie* distribution of the SDL loan at that value. Thus Mrs C would receive the full face value of the loan and would be entitled to retain this even if BNP did not recover the full amount of the loan.

(x) As to the point concerning title, BNP considered that SDL was precluded from taking any point because of it having agreed not to do so and to be party to the assignment. But even if it did take such a point, this could easily be rectified by the executors obtaining probate in BVI or Singapore, as the case may be. This would be a simple process.

92 We would summarise the arguments of MC and Mrs C as follows:-

Decision

(i) The Court should respect the testator's wishes. He had chosen the executors to administer his estate. In particular, he had chosen a partner in Simmons and Simmons and he had also chosen MC – despite the fact that she was the seventh child – presumably because he saw suitable qualities in MC. The executors' duties included investigating and if necessary collecting the SDL claim and it would be wrong for the Court to transfer that function to BNP, whom the testator had not nominated for that purpose.

(ii) BNP had no right to demand an assignment of the SDL claim.

(iii) The executors had not yet got title to the SDL claim as no grant had been taken out in the BVI (or possibly Singapore).

(iv) CG, on behalf of the non-conflicted executors, had carried out considerable investigations into the SDL claim and there was not much further investigation to be done. It should therefore be left to the executors to continue the task. Assignment at this stage would throw away much of the work already done.

(v) There was no advantage in assigning the claim to BNP. BNP was a trustee and accordingly, it would have to take out a Beddoe application whichever way it decided. If it decided to institute proceedings against AC / PC, it would require the Court's blessing and it would similarly require blessing if it decided not to proceed.

(vi) MC and Mrs C did not have confidence in BNP to investigate the SDL claim properly. The terms of some of the correspondence from BNP suggested that it had already made up its mind not to pursue the matter against PC / AC.

(vii) The fact that Mrs C was against the assignment was relevant. She was a 1% residuary beneficiary. It was conceded that, following the refined proposal in October 2011, she would not lose financially but she did not wish to gain at the expense of the other beneficiaries of the GDS in the event that the full amount of the SDL claim was not recovered. She believed that the proper course was therefore for the executors to

investigate and gather in the claim. In any event BNP had ignored Mrs C and not treated her appropriately as a beneficiary of the GDS.

(viii) It was accepted that, if the Court ordered CG, MC and LC to investigate and pursue the claim, this could result in intra family litigation, which would not have pleased the testator. But the alternative suggestion was that the Court should direct CG alone to pursue the matter and this would avoid intra family litigation.

(ix) It was conceded that the administration of the estate had taken a long time and cost a considerable amount but this was because of the actions of BNP, PC and AC who had contributed to the delay and the costs.

(x) An order for assignment would in effect constitute BNP as executor to administer the estate. BNP would have to take exactly the same steps as the executors and therefore no advantage was to be gained by an assignment.

(xi) BNP had been very reluctant to disclose information about how it would deal with the SDL claim and this had exacerbated the concerns of MC and Mrs C as to whether BNP would pursue the matter with appropriate vigour.

(xii) It was accepted that, where a sole residuary beneficiary who was beneficially entitled to the residue wished to have a disputed debt assigned to him, it might well be seen as unreasonable for an executor to insist on having the conduct of a claim which the beneficiary might want to deal with in his own way and for his sole benefit. He might want to pursue the claim. He might not. He might like the alleged debtor or he might dislike him. He might want to spend a lot on the claim or very little. It was a matter for the residuary beneficiary rather than the executor. But the position was different where the residuary beneficiary was a trustee (as here), as the obligations of the trustee were exactly the same as those of the executors in the sense that they owed fiduciary duties to their respective beneficiaries and could not just therefore do as they wished.

93 We have carefully considered the evidence and submissions made to us. We have come to the clear opinion that the executors should be directed to assign the SDL claim to BNP as trustee of the GDS. We would summarise our reasons as follows:-

(i) Following the refined proposal of October 2011, there can be no financial prejudice to Mrs C. She will receive the full face value of her share of the SDL loan (approximately £100, 000) and will be entitled to keep that even if BNP recovers nothing. She has expressed concern that she might therefore benefit at the expense of other beneficiaries of the GDS but that is entirely a matter for her. In the event that less than the full face value of the SDL loan is recovered by BNP, there would be nothing to prevent Mrs C from making a compensating gift to the GDS so that she does not keep more than her fair share.

(ii) It follows that the sole economic interest in the SDL claim lies with BNP as 99% residuary beneficiary. In circumstances where the sole residuary beneficiary with an

interest in an asset (whether or not it is 'disputed' as between the estate and a third party) wishes it to be distributed *in specie*, it would, in our judgment, require some very powerful reason for the executors to refuse the requested distribution and insist on prolonging the administration of the estate for the purpose of investigating whether the asset is capable of conversion into cash. In this case it is of course only one executor who wishes to do so.

(iii) BNP, as the entity with the sole economic interest in the SDL claim, has requested its assignment so that it can carry out the investigation and, if appropriate, collection of the claim. In our judgment, the fact that BNP is a fiduciary rather than a person absolutely entitled in its own right to the residuary estate does not make any difference. So far as the executors are concerned, they have to account to BNP for the residuary estate and it is for BNP to fulfil its fiduciary duties under the GDS.

(iv) But in any event, we see no reason to doubt that BNP will carry out its fiduciary duties under the GDS. In the first place, it has asserted that it will do so. Secondly, we do not read any of the correspondence as throwing doubt on this assertion. Thirdly, it is aware of the fact that Mrs C and MC are amongst the beneficiaries of the GDS and they clearly have a strong view as to the need to investigate properly and, if appropriate, collect the SDL claim. We think it highly unlikely that, with that knowledge, BNP will not conduct the investigation properly and in good faith. Were it to do otherwise, it would clearly be opening itself up to a claim by one or more of the beneficiaries of the GDS. For the sake of completeness on this aspect, we should add that, although at the time of the preliminary hearing on 14th April 2011 there was some suggestion that BNP might be vulnerable to removal by PC / AC and therefore might not wish to upset them, Advocate Dickinson expressly disavowed any such suggestion before us.

(v) It is quite clear that there is considerable distrust and division amongst the executors and that they are incapable of acting effectively and efficiently as a body. The administration of this estate has taken far too long and cost far too much. Although the amounts involved were large, it was not a particularly complex estate. In saying this, we are not to be taken as attributing blame as between the various executors. In particular, we are not to be taken as associating ourselves with the criticism of CG and her firm by BNP and by PC / AC. We are not in a position to make any finding on the fault for the level of fees or the time that matters have taken. But the fact is that, because of the divisions, progress on any aspect of the estate is painfully slow and, as a result, expensive. We have no doubt that the testator would be dismayed by what has occurred.

(vi) The interests of all the beneficiaries of the estate would, in our judgment, be best served by bringing the administration of the estate to a close as soon as possible. There is no reason why this should not be done very promptly if the SDL claim is assigned. The other outstanding matters have been described to us and there is nothing of note. Conversely, if the SDL claim is not assigned, the executors will have to continue in post for some time with continuing scope for division and argument. We accept of course that responsibility for the SDL claim itself would be delegated either to CG alone or to CG, MC and LC, but the executors as a whole would still need to

deal with the other matters in circumstances where some of the executors were investigating and possibly instituting action against a company owned by two of the other executors. It would be a recipe for continued bad feeling, disagreement, delay and expense.

(vii) In our judgment, it would be quite wrong for CG (or CG, MC and LC) to have responsibility for deciding on what investigations and actions should be taken in relation to the SDL claim in circumstances when BNP, as the sole entity with any economic interest in the claim, was not content for them to do so but would be bearing the cost of such investigations and actions. It is clear from the history of this matter, as recited earlier, and also from the tone of the submissions made by counsel, that the relationship between CG and BNP has broken down to a considerable extent. Thus, if there is no assignment, CG, as the professional executor, will have the major responsibility for conducting the investigations and possible litigation, all at BNP's expense in circumstances where there is already dispute between BNP and CG as to the level of expense incurred in relation to the estate. We emphasise that we are not suggesting that CG's fees have been excessive. We are not in a position to decide this. But it is clear that BNP feels that they are. To require a residuary beneficiary with the sole economic interest in the estate to fund continued investigation by the executors in circumstances where the beneficiary wishes to assume control of the investigations and does not have confidence in the executors concerned seems to us a highly unsatisfactory outcome and cannot be considered to be in the best interests of the residuary beneficiary.

(viii) It is not insignificant that in 2008, CG herself thought that assignment would offer an appropriate way out of the impasse which had developed. Subsequently, in the face of opposition from MC, she changed her mind and opposed assignment; now she is neutral. However we think that her first instincts were correct.

(ix) In the light of the confirmations enshrined in the consent order dated 24th June 2011 (see para 46 above), there would appear no longer to be any technical objections to an assignment. In the unlikely event that there were, this could be easily resolved by the executors taking out a grant of probate in the BVI (or possibly Singapore) and it would not in our judgment be a reason for deciding against assignment.

(x) We have carefully considered MC and Mrs C's strongly held view that the testator chose the present executors to administer his estate and it would be disregarding those wishes to permit the assignment. Whilst understanding the sincerity of those views, we must respectfully disagree. The executors will have administered the estate and will have distributed the remaining assets to the residuary beneficiary in accordance with their duties. The sole issue is whether this particular asset should be distributed *in specie* or in cash and a direction that it should be distributed *in specie* is not to supplant the executors by the beneficiary. The testator is unlikely to have envisaged the current situation.

(xi) We have also considered the submission that MC and Mrs C do not have confidence in BNP to pursue the SDL claim vigorously. As already stated, we see no

reason on the evidence produced to us to doubt that BNP will not fulfil its fiduciary duties as trustee of the GDS but, should their fears turn out to be well founded, they would of course have a remedy as beneficiaries of the GDS.

(xii) We note that the work investigating the SDL loan has to date been undertaken by the executors but we see no reason why the executors should not make all the product of that investigation available to BNP so that no extra cost should be incurred by the assignment. BNP will be able to use all the information and advice which has been obtained by the executors.

(xiii) We accept that BNP has no right to demand an assignment of the SDL claim and it has not contended that it has. The issue for our decision is whether it is in the best interests of the residuary beneficiaries of the estate that the claim should be assigned.

(xiv) It is not disputed by any party that the duty of executors is to act in the best interests of the beneficiaries of the estate. Where the sole beneficiary with an economic interest in an asset wishes that asset to be distributed to it and for the executors not to incur further expense in investigating that asset, it is hard to see how it can be said to be in the best interests of that beneficiary to ignore the request.

(xv) We accept that BNP may well feel the need to take out a Beddoe application once it has reached a decision on whether or not to institute proceedings to recover the SDL claim. But we think the executors would be likely to do the same if the Court left the matter with some of them as requested by MC and Mrs C. We therefore regard the point as neutral.

94 In case our analysis of the legal position at paras 62 – 89 above is wrong, we have gone on to consider whether the decision of MC to oppose the assignment is a decision to which no reasonable executor could come, thereby enabling the Court, even on the argument of MC and Mrs C, to direct that the power to distribute in specie be exercised in this case. We are conscious that, simply because we have reached a particular view, this does not mean that an opposing view is one to which no reasonable executor could come. We accept that it is a very high threshold. As already stated, we also accept the genuineness of MC's views and her strong feelings of loyalty to what she perceives were the testator's wishes.

95 Nevertheless, doing the best we can, we have concluded that even that high threshold is met. In circumstances where the executors are deeply divided and incapable of acting effectively as a body, where the administration of the estate has lasted over nine years and cost over $10 million, where since the October 2011 refinement Mrs C's position has been fully protected and the only economic interest in the SDL claim lies with BNP, where BNP itself wishes that the claim be assigned to it, where BNP does not have confidence in the executors and does not wish them to be in control of conducting the claim at the expense of BNP and for the additional reasons summarised in para 93, we consider that a decision to seek to prolong the administration for the purpose of investigating whether the asset in question is capable of conversion into cash is a decision to which no reasonable executor could come.

96 Accordingly, even if the Court is being asked to direct the execution of a permissive power and the law is as submitted by Advocate Dickinson, we consider that the threshold for so ordering has been met.

97 We are willing to hear the parties on the exact form of the order.