

First Purported Trustee v Second Purported Trustee

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| Jurisdiction: | Jersey |
| Judge: | J. A. Clyde-Smith, Jurats Ramsden, Morgan, Clyde-Smith |
| Judgment Date: | 22 February 2016 |
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| Court: | Royal Court |

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Text

Between
First Purported Trustee
Representor
and
Second Purported Trustee
First Respondent

and

Retired Trustee
Second Respondent

and

Settlor's Spouse
Third Respondent

and

Beneficiary
Fourth Respondent

and

Advocate James Dickinson as guardian for the minor daughter of the Beneficiary and any
unborn beneficiaries of the Trust
Fifth Respondent

[2016] JRC 48

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Ramsden **and** Morgan

ROYAL COURT

(Samedi)

Trust — application by the 4th respondent to set aside the appointment of the representor
and the 1st respondent as trustees of the Trust.

IN THE MATTER OF THE Z TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Authorities

Re Skeats' Settlement [1889] 42 Ch D 522.

In re Bird Charitable Trust [\[2008\] JLR 1](#).

In re Jasmine Trustees Limited [\[2015\] JRC 196](#).

Trusts (Jersey) Law 1984.

Re Z [2015] JRC 19.

Tait v Apex Trustees Limited [\[2012\] JRC 148](#).

Seggins v Apex Trust Company Limited [\[2013\] JRC 77](#).

Moffat v Apex Trust Company Limited [\[2014\] JRC 252](#).

In the Matter of the Representation of Wilkes [\[2015\] JRC 200](#).

Royal British Bank v Turquand [1856] 6 E&B 327.

[Law of Property Act 1925](#).

Re BB [\[2011\] JLR 672](#).

Trust & Trustees Volume 19 No 1 February 2013.

Trusts and Trustees Volume 19 No 5 June 2013 pages 469–474, Dakis Hagen and Bruce Lincoln.

19th Edition of Lewin on Trusts.

Re IMK Family Trusts [\[2008\] JLR 250](#).

Shinorvic Trust [\[2012\] \(1\) JLR 324](#).

Re Gleeds Retirement Benefits Scheme [\[2015\] Ch 212](#).

HR Trustees Ltd v Wembley Plc [\[2011\] EWHC 2974 \(Ch\)](#).

Schmidt v Rosewood Trust Ltd [\[2003\] 2 AC 709](#).

Re Norfolk's Settlement Trusts [\[1982\] Ch. 61](#).

Re WW and XX [\[2011\] JRC 231](#).

Re New [\[1901\] 2 Ch 534](#).

Chapman v Chapman [\[1954\] AC 429](#).

Jasmine Trustees Ltd v Wells & Hind [\[2008\] Ch 194](#).

English [Trustee Act 1925](#).

Mettoy Pension Trustees Ltd v Evans [\[1990\] 1 WLR 1587](#).

Advocate G. C. Staal **for the Fourth Respondent**.

Advocate L. K. A. Richardson **for the Representor and the First Respondent**.

Advocate A. Kistler **for the Second Respondent**.

THE COMMISSIONER:

- 1 The fourth respondent (“the Beneficiary”) applies to have set aside the appointment made by his late mother the settlor of the representor and the first respondent as trustees of the Trust, as a consequence of which the Trust became resident in the United Kingdom for tax purposes.

Background

- 2 The Trust is a discretionary trust settled by the settlor by deed of settlement. It is governed by Jersey law.
- 3 The principal asset of the Trust is a shareholding in a foreign registered company ("the Company") which prior to any of the events listed below owned two properties in England, a leasehold flat ("the Flat") and a freehold property ("the Property").
- 4 The original beneficiaries of the Trust were the settlor and her children (including the Beneficiary) and remoter issue.
- 5 The settlor purported to exercise the power of appointment conferred on her under the Trust deed on the "Appointment Day", so as to appoint the Representor and the First Respondent (together the "Purported Trustees") as trustees in place of the second respondent the Retired Trustee. At that time, the Purported Trustees were both resident in the UK and worked for a firm of solicitors ("Solicitors' Firm") in London.
- 6 On the same day, the Retired Trustee purported to appoint the Purported Director as the Company's director, president, treasurer and secretary and to transfer the Company's shares to the Purported Nominee, which in turn purportedly held the Company's shares on bare trust for the Purported Trustees.
- 7 At the instigation of the settlor, the Purported Trustees executed a deed of addition and a deed of exclusion on by which, respectively, two of her children were revocably excluded and the settlor's spouse was added as a beneficiary.
- 8 The settlor died less than a year after the Appointment Day. Shortly after the settlor's death, the settlor's two children who had been revocably excluded challenged the validity of the appointment of the Purported Trustees on the basis of the settlor's lack of physical and mental capacity.
- 9 Approximately two years after the Appointment Day the Company sold the Flat for approximately $\frac{2}{3}$ of the value of the trust fund. It retains ownership of the Property which is thought to be worth approximately $\frac{1}{3}$ of the value of the trust fund and is occupied by the settlor's spouse.
- 10 The two revocably excluded children neither acted upon nor withdrew their challenge, and as a consequence the First Purported Trustee brought a representation before the Court, seeking directions as to the validity of the appointment of the Purported Trustees.
- 11 During the course of last year, the Court approved an agreement between the convened

parties, the Purported Trustees and the Retired Trustee surrendering their discretion to the Court, by which all of the claims the two revocably excluded children (and their issue) had in relation to the Trust were settled and under which they, their children and remoter issue were irrevocably excluded as beneficiaries of the Trust.

- 12 It was also a term of that agreement that the Beneficiary would apply to the Court to set aside the appointment of the Purported Trustees because of the adverse tax consequences to the Trust of that appointment. It was agreed that the Purported Trustees and the Retired Trustee would play a neutral role in that application. HMRC had been notified of the application but had not sought leave to participate.

The appointment of the Purported Trustees

- 13 The Court had before it affidavits sworn by the Purported Trustees, the Beneficiary, the settlor's spouse and Mr X on behalf of the Retired Trustee. It also had a report from Mr Jonathan Riley, an English solicitor in the firm of Michelmores LLP, on the tax consequences of the trust moving onshore.
- 14 There is no dispute as to the events surrounding the appointment of the Purported Trustees and we set them out as we find them to be.
- 15 The settlor was a member of a significant Middle Eastern family. She married the settlor's spouse before the Trust was established, but because they were not from the same country, the marriage was not approved by her family. As a consequence, they experienced a number of difficulties with the authorities in her home country. She was stopped from accessing her assets her home country. Two of her children (namely those who were later revocably excluded) benefited from these assets and declined to transfer them to her. As a consequence of this and a number of other matters which it is not necessary to go into, she had a very strained relationship with the two children who were later revocably excluded. She and the settlor's spouse had one son, the Beneficiary, and some five years after establishing the Trust, they moved permanently to the United Kingdom, which was when their home, the Property, was acquired by the Company.
- 16 The settlor and the settlor's spouse were clients of the Solicitors' Firm and consulted the Second Purported Trustee (who worked at the firm) in relation to their wills and the Trust. At that time the settlor was very ill with a series of medical issues and had suffered from a stroke. Although she spoke some English, it was not her first language and the settlor's spouse would act as an intermediary, sometimes explaining the Second Purported Trustee's advice to the settlor.
- 17 The settlor had a number of concerns at that time in relation to the Trust:-

(i) The Retired Trustee, who administered the Trust from Jersey, was threatening (in her view) to sell the Flat for a figure of less than ? of the eventual sale price, something she and the family were strongly opposed to and which they thought was a serious undervalue. To be fair to the Retired Trustee, the Trust had no liquid funds to meet its obligations and as a consequence, relations between the settlor and the Retired Trustee had become strained. The Flat had been let out by the family, with income being collected by the settlor's spouse, as opposed to being paid to the Company. It was actually a suggestion, rather than a threat, of the Retired Trustee that it solve the funding problem by selling the Flat, which it thought was worth in the region of less than ? of the eventual sale price, but it made it clear that an agent would be appointed to give a more accurate figure.

(ii) One of the settlor's children (who would later be revocably excluded) ("A") had contacted the Retired Trustee directly about the Trust, which as a beneficiary she was perfectly entitled to do. However, this caused the settlor a great deal of anguish and distress. She felt this interference in the affairs of the Trust was disrespectful on the part of A. In the settlor's view, A was trying to obtain information about assets which the settlor felt were hers as the primary beneficiary during her lifetime and she was shaken that A had, in her eyes, gone behind her back to discuss the trust assets, which included the settlor's home.

(iii) The settlor was very concerned that persons connected with her wider family in her home country would be able to take the trust assets of the Trust because the trustee was based in Jersey. There is in fact no evidence at all that persons connected with her wider family were seeking to interfere with the Trust in any way.

(iv) She wanted to ensure that the Beneficiary's future was safeguarded and felt this was best done through having UK trustees. She and the settlor's spouse suggested that this be done by the Purported Trustees taking over as trustees on the basis that this would secure the trust assets and, because she had been living in the UK for some years, she was prepared to pay a reasonable amount of English taxation.

18 The Solicitors' Firm prepared a "*tax note*", the purpose of which was to highlight some of the tax implications of moving the Trust and the Company onshore, which was sent to the settlor some five months before the Appointment Day. The tax note, being preliminary in nature, does not go into the quantum of any tax that would become payable. Taking extracts from the tax note:-

"8.7 It is necessary to bring the possible tax charges to your attention so that you can make an informed choice. Andrew will require further information should you wish to progress the transfer notwithstanding the tax advice to date. Consideration should be given to the onward sale of the properties from within the company. Consequently, there may be a substantial charge to capital gains tax at the corporate tax rate on an onward sale of the properties which you will need to consider. [...]"

8.9 In order to avoid the additional cost and due to the potential risks associated

you may wish to keep the Settlement and the underlying company offshore; if this is a course of action that you would wish to pursue we would recommend [a Jersey Trust Company] and we can make the necessary introduction ...

8.10 As the properties are held in an offshore company there are potential income tax and capital gains implications ... There are potential issues relating to the current structure from an income tax perspective. We should be grateful if you would confirm whether the Retired Trustee has provided you with advice in this area. [...]

9.2 It is our understanding that the properties are likely to have substantial capital gains tax liabilities; it will be necessary to obtain up to date valuations and obtain base costs to be able to consider potential tax charges that may arise in the future if the company is brought onshore which must included [sic] enhancement expenditure. Any tax liability relating to the company will be taxed to corporation tax in the future. [...]

9.11 Income tax is problematic and the trustee's compliance obligation for paying tax can be onerous ... [...]"

19 The tax note concluded at paragraph 10.2:-

"Capital gains tax will need to be considered before any action is taken and as stated we would recommend that counsel be briefed to advice [sic] fully on all the implications. Based on the information it would not be our advice to bring the Trust and the underlying company onshore without a review of the corporate issues and rebasing the assets."

It would seem that this advice did not make clear the impact of taxation at both company and trust level.

20 The settlor's spouse recalls reading the tax note to the settlor and trying to explain it to her as best he could, but as neither of them were English speakers, it is fair to say that they did not understand all the technicalities. No further advice was obtained as recommended and therefore no calculations were ever undertaken to identify the extent of the tax consequences. He explains at paragraph 32.8 and 32.9 of his affidavit:-

"32.8 Whilst I now understand how important this would have been, the reality is that at that time my Wife's health was very poor, and she was almost constantly in pain, both of which affected every aspect of her life. I was physically and mentally exhausted from running between medical advisors, doctors and hospitals at the time to give deep consideration to the financial implications to my family. One of our primary concerns was being able to cover my Wife's medical expenses (particularly given the [the settlor's wider family's] withdrawal of funding) rather than spending money on further tax advice. This was the immediate family need at the time, without the benefit of hindsight which I now have.

32.9 In addition, my Wife accepted the advice that she was UK domiciled and, on the basis that she had lived in the UK for so many years, was untroubled by some UK tax being paid. I do not recall discussing the amount of tax she thought might become payable, or what she thought would be reasonable in that regard. I do not recall my Wife considering whether the payment of UK tax was in the best interests of the beneficiaries of the Trust. Ultimately she was anxious to do what was required to keep the Trust safe from [A] and the [settlor's wider family]."

- 21 It was in these circumstances that on the Appointment Day, the settlor exercised her power under the relevant clauses of the Trust deed to appoint the Purported Trustees as trustees of the Trust and the Retired Trustee resigned. Before resigning, the Retired Trustee sought and obtained confirmation from the Solicitors' Firm that the settlor had received tax advice on the implications of bringing the Trust and the Company onshore.
- 22 Also on the Appointment Day, and consequent thereto, employees of the Retired Trustee retired as directors and officers of the Company and the Purported Director, a UK resident company, was appointed in their place. Thus both the Trust and the Company were moved onshore.
- 23 The consequences of this move gives rise to English tax liabilities approaching 40% of the value of the trust assets, creating tax liabilities at the level of both the Company and the Trust which we can summarise as follows:-
- (i) On the sale of the Flat for approximately ? of the value of the trust fund, corporation tax in the sum of approximately 16% of the value of the trust fund is payable by the Company.
 - (ii) On a distribution of the net proceeds from the Company to the Trust, income tax in the sum of approximately 16% of the value of the trust fund is payable by the Trust.
 - (iii) Thus there is a total tax liability on the sale of the Flat of approximately 32% of the value of the trust fund on sale proceeds of approximately ? of the value of the trust fund.
 - (iv) On a future sale of the Property, (assuming a sale value of approximately ? of the value of the trust fund and 2015 tax rates), corporation tax in the sum of approximately 2% of the value of the trust fund is payable by the Company.
 - (v) On a distribution of the net proceeds from the Company to the Trust, income tax in the sum of approximately 8% of the value of the trust fund will be payable by the Trust.
 - (vi) Thus, there is a potential total tax liability on a sale of the Property of approximately 10% of the value of the trust fund on the distributed sale proceeds of approximately ? of the value of the trust fund.

(vii) On the basis of current UK tax rules and if the appointment of the Purported Trustees is not set aside, any future transfer of the Trust back offshore will attract a UK capital gains charge on the basis that the trustees will be deemed to have disposed and immediately re—acquired all of the trust property at its market value, immediately before the change of trustees.

The law

24 It is well established that a power to appoint new trustees is a fiduciary power, even when that power is vested in a person other than the outgoing trustee – see *Re Skeats' Settlement* [1889] 42 Ch D 522, *In re Bird Charitable Trust* [2008] JLR 1 and *In re Jasmine Trustees Limited* [2015] JRC 196.

25 In *Jasmine Trustees*, the Court summarised the duties of a person exercising a fiduciary power to appoint new trustees in this way (at paragraph 45):-

“45 We accept the point made by Lewin that the duties of the holder of a fiduciary power can be formulated in different ways and the formulation may vary having regard to the nature of the particular power under consideration. Without purporting to assert an exhaustive statement of the duties, for the purposes of this case, we would hold that, when exercising the power to appoint a new trustee, the protector was under a duty :-

(1) to act in good faith and in the interests of the beneficiaries as a whole;

(2) to reach a decision open to a reasonable appointor;

(3) to take into account relevant matters and only those matters; and

(4) not to act for an ulterior purpose.”

26 Where the holder of a fiduciary power to appoint new trustees is found by the Court to be in breach of any one or more of these duties, the Court may, in the exercise of its inherent jurisdiction as supplemented by article 51 of the *Trusts (Jersey) Law 1984* (“the Trusts Law”), declare the appointment to be invalid as it did in *Jasmine Trustees*, and as it did, for example, in *Re Z* [2015] JRC 196C.

27 The Court also has power under articles 47G and H of the Trusts Law to declare the exercise of a power voidable and of no effect from the time of its exercise, which we set out in turn:-

“47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake .

(1) In this paragraph, “person exercising a power” means a person

who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property .

(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise .

(3) The circumstances are where the trustee or person exercising a power –

(a) made a mistake in relation to the exercise of his or her power; and

(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and

the mistake is of so serious a character as to render it just for the court to make a declaration under this Article .

47H Power to set aside the exercise of fiduciary powers in relation to a trust or trust property .

(1) In this paragraph, “person exercising a power” means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property and who owes a fiduciary duty to a beneficiary in relation to the exercise of that power .

(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise .

(3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power –

(a) failed to take into account any relevant considerations or

took into account irrelevant considerations; and

(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations .

(4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.”

28 Under article 47B(2)(a), “***mistake***” includes a mistake as to:-

“(i) the effect of,

(ii) any consequences of, or

(iii) any of the advantages to be gained by,

a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property.”

29 Under article 47I (2)(c), an application under articles 47G and H can be made by a beneficiary; in this case, the application is by the Beneficiary who is a beneficiary of the Trust.

30 Under article 47I(3) and (4) the Court has the following consequential powers:-

“(3) Without prejudice to Article 51 and subject to paragraph (4), the court may, consequential upon a declaration made under any of Articles 47E to 47H, make such order as it thinks fit .

(4) No order may be made under paragraph (3) which would prejudice any bona fide purchaser for value of any trust property without notice of the matters which render the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, voidable” .

Decision

31 The exercise by the settlor of the power to appoint the Purported Trustees as trustees can be impugned on a number of grounds:-

(i) She did not seek or obtain any advice on the fiduciary nature of the power she was exercising, which, *inter alia*, required her to consider the interests of all the

beneficiaries. She was focused almost exclusively on the interests of the Beneficiary.

(ii) She failed to obtain the further detailed advice on the tax consequences of the move onshore that the Solicitors' Firm recommended in the tax note and so had no idea of the actual tax implications. As the settlor's spouse said at paragraphs 32.11 and 33.4.3:-

"32.11 Given my Wife's concern to protect [the Beneficiary]'s interests and to ensure he was provided for, I do not believe that if my Wife had known that her exercise of the Power of Appointment would essentially wipe out half the trust fund, she would have exercised that power as she did.

...

33.4.3 Had my Wife been well and not plagued by her illness as well as malicious family members, I firmly believe she would have kept the Trust offshore. Due to the pressures exerted on her during her most vulnerable state, she grew increasingly paranoid as to the safety of assets and the protection of her family and that led to her decision to bring it onshore without properly investigating the consequences of such an action. I was so worried for her health at the time, I did not question her decision to bring it onshore, but rather wanted her to feel peace and happiness."

(iii) Her fear that her wider family would be able to take the trust assets if held through Jersey trustees was irrational. There was no evidence from the Retired Trustee of any attempt by the settlor's wider family to do so and the settlor's wider family had no *locus* within the Trust. It was equally irrational to move the Trust onshore in order to protect the trust assets from the settlor's wider family, when such a move would have made no difference —any person's entitlement to benefit from or claim assets forming part of the trust property would still be determined by reference to the same yardstick — one of Jersey law. The same can be said of A's ability as a beneficiary to obtain information about the trust assets. Changing the trustee made no difference whatsoever to her rights in this respect. Again referring to the affidavit of the settlor's spouse —

"33.4.5 Furthermore, my Wife did not obtain any legal advice as to whether her exercise of the Power of Appointment would have the legal effects she intended. For example, my Wife was entirely unaware that A, as a beneficiary of the Trust, was entitled to certain information about the Trust (regardless of whether the Trust was offshore or onshore).

33.4.6 I now understand that since the Trust remained a Jersey proper law trust throughout, the potential threat from non-beneficiaries (such as the settlor's wider family), beneficiaries' right to information about the Trust, and the Beneficiary's and my (once I was added to the class of beneficiaries) positions were all unaffected by moving the Trust onshore.

33.4.7 Given that it is now understood that my Wife's exercise of the Power of Appointment could not, and did not, have the effect of better

protecting the Trust assets from [the settlor's wider family], preventing (and other beneficiaries) from having access to Trust information or better protecting my interests, I do not believe that if my Wife had known that at the time she would have gone through the process of finding and appointing new trustees, at a time when she was greatly affected and restricted by her poor health and pain."

(iv) It was equally irrational for the settlor to think that moving the Trust onshore improved the safeguards for the Beneficiary. It made no difference to his rights whatsoever. What it did do was nearly halve the value of the trust assets that would otherwise have been available to him and his children.

32 We would, therefore, by exercising the Court's inherent jurisdiction, as supplemented by article 51 of the Trusts Law, set aside the appointment of the Purported Trustees, on the grounds that the power of appointment of trustees was not exercised in the interests of all of the beneficiaries, it failed to take into account the serious tax consequences and it was irrational.

33 Applying article 47G of the Trusts Law, the settlor made a mistake when exercising the power of appointment in that she: -

(i) did not understand or appreciate that the power of appointment was a fiduciary power and accordingly was one that needed to be exercised in the interests of all of the beneficiaries;

(ii) wrongly believed that the exercise of the power of appointment would achieve her objectives, namely the protection of the trust assets from the settlor's wider family and the prevention of A from having access to information in relation to the trust assets or otherwise interfering in the management of the trust assets and the better protection of the trust assets for the benefit of the Beneficiary; and

(iii) did not appreciate, and was mistaken, as to the full extent of the tax consequences including the impact or potential impact that the tax consequences might have on all of the beneficiaries.

34 It is clear to us that the settlor would not have exercised the power of appointment had she appreciated the true position. Put simply, there was simply no point in doing it and incurring a substantial tax charge which deprives the beneficiaries of the benefit of some 40% of the trust fund she was seeking to protect.

35 Given the magnitude of the tax charge, the mistake is clearly of a sufficiently serious character as to render it just for the Court to grant relief.

36 Applying article 47H of the Trusts Law, the settlor was exercising a fiduciary power and

failed to take into account the true effect of the steps that she was taking (and in particular, the inability to achieve the desired outcome) and the full extent of the tax consequences of her actions. Again, we find that she would not have exercised the power of appointment in the way she did had she taken into account all of these relevant considerations.

- 37 As to the latter point, the test of whether a person who has exercised a power would have done so had he or she taken into account all relevant considerations is necessarily an objective one, based on the reasonable person acting in accordance with her or her duties. Were it to be otherwise, it would be an answer to an application under article 47H for a person to assert that he would not have acted differently, even if that position were one which no reasonable person could adopt (and which would be a breach of duty). No reasonable person in the position of the settlor and fully aware of the true position would have exercised the power of appointment in the way that she did.
- 38 Thus, applying the case law and exercising the Court's inherent jurisdiction, we would declare the appointment of the Purported Trustees invalid and applying article 47G and H of the Trusts Law, we set aside that appointment with effect from the time of its exercise.

The Company

- 39 The Company is a wholly owned and controlled company through which the assets of the Trust are held. On the day of the appointment of the Purported Trustees, a meeting of the directors of the Company was held under which:-

- (i) the employees of the Retired Trustee who were directors resigned in favour of the Purported Director as sole director and officer,
- (ii) the nominee shareholders who held the shares in the Company as nominee for the Retired Trustee transferred these shares to the Purported Nominee as nominee for the Purported Trustees.

- 40 As Mr X of the Retired Trustee explained in his second affidavit, the Retired Trustee put forward its employees to act as directors of the Company solely by reason of the Retired Trustee's role as trustee of the Trust. It would have been inconsistent with the Retired Trustee's internal policies for it to continue to provide directors and nominee shareholders for the Company if it was no longer trustee of the Trust.
- 41 The resignation of the Retired Trustee's officers as directors of the Company, the appointment of the Purported Director as sole director and officer and the transfer of the shares to the Purported Nominee were all undertaken for the sole purpose of giving effect to the settlor's exercise of the power of appointment, and pursuant to the obligation of the Retired Trustee under paragraph 4 of the deed of appointment and retirement, by which the Retired Trustee was obligated to vest the trust fund in the Purported Trustees and to

execute all documents necessary for that. It was also consistent with the Retired Trustee's obligation under Article 34(1) of the Trusts Law to surrender all other trust property under its control to the Purported Trustees.

- 42 The Royal Court has, on a number of previous occasions, set aside on the grounds of mistake Jersey purpose trusts and estate annuity purchase deeds entered into by trustees, the collective purpose of which was to give effect to tax planning schemes devised by a now defunct firm of English solicitors, *Baxendale-Walker* (see *Tait v Apex Trustees Limited* [2012] JRC 148, *Seggins v Apex Trust Company Limited* [2013] JRC 77, *Moffat v Apex Trust Company Limited* [2014] JRC 252, and *In the Matter of the Representation of Wilkes* [2015] JRC 200).
- 43 In essence, the documents giving effect to the tax planning schemes were treated as “**one related group**” for the purpose of the Baxendale-Walker decisions. The execution of the estate annuity purchase deeds was considered to be “**sufficiently linked**” to the establishment of the trusts in each of those cases that the Court considered it could also set the annuity deeds aside when setting the trusts aside on the grounds of mistake.
- 44 In considering whether there was a “**sufficient link**” between the estate annuity purchase deeds and the trust in *Tait v Apex*, notwithstanding that the Court found “**there is nothing on the face of the estate annuity purchase deeds to suggest that they are in any way linked to the Tait Annuity Investment Trust**”, it determined that (para 18):-

“it is right to treat the Tait Annuity Investment Trust as a document drawn up with the Representors in mind, in accordance with the scheme which was sold to them and we also think it is right to link the estate annuity purchase deeds with the Tate Annuity Investment Trust because without that trust, it is extremely improbable that the Representors would have made the estate annuity purchase deeds. These deeds, although described as annuity purchases, were in reality deeds of transfer of property into the Tait Annuity Investment Trust .

They thus fall within Article 9(1) of the Trusts Law” (emphasis added)

- 45 Applying the Court's reasoning in the *Baxendale-Walker* decisions to the present application by analogy, there is a “**sufficient link**” between
- (i) the exercise by the settlor of the power of appointment and the Retired Trustee's subsequent retirement as trustee of the Trust;
 - (ii) the transfer of the Company's shares to the Purported Nominee consequent upon that appointment and retirement of trustees; and
 - (iii) the resignation of the Retired Trustee officers as directors of the Company and the appointment of the Purported Director in that capacity. The Retired Trustee officers

would not have appointed the Purported Director as director of the Company and themselves resigned as directors of the Company if the settlor had not exercised the power of appointment, in just the same way as the Retired Trustee would not have purported to retire as trustee and transferred the Company shares to the Purported Nominee as nominee for its successors in the absence of the exercise of the power of appointment.

46 Accordingly, we agree with the parties that they should be treated as one related transaction for the purpose of this application, so that having set aside the exercise by the settlor of the power of appointment, with the effect that the Retired Trustee's retirement as trustee was invalid and ineffective, then, pursuant to article 47I(3) of the Trusts Law, the transfer of the Company's shares and the resignation of the Retired Trustee officers as directors and officers of the Company and the appointment of the Purported Director as director and officer of the Company are also set aside as a necessary consequence thereof and consistent therewith, and we so order.

47 In doing so and pursuant to article 47I(4) of the Trusts Law, we considered whether the interests of third parties who had dealt with the Purported Director (in England where it is resident) as purported director would be adversely affected, and in particular the purchaser of the Flat. Advocate Staal had procured, at the Court's request, an opinion from English counsel, Richard Wilson, whose advice on English law, which we accept, was in summary:-

Counsel therefore concluded, and we were satisfied, that the position of a third party purchaser without notice of the Purported Director's voidable appointment, and in particular the purchaser of the Flat, will not be affected by any order setting aside that appointment.

(i) As a matter of general law a defect in the appointment of a director, if the retrospective setting aside of its appointment can be properly described as such, would not serve to invalidate the acts of the company. In *Royal British Bank v Turquand* [1856] 6 E&B 327 it was held that where a company had carried out a transaction in excess of the board's power to borrow, the transaction bound the company because, firstly, nothing on the face of the documents revealed the lack of authority, secondly nothing else put the third party on inquiry, and thirdly that party had the right to assume that the internal management of the company had been conducted correctly. In the case before us, it is hard to see how any third party would have had notice, actual or constructive, of the possible setting aside retrospectively of the Purported Director's appointment as director.

(ii) Section 49 of the Company's constitution provides that actions of directors who have been defectively appointed are to be treated essentially as valid.

(iii) In relation to the Flat, the extensive statutory powers of disposition of registered proprietors (this being registered land) could be relied upon to ensure that the disposition came within the protection of Section 2(1) of the [Law of Property Act 1925](#).

Release of the Retired Trustee and Purported Trustees

- 48 Article 19(1) of the Trusts Law provides that “Subject to paragraph (3), a trustee, not being a sole trustee, may resign his or her office by notice in writing delivered to his or her co—trustees.”
- 49 Having set aside the appointment by the settlor of the Purported Trustees as trustees of the Trust, it follows from this that the Retired Trustee, which was a sole trustee, must be treated as never having retired as trustee and we so declare. We then need to address the position of the Retired Trustee, which in good faith thought it had resigned as trustee and the position of the Purported Trustees who in good faith thought they had been appointed as trustees. Article 45 of the Trusts Law is in the following terms:-

“45 Power to relieve trustee from personal liability

(1) The Court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that –

(a) the trustee is or may be personally liable for the breach of trust;

(b) the trustee has acted honestly and reasonably;

(c) the trustee ought fairly to be excused –

(i) for the breach of trust, or

(ii) for omitting to obtain the directions of the court in the matter in which such breach arose.”

- 50 As the Court said in *Re BB* [\[2011\] JLR 672](#) at paragraph 43, the definition of “**trustee**” in the Trusts Law is wide enough to encompass a trustee *de son tort*, and we can see no reason why the provisions of Article 45 cannot be extended to a trustee *de son tort*.
- 51 We find that both the Retired Trustee and the Purported Trustees have acted honestly and reasonably on the basis that the Retired Trustee had resigned as trustee and the Purported Trustees had been appointed in its place, and each ought fairly to be excused from any breach of trust arising out of: -

(i) in the case of the Retired Trustee, its failure to act as trustee from the date of its purported resignation to the date of this order; and

(ii) in the case of the Purported Trustees, their purporting to act as trustees from the date of their appointment to the date of this order, save that, in relation to the Purported Trustees we do not relieve them from personal liability for breaches of trust for which they would have been liable had they been validly appointed as trustees.

By so doing, we preserve any claims the beneficiaries may have against the Purported Trustees for breach of trust assuming they had been validly appointed.

New Trustee

- 52 As stated in Mr X of the Retired Trustee's affidavit, the Retired Trustee would not normally consider resuming trusteeship of the Trust after so many years, and against the history of discontent with its role as trustee, albeit such discontent was primarily on the part of the settlor, who is now deceased. If the application to set aside the appointment of the Purported Trustees is successful, the Retired Trustee is in no better starting position to act as trustee of the Trust than any other Jersey incorporated regulated trustee and accordingly the Retired Trustee wishes to retire as trustee in favour of a new trustee to be nominated by the Beneficiary. The Beneficiary has confirmed his agreement to the Retired Trustee's retirement and has nominated the New Trustee to be appointed in its place.
- 53 Following the death of the settlor and the setting aside of the appointment of the Purported Trustees, the power to appoint new trustees vests in the Retired Trustee, pursuant to the relevant clauses of the Trust deed. The Retired Trustee seeks the sanction of the Court to its decision to retire and appoint the New Trustee. In these circumstances, which have been brought about by the Court's order, we feel it is appropriate to give it that protection.

Ratification

- 54 The Beneficiary, with the support of the Retired Trustee and the Purported Trustees, seeks ratification by the Court of certain actions carried out by the Purported Trustees either directly or through the Company as set out in schedules provided to the Court. Whilst the Court has relieved the Purported Trustees from personal liability for actions they have taken in the manner set out above, those actions may nevertheless be impugned on the basis that the Retired Trustee, which was still trustee, did not participate in them or because the power or discretion purportedly exercised by the Purported Trustees as trustees *de son tort* was not available to them.
- 55 The Court has been provided with a draft order to which have been attached a schedule of acts for ratification at trust level and a separate schedule for ratification of acts at company level. Of the acts listed, two at trust level appear to be dispositive, namely a decision in February 2009 to permit the settlor's spouse to continue to occupy the Property (procured through the Company) and a decision approximately two years after the Appointment Day to distribute a sum of approximately 3% of the value of the trust fund to the Beneficiary (which distribution was made) (the "Distribution"). The remaining acts are administrative in nature. It was not sought by the parties, however, to ratify the respective deeds of addition and exclusion as these matters had been dealt with separately.
- 56 Reliance was placed by the parties on the decision of the Court in the case of *Re BB*

where the Court ratified certain actions of a trustee *de son tort*. Noting the lack of any authority on the power of the Court to do so, the Court held that it had such a power either under article 51 of the Trusts Law or under the Court's inherent jurisdiction. Quoting from paragraphs 39 —44 of the judgment of Clyde-Smith, Commissioner:-

“39 We are then left with the actions taken by the representors as trustees de son tort from the date of their respective appointments to the present.

The representors have helpfully provided us with a schedule setting out everything done by them, including appointments and distributions of capital and income to the beneficiaries. These they seek to have ratified pursuant to the court's powers under art. 51 of the Trusts Law, which permits the court to make orders concerning inter alia “the exercise of any power, discretion or duty of the trustee” and “the conduct of the trustee.”

40 There appears to be a dearth of authority on ratification. Mr MacRae drew our attention to an order made by the court, Bailhache, Bailiff presiding, in a representation brought by *Barclays Private Bank & Trust Co. Ltd. in relation to the PDK Settlement on November 1st, 2004, in which the court ratified the acts of the trustee de son tort in the following terms:-*

‘The court ... ratified the past acts of the representors since October 28th, 1991 taken in its capacity as the purported trustee of the PDK Settlement, subject to any claim alleging breach of trust that any person beneficially interested under the PDK Settlement might be entitled to make.’

No judgment was issued by the court when making that order .

41 Mr MacRae suggested that the lack of authority might simply be that it is trite law that the court has the power to ratify the acts of trustees and regularly does so .

42 Lewin has the following passage on the powers of trustees to confirm the acts of trustees de son tort (op. cit. para 42–82, at 1776) :

‘In some trusts, powers may be available to properly constituted trustees such as enables them to confirm the exercise of powers purportedly exercised by the trustee de son tort. While it would not be open to the properly constituted trustees to exercise powers of this character merely so as to save the trustee *de son tort* from liability, nonetheless the exercise of such powers may be justified so as to save the trust from the havoc that would be caused by any attempt to unscramble what was purportedly done by the trustee *de son tort*, and would have been properly done had there been no defect in his appointment. In a case where a settlement was *de facto* administered by the settlor who bought agricultural land in the name of the trustees and granted a tenancy, it was held, upon the purchase being affirmed by the trustees, that the tenancy bound them as well.’

43 The definition of a trustee in art. 2 of the Trusts Law is wide enough to encompass a trustee de son tort and therefore the court would have jurisdiction to make orders in relation to the representors under art. 51 of the Trusts Law. That article makes no reference to ratification of past acts of trustees but if there is any doubt as to the court's power to ratify the past actions of the representors under art. 51 then, in our view, the court has an inherent jurisdiction to do so .

44 The general principle guiding the court in the exercise of its jurisdiction under art. 51 and of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour.

Where, as here, a trustee de son tort has acted in good faith, unaware that he has not been duly appointed to office, then, applying that general principle, it seems to us that we should save the trust from the havoc that may ensue from any attempt to unscramble what was purportedly done by the trustee de son tort by confirming and approving those actions (i.e. to ratify them), whilst at the same time preserving any claims the beneficiaries may have against the trustee de son tort for breach of trust assuming he had been validly appointed.”

57 The decision in *Re BB* has not been the subject of subsequent judicial scrutiny, but as Advocate Kistler pointed out, it has been the subject of adverse commentary. In his article for Trust & Trustees Volume 19 No 1 February 2013 at pages 23–30, Francis Tregear QC argues that:-

(i) there was not a great deal of argument or analysis as to the precise scope and effect of ratification;

(ii) the passage referred to in *Lewin* related to a possible power on the part of trustees of certain trusts to confirm the exercise of powers purportedly exercised by the trustee *de son tort*, which is different from ratification by the Court; and

(iii) There was no “overwhelming confidence that Article 51 did the trick, and hence the reliance on the inherent jurisdiction”, the scope of which appears not to have been fully considered by the Court.

58 Francis Tregear QC pointed out that the case had not been argued out adversarially as all the parties wanted the same thing, which was for the Court to do whatever it could to make good what was imperfect. This was one of the principal difficulties with placing great weight on the approach of the Court in that case:-

“For such a dramatic and magical effect there was not a great deal of argument or analysis as to the precise scope and effect of ratification.”

59 In their article for Trusts and Trustees Volume 19 No 5 June 2013 pages 469–474, Dakis Hagen and Bruce Lincoln (the latter having appeared as counsel in *Re BB*) advanced

similar criticisms to those put forward by Francis Tregear QC. They argued that article 51 of the Trusts Law or the inherent jurisdiction cannot be relied upon by the Court to ratify past conduct of improperly appointed trustees nor could it “write into the trust instrument a retrospective power of ratification” which did not exist in the trust instrument itself, on the basis that this would amount to a variation of a trust which the Court does not have power to do, pursuant to either its inherent jurisdiction or its powers under article 51 of the Trusts Law.

- 60 Notwithstanding these criticisms, all three counsel submitted that the Court should follow *Re BB* in the absence of negative judicial authority and on the basis that despite the arguments put forward in these articles, the Court had the flexibility and authority to develop its inherent jurisdiction to meet the requirements of trusts practice. The jurisdiction exercised by the Court was one of pragmatic convenience and was exercised in the best interests of the beneficiaries.
- 61 All three counsel further submitted that, in any event, the Court now had power under article 47I(3) of the Trusts Law (set out in paragraph 32 above) which provides that the Court, consequential upon a declaration made under any of articles 47E to 47H, may **“make such order as it thinks fit”**, which they said was wide enough to encompass a power to ratify the actions of the Purported Trustees.
- 62 The Court did not feel that it had received the benefit of fully considered submissions on the issue of ratification and invited further written submissions supported, if possible, by the opinion of English counsel. Advocate Staal procured an opinion dated 5th January 2016 from Lynton Tucker who is, *inter alia*, senior editor of the 19th Edition of Lewin on Trusts published in 2015, and who proposed a different approach to the orders sought, with which all three counsel concurred. The Court is greatly indebted to Lynton Tucker for his most careful and persuasive analysis and gratefully draws from his opinion for the purposes of this part of the judgment, adopting his wording in substantial part.
- 63 Ratification is usually defined in the Oxford Dictionary as describing the process whereby some act, agreement or disposition is confirmed or validated by giving some formal consent or sanction. Confirmation can be used as a synonym for ratification, and is more widely defined in the Oxford Dictionary as describing the process whereby some state of affairs is made firm or firmer or established or put beyond doubt.
- 64 Lynton Tucker drew a distinction between three forms of ratification or confirmation, all of which may have the same practical result, but which are conceptually distinct:-
- (i) Confirmation by perfection of an imperfect act or transaction. Examples he gave are confirmation by a principal of a contract entered into by an agent without authority, confirmation by a company of acts done by directors which are voidable by reason of an undisclosed interest, and confirmation by a donor of a gift made as a result of

undue influence. In these cases a transaction which is capable of being set aside or otherwise impugned itself becomes fully valid and enforceable.

(ii) Confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect. An example he gave is where a power is conferred on the trustees of a settlement to appoint or apply capital or income of a trust fund for the benefit of any one or more of a class of beneficiaries, and following a purported appointment by trustees, whose appointment is in doubt, of part of the trust fund to a beneficiary absolutely, the validly appointed trustees exercise their powers so as to appoint the same part of the trust fund to the beneficiary absolutely and to resolve to apply all income of that part since the date of the purported appointment to the beneficiary. In this type of case, the state of affairs which was intended to have been brought about by the tainted or doubtful act or transaction, is instead brought about by a second act or transaction which is fully effective.

(iii) Confirmation by non-intervention in acts or omissions which were not or may not have been authorised but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed and the trusts are accordingly administered on the same footing as if those acts or omissions had been done or omitted by or with the authority of duly constituted trustees. An example is where trustees *de son tort* who have control over the trust assets, and mistakenly believe that they are the duly constituted trustees, operate a discretionary income trust so as to make distributions of trust income among a class of beneficiaries in a manner which would have been entirely proper had the trustees been duly appointed and those distributions are subsequently left undisturbed on the same footing as though they had been validly made.

- 65 The availability of the first form of confirmation depends on the existence of an act or transaction which is capable of being perfected, whether by act of the parties or order of the court. Usually an act or transaction which is confirmed by the first form of confirmation is voidable rather than void, or unenforceable against a particular party unless confirmed by that party. But conceptually there is no reason why an act or transaction which is initially invalid should not be validated or treated as valid by reason of some subsequent act or agreement of the parties or order of the Court.
- 66 The second form of confirmation may be used irrespective of whether the initial act or transaction was void or voidable, and whether or not it is capable of being perfected. What is crucial for the second form of confirmation is the continuing existence of a power or discretion to achieve what was intended to be achieved by the initial act or transaction.
- 67 The third form of confirmation does not depend upon whether the initial act or transaction was valid or void, but does depend upon its having been acted upon, though it may be acted upon in a negative as well as positive manner. Acts may be void, but are not necessarily without effect. For instance, if trustees *de son tort* distribute income under an income discretionary trust to a beneficiary, the distribution may be void so that the income remains held on the original trusts, but the beneficiary will obtain a legal title to the

distribution, and if the beneficiary spends the distribution by paying it to a purchaser without notice, it will be gone. Further, though Purported Trustees are not duly authorised to act as trustees, what they do is not necessarily void or voidable at all, as where trust capital or income is distributed by purported trustees to a beneficiary who is entitled to receive it under the terms of the trust without any exercise of a power or discretion being involved.

- 68 The third form of confirmation will not be available if nothing has been done to give effect to some purported exercise of a power on the part of the Purported Trustees. For instance if the Purported Trustees have purportedly appointed a trust asset to be held in trust for a beneficiary absolutely, but that trust asset remains held by the Purported Trustees, non-intervention would mean that the trust asset remains held on the original trusts disregarding the purported appointment. Confirmation of such an appointment could be achieved, if at all, only by the first or second form of confirmation.
- 69 The availability of the third form of confirmation may depend upon whether the proposed confirmation is of an administrative or dispositive character. While non-intervention in an administrative act or omission will, at any rate normally, itself be administrative in character, it is not necessarily the case that non-intervention in a dispositive act or omission will be of a dispositive rather than administrative character. For example, if a discretionary income trust is operated for many years by trustees *de son tort* in favour of members of a class of beneficiaries, the view may be taken that the trouble and expense involved in (i) investigating what happened to the income that was distributed and what are the practical prospects of achieving recovery from the beneficiaries to whom distributions were made, (ii) recovering income distributed by the Purported Trustees so far as practicable and (iii) re-operating the discretionary income trust in favour of the same class of beneficiaries in so far as recovery is achieved, would be a waste of time and money, contrary to the interests of the beneficiaries as a whole and contrary to the sound administration of the trust concerned. On the other hand, if part of the trust fund was transferred by Purported Trustees to the trustees of another trust in purported exercise of a power to transfer between trusts and the transferred fund remains intact in the hands of the transferee trustees and is readily recoverable, then any decision to leave such a transfer undisturbed would be a dispositive act and be permissible only if a dispositive power to do nothing was available.
- 70 Although there is a clear conceptual distinction between the first and third forms of confirmation, the practical distinction may be slight. For example, validation of an invalid act or transaction by trustees *de son tort* is an example of the first form of confirmation, but a direction to trustees that they are to administer a trust on the same footing as though an act or transaction by trustees *de son tort* had been valid, and accordingly not to take steps to unscramble or reverse that act, is an example of the third form of confirmation.

Re BB

- 71 *Re BB* was controversial because it had been read, as is apparent from the articles referred to above, as deciding that the Court had jurisdiction to validate invalid exercises of powers by trustees *de son tort* and thereby change the trusts on which the trust property is

held. The Court has no general jurisdiction to validate invalid exercise of powers by trustees (see *Re IMK Family Trusts* [2008] JLR 250 at paragraph 65). The only established case where a court may intervene to validate a defective exercise of the power is where the donee of the power intends to exercise a power in favour of an object of the power for whom the donee has a natural or moral obligation to provide, but the exercise of the power fails to comply with some formal requirement of the exercise of the power (see *Shinorvic Trust* [2012] (1) JLR 324). A less well established case in England of intervention by the court in the defective exercise of powers is where duly constituted trustees decide, consistently with the terms of the trust, to exercise a power conferred on them in favour of an object of the power who is not a volunteer in relation to the trust, but fail to implement that decision in the manner required by the terms of the trust. In such a case the decision may take effect on the basis that equity looks on that as done which ought to be done—see *Re Gleeds Retirement Benefits Scheme* [2015] Ch 212 at paragraphs 70 to 82, doubting a rather wider formulation in *HR Trustees Ltd v Wembley Plc* [2011] EWHC 2974 (Ch) at paragraphs 53 to 67. The *Shinorvic*, *Gleeds* and *HR Trustees* cases are all very far removed from *Re BB* and the present case.

- 72 Despite the absence of any such general jurisdiction, Lynton Tucker considered it well arguable that where trustees *de son tort*, who are acting in good faith in the belief that they are the duly constituted trustees, purport to exercise administrative powers, or perform other administrative functions conferred on the duly constituted trustees, whether by law or by the terms of the trust concerned, then, even if the exercise of the powers is invalid, the court has jurisdiction to validate those acts on the basis that the court may intervene in the administration of a trust so as to secure its competent administration.
- 73 It is clear from *Re BB* at paragraph 44 that the ratification order made in that case was made in exercise of the court's inherent jurisdiction to supervise and where necessary or appropriate to intervene in the administration of the trust, for the purpose of securing the competent administration of the trust, a jurisdiction described in those terms by the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 at paragraphs 51 and 66 and by the English Court of Appeal in *Re Norfolk's Settlement Trusts* [1982] Ch. 61 at page 78. The inherent jurisdiction is supplemented in Jersey by the wide jurisdiction conferred by article 51 of the Trusts Law. The inherent jurisdiction is not merely a supervisory jurisdiction. It is also a jurisdiction where necessary or appropriate to intervene in administration. The jurisdiction under article 51 authorises the court, among other things, to make an order concerning the administration of any trust on the application of a beneficiary. The jurisdiction under article 51 was described by Bailhache, then Deputy Bailiff, in *Re WW and XX* [2011] JRC 231 at paragraph 13 as a “**wide and vibrant jurisdiction**”.
- 74 The appropriate method of intervention, and appropriate form of order, must necessarily depend on the circumstances of the case. In many cases the intervention or order will take the form of a direction to the trustees, but that is not the only kind of intervention possible. The guiding principle must be that the form of intervention or order is such as best serves the welfare of the beneficiaries and the competent administration of the trust in the circumstances of the case. If validation of an invalid act or transaction is in the

circumstances suitable then Lynton Tucker could see no reason why the court should not be able to make such an order.

- 75 Lynton Tucker did not consider that it is an objection to a ratification order that the court is doing something that the trustees do not themselves have the power to do. When the court authorises remuneration or sanctions a self-dealing transaction which is not authorised by the terms of the trust, it is doing something that the trustees have no power to do, and the court gives that authorisation or sanction because it is securing the competent administration of the trust. In *Re New* [\[1901\] 2 Ch 534](#) the English's court's inherent jurisdiction was described by Romer LJ as extending to circumstances arising in the management of a trust estate for which provision is not made in the trust instrument, and which renders it desirable, if not essential, for the benefit of the trust estate that certain acts should be done by the trustees, which in ordinary circumstances they would have no power to do, and which the court in a proper case had the jurisdiction to sanction. Nor does Lynton Tucker consider that it is an objection to a ratification order that in general the court does not intervene in relation to the exercise of powers by the trustees and leaves their exercise to the trustees, see *Lewin on Trusts*, 19th edn paragraph 29–336 et seq. Of course, non-intervention is the general principle, but nevertheless where circumstances arise which justify the court's intervention so as to secure the competent administration of the trust, then plainly the jurisdiction exists.
- 76 Paragraph 74 above refers to validation of invalid exercises of administrative powers or invalid performance of other administrative functions. Validation of invalid exercises of dispositive powers stands on a different footing since this does or may involve a change in the beneficial trusts. For example, if a fund is held on trusts for the benefit of A and trustees *de son tort* purport to appoint that fund on trusts for the benefit of B in exercise of a power of appointment conferred on the duly constituted trustees, then the appointment is invalid and the fund remains held on trusts for the benefit of A. If the court intervenes to validate the invalid appointment by a ratification order, then the fund becomes held (for the first time) on trusts for the benefit of B and the trusts are changed. That is so even though duly constituted trustees could have appointed in favour of B or can in the future appoint in favour of B. The court has, under the principles of *Chapman v Chapman* [\[1954\] AC 429](#), HL (followed in *Re IMK*), no power to do that save in accordance with statutory authority (which in Jersey is conferred by Article 47(1) of the Trusts Law (corresponding to the English [Variation of Trusts Act 1958](#)) or in the context of compromise of a genuine dispute concerning a trust.
- 77 A good illustration of the limits of the English court's powers to rescue invalid exercises of powers of appointment is provided by *Jasmine Trustees Ltd v Wells & Hind* [\[2008\] Ch 194](#). In that case an appointment under the English statutory power of appointment of two new trustees of a family settlement containing trusts and powers in favour of the children and remoter descendants of the original trustees, although effective to appoint two new trustees, failed to discharge the original trustees who intended to retire, and so they continued as trustees. In consequence, a number of later appointments of new or additional trustees were held to be invalid since they were not made by all the duly constituted trustees for the

time being, as required by the statutory power. The court also considered, at paragraphs 52 to 57, the validity of a number of resolutions made by the Purported Trustees exercising a power of appointment conferred by the settlement on its trustees which authorised variations to the trusts of the settlement. It appears that the appointments did not involve distributions from the trust but rather purported to postpone the ages at which beneficiaries were to take interests in possession under the terms of the settlement. The appointments were held to be invalid since the power of appointment was, as a matter of interpretation of the settlement, conferred on the duly constituted trustees of the settlement, but was not exercised by such trustees. The court rejected an argument that the reference to trustees in the settlement included trustees *de son tort* even though those trustees acted in good faith in the belief that they were the duly constituted trustees. Accordingly, the resolutions were invalid because they were made by the wrong people. In consequence, the beneficiaries took vested interests in accordance with the original terms of the trusts. There was no suggestion that the court had any power to validate the invalid appointments and the appointments failed altogether.

78 It is notable that *Re BB*, like the *Jasmine* case, also involved the purported exercise by trustees *de son tort* of dispositive powers, namely appointments and distributions of capital and income to beneficiaries of an employee benefit trust. These were among the acts for which ratification was sought and (unlike in the *Jasmine* case) given. The explanation may be that distributions had actually been made in reliance on the invalid exercise of powers, in contrast to the *Jasmine* case, and the ratification order was regarded merely as an administrative matter, saving the trust from the havoc that would ensue in seeking recovery of the wrongly distributed capital or income and re-exercising discretions-see paragraph 71 above.

79 This Court had queried whether there might be qualitative difference between the Court ratifying on the one hand something outside the powers of the trustees (for example, a distribution to a non-beneficiary) and on the other hand a distribution made in good faith to a beneficiary in compliance with the trust deed by a trustee who, on the face of it, had been properly appointed. The difficulty with this, as Lynton Tucker pointed out, is that all the terms of the trust have not been complied with because the power of distribution was conferred on the duly constituted trustees and the persons who purportedly exercised the power were not in fact the duly constituted trustees. A settlor may well express surprise that a distribution is invalid if made by trustees *de son tort* in the belief that they are the duly constituted trustees, and which would have been fully consistent with the terms of the trust but for the inadvertent defect in their appointment. But that is an argument for construing the reference in the trust instrument concerned to the "Trustees" as including a trustee *de son tort* in special circumstances, rather than an argument that no variation of trust is involved. In the *Jasmine* case, the English court was adamantly opposed to that argument. If a Jersey court was persuaded to take a more lenient view (and counsel had not sought to so persuade the Court in this case), no question of ratification would arise, since the act in question would be valid from the time when the relevant power was exercised.

80 The doubts expressed by Lynton Tucker in relation to validation of invalid dispositive

powers does not, of course, mean that nothing can be done to confirm invalid exercises of dispositive powers. The second form of confirmation will usually be available and the third form may also be available. The kind of case which causes difficulty is where the power which was originally sought to be exercised has lapsed by the time that the defective appointment of trustees is discovered, or can no longer be exercised in the manner originally intended, and no distributions have been made to give effect to the invalid exercise of power. That was the position in the *Jasmine* case, and perhaps in such a case the only way of resolving matters is a variation of trust in accordance with article 47(1) of the Trusts Law, or (as happened in the *Jasmine* case) a claim against the professional advisers involved.

The position in the present case

- 81 Despite Lynton Tucker's support (subject to some qualification as regards dispositive powers) for the decision in *Re BB*, he did not consider that a ratification order in these terms, as sought by the parties, to be suitable in the particular circumstances of this case:-

“The acts or omissions of the purported trustees described in the schedules to this order are hereby ratified by the Court” .

In Lynton Tucker's view, these objectives (in themselves sound) were better achieved by orders with much the same effect as ratification but in essence based on the second and third forms of confirmation as discussed in paragraphs 66 to 72 above, that is based on confirmation by replacement and confirmation by non-intervention in the interests of the beneficiaries as a whole and the competent administration of the trust. He gave a number of reasons why this is so:-

Powers of the trustees and the court

- (i) The present case is different from *Re BB*. There, the objective was to confirm everything that could be confirmed following void appointments of trustees. Here, the primary objective is not confirmation of void appointments but destruction of voidable appointments with retrospective effect from the time when they took place, and that is the exact opposite of ratification. It appeared to Lynton Tucker at least odd to provide for total destruction of the appointments and some consequential acts, and then to go on to provide that some of the consequential acts are ratified and so validated. For example, as the draft order was presented by the parties, some exercises of dispositive powers by the Purported Trustees are struck down, namely the purported addition and removal of beneficiaries, while another exercise of a dispositive power, namely the Distribution by the purported trustees to the Beneficiary was to be ratified. There is, however, no oddity in utilising the second and third forms of confirmation neither of which involve any validation or ratification of the initial tainted act or transaction. The second form of confirmation involves replacement of a tainted act or transaction because a replacement is desirable in the circumstances which exist when the order is made. The third form of confirmation involves no action being taken to reverse the consequences of an act or transaction which has actually been carried

into effect because it would be contrary to the welfare of the beneficiaries as a whole for that to be done in the circumstances which exist when the order is made.

(ii) The acts and omissions in the schedule to the draft order have been divided into two parts namely acts done at trust level and acts done at company level. It is apparent from the schedule that the acts at trust level and at company level are closely interlinked. Although the draft order speaks only of the acts or omissions of the Purported Trustees, acts or omissions at company level are acts or omissions of the Company not the Purported Trustees, though those acts or omissions were (or may have been) procured by the Purported Trustees. It is one thing to ratify acts of trustees, another to ratify acts of a company. Questions might well be raised whether the Court can or should directly ratify acts of a company. But if the matter is approached in terms of the second and third forms of confirmation there is no difficulty at all because what can be done is to authorise and direct the duly constituted trustees for the time being to procure and allow the Company to be administered on the same footing as though the acts and omissions in question had been procured or permitted by duly authorised trustees.

(iii) Ratification may have adverse tax consequences. Although what (in general terms) is crucial for UK tax and tax residency of trusts is where the duly constituted trustees are ordinarily resident, what (in general terms) is crucial for tax and tax residency of companies is where central management and control exists. Although he was not advising in this matter as a tax barrister, it seemed to Lynton Tucker undesirable to ratify (that is validate) acts or omissions of the Company (in fact carried out in England) or acts of the Purported Trustees at company level (again carried out in England), since this might encourage HMRC to contend that the effect of ratification is that the Jersey court has endorsed and provided a legal basis for central management and control being lawfully carried on in England. It appeared to Lynton Tucker safer to use the second and third forms of confirmation which do not involve ratification of acts which took place in England.

(iv) As indicated in paras 78 to 81 above, doubts arise in relation to the concept of validation by the court of invalid exercises of dispositive powers. While most of the acts and omissions set out in the schedule to the draft order are administrative in character, or payments made pursuant to court orders, there is at least one act done without a court order which is dispositive in character, namely the Distribution to the Beneficiary. It seemed to Lynton Tucker best to deal with this by the second or third form of confirmation. Of these two forms of confirmation, while the third form may be feasible, bearing in mind that, as he understood, the money was spent by the Beneficiary or paid away by way of dowry, Lynton Tucker felt that the second form of confirmation would be safer and better, and as explained below, is readily available. Another of the acts or omissions which arguably might be characterised as being dispositive in nature is the permission that was given to the settlor's spouse in February 2009 to continue to occupy the Property on a gratuitous basis. It is understood that the future position concerning the Property is to be regularised by the grant of annual shorthold tenancies to the settlor's spouse (as to which the court's assistance is not sought). As to the past, the settlor's spouse's occupation of the Property on a gratuitous basis was actually authorised by persons whom he

reasonably believed to be capable of giving that authority, and who would have been authorised but for a retrospective order of the Jersey court. In the circumstances, it seems that it would, at the least, be difficult to formulate a claim against the settlor's spouse for damages or compensation of unlawful occupation, and such a claim would not only cause aggravation to the family but also *prima facie* be a waste of trust money because of the probability of failure of the claim.

(v) Some of the acts set out in the schedules to the order consist of payments made pursuant to an order of the court, and payments pursuant to a settlement agreement which was approved by the Court. Ratification of a previous unconditional court order is not necessary or appropriate. An order of the court takes effect because it has been made and has not been appealed. Such an order does not need ratification in order to be valid, especially as the orders concerned were made with the knowledge of the Beneficiary's impending claim in the present application. As to these payments, what Lynton Tucker suggests is appropriate is a direction that for the avoidance of doubt nothing in the order prejudices or affects the payments made pursuant to the relevant court orders and settlement agreement.

82 So as to proceed with the second and third forms of confirmation instead of a ratification order, it is relevant to consider the powers of the duly constituted trustees and powers of the Court in this regard.

83 Under the terms of the Trust deed, the duly constituted trustees for the time being of the Trust have administrative powers in the widest terms, which are conferred by the following relevant clause:-

"SUBJECT always to any restrictions expressly contained in this Settlement the Trustees shall have all powers of investment management sale exchange partition mortgage leasing insurance protection improvement equipment dealing and disposition (and all other powers) of an absolute beneficial owner of the Trust Fund and their powers shall not be restricted by any principle of construction or rule or requirement of the Proper Law save to the extent that such is obligatory) but shall operate according to the widest generality of which the foregoing words are capable notwithstanding that certain powers are hereinafter more particularly set forth."

84 This power is clearly wide enough to authorise the duly constituted trustees for the time being of the Trust, if satisfied that it is not in the interests of the beneficiaries as a whole or the competent administration of the Trust, to unscramble or reverse or otherwise interfere with acts or omissions of the Purported Trustees (including acts or omissions permitted or procured by them at company level) which have been carried into effect, to leave those acts or omissions undisturbed, so that the Trust is administered on the same footing as though those acts or omissions had been validly done by or with the authority of duly constituted trustees. This power to confirm acts of the Purported Trustees by non-intervention extends also, in Lynton Tucker's opinion, to any unauthorised dispositive acts or omissions of the

Purported Trustees which have been carried into effect so far as that can be justified as being in the interests of the beneficiaries as a whole and in the sound administration of the Trust.

- 85 The duly constituted trustees for the time being of the Trust also have power to confirm that the Distribution be paid to the Beneficiary and all rights of recovery in respect of that sum or any property representing it are held in trust for the Beneficiary absolutely, and by resolving under the relevant clause of the Trust deed that the income (if any) of that part of the trust fund which has arisen since the payment is held in trust for the Beneficiary absolutely.
- 86 As to the court's powers, one source is article 47I (3) of the Trusts Law. Lynton Tucker considers that this covers (among other things) matters of administration which arise because a declaration is made under article 47G or article 47H of the Trusts Law and which are consistent with the nature of that declaration. He has reservations whether a ratification order would be permitted by article 47I(3), bearing in mind that it would be conceptually inconsistent with an order setting aside the appointment of the Purported Trustees retrospectively, for similar reasons to those expressed in para 83(1) above. But the second and third form of confirmation is consistent with an order setting aside the appointment of the Purported Trustees retrospectively, and is consequential because that order throws the status of acts and omissions of the Purported Trustees before the order into doubt and a direction is needed as to what is to be done or not done about them.
- 87 Since that requisite confirmatory acts fall within the scope of the trustees' powers, there is no need in this case for the court to exercise its inherent administrative jurisdiction as supplemented by article 51 or the jurisdiction conferred by article 47(3) of the Trusts Law (corresponding to section 57 of the [English Trustee Act 1925](#)) which is wider. However, it is relevant to consider why the Court should intervene, rather than leave the duly constituted trustees for the time being to consider what if anything they should do about the acts or omissions referred to in the Schedules to the draft order, whether the Court's jurisdiction is based on article 47I(3) or on article 51, or on the inherent administrative jurisdiction, or on the Court's jurisdiction to approve or even direct exercises of powers (including dispositive powers) by trustees.
- 88 Save in a case where exercise of a power by trustees is mandatory and the trustees' discretion is limited to the manner in which the power is exercised, or a case where the trustees have surrendered their discretion to the court, the court does not normally intervene to direct an exercise of a power in a particular manner, see [Lewin on Trusts, 19th edn](#), at paragraph 29–127 et seq. The court will, where appropriate, direct trustees to consider an exercise of a power and may replace trustees who refuse to do so. Usually no further action by the court is necessary or appropriate since it is the function of trustees to consider whether and how to exercise their powers. Nevertheless, the court does have jurisdiction to authorise and direct the exercise of a power by trustees in a particular way, see [Mettoy Pension Trustees Ltd v Evans \[1990\] 1 WLR 1587](#) at 1617 to 1618.

89 The view is expressed in Lewin on Trusts, 19th edn. at para. 29–128 that the traditional remedies (namely directions to trustees to consider an exercise of a power and replacement of trustees) are adequate to cover most cases and that the court would be very reluctant to exercise a power which had not been properly considered by trustees. In the present case, however, there is in the opinion of Lynton Tucker, a sound basis for an order authorising and directing the duly constituted trustees of the Trust for the time being to leave acts and omissions of the Purported Trustees undisturbed, so that the trust is administered on the same footing as though those acts or omissions had been validly done by or with the authority of duly constituted trustees:-

(i) The need for an exercise of the power is brought about by the Court's decision to set aside the appointment of the Purported Trustees with retrospective effect. In the absence of such an order, no question of exercise of confirmatory powers of the duly constituted trustees would arise. An exercise of confirmatory powers is ancillary to the Court's decision.

(ii) The Court's decision, however, creates, for practical purposes, a vacuum in the trusteeship. The Purported Trustees are out and there is plainly no question of them exercising any powers since, if the Court makes an order setting aside their appointment retrospectively, they are not, never have been and never will be the duly constituted trustees. The Retired Trustee's trusteeship is revived, but it has not in fact acted as a trustee since the appointment of the Purported Trustees, nor is it envisaged that it will have any future role as trustee. It adopts a neutral stance in the application to set aside the appointment of the Purported Trustees, and if the application is successful it wishes to be immediately replaced by a regulated Jersey trustee chosen by the beneficiaries. It is plainly inapposite to expect or ask the Retired Trustee to exercise any discretion or power before its departure from office. No new trustee is before the Court and it could not exercise any power until after its appointment.

(iii) While it would be possible to leave any exercise of powers of confirmation to a new trustee when appointed, that would be unsatisfactory since the Court needs to consider, in reaching a decision as to whether to make any and if so what order setting aside the appointment of the Purported Trustees, the effect of its order on the past administration of the Trust and of the Company. If the Court considers that it is in the interests of the Trust to leave undisturbed acts or omissions of the Purported Trustees which are brought into doubt only because of the court's decision to set aside their appointments retrospectively, then it is sensible for the Court to make an order authorising and directing the trustees to act in that way in accordance with their powers so that the full effect of the Court's order is clear from the outset. All concerned will then know where they stand.

(iv) Likewise, the Court needs to consider, in reaching a decision whether to make an order setting the appointment of the Purported Trustees aside, the effect of its order on past exercises of dispositive powers which are brought into doubt only because of the order made by the Court. If the Court considers that any such exercises should be confirmed by their replacement in accordance with the powers of the duly constituted

trustees, then it is sensible for the Court to make an order in those terms so that the full effect of the Court's order is clear from the outset.

90 The Court agrees with the parties that, consistent with the advice of Lynton Tucker which it accepts, the objectives of the parties in seeking ratification, which are in themselves sound, are better achieved in this case by orders based on confirmation by replacement and confirmation by non-intervention in the interests of the beneficiaries as a whole and the competent administration of the Trust. It is the Court's decision to set aside the appointment of the Purported Trustees with retrospective effect, and, for the reasons given by Lynton Tucker, which the Court accepts and adopts, that forms a sound basis for the Court to make orders authorising and directing the duly constituted trustees of the Trust for the time being firstly to confirm by replacement the distribution to the Beneficiary and secondly to leave undisturbed the acts or omissions of the Purported Trustees so that the Trust is administered on the same footing as though those acts or omissions had been validly done with the authority of duly constituted trustees.

Orders

91 We therefore order that:-

(i) The purported exercise on or about the Appointment Day by the settlor of the power conferred on her by the Trust deed to appoint the Purported Trustees as trustees of the Trust be set aside pursuant to Article 47G and/or Article 47H of the Trusts Law with effect from the Appointment Day;

(ii) We declare that by reason of paragraph (i) of this order: -

(a) the Purported Trustees were never appointed as trustees of the Trust;

(b) the purported retirement of the Retired Trustee as trustee of the Trust was of no effect;

(c) the purported appointments of the Purported Director in place of the Retired Trustee (and its employees) as respectively director, president, treasurer and company secretary of the Company were of no effect;

(d) the transfer of the shares in the Company to the Purported Nominee was of no effect;

(e) the deed of addition and the deed of exclusion entered into between the settlor and the Purported Trustees, both dated some two months after the Appointment Day, were of no effect;

(iii) We further order that: -

(a) the Retired Trustee be relieved from liability in respect of any (and all) of its acts or omissions in connection with the Trust and the Company in respect of the period from

the Appointment Day to the date of this order;

(b) the Purported Trustees be relieved from the liability in respect of any (and all) of their acts and omissions in connection with the Trust and the Company in respect of the period the Appointment Day to the date of this order other than acts or omissions which constitute breaches of trust for which they would have been liable had they been validly appointed as trustees;

(c) the Court being satisfied that it would be contrary to the welfare of the beneficiaries of the Trust and contrary to the competent administration of the Trust, for the trustees for the time being of the Trust to unscramble or reverse or otherwise interfere with the acts or omissions of the Purported Trustees or the Company described in Part One of the schedule to be attached to this order, the trustees for the time being of the Trust be authorised and directed to administer the Trust and procure or allow the Company to be administered on the same footing as though those acts or omissions had been done or omitted by or with the authority of duly constituted trustees;

(d) the Court being satisfied that it would be proper for steps to be taken after the date of this order to confirm the Distribution made by the Purported Trustees to the Beneficiary on or about two years after the Appointment Day in purported exercise of powers conferred by the Trust deed notwithstanding that in consequence of this order they were never appointed as trustees of the Trust, the New Trustee be authorised and directed to, as soon as reasonably practicable after its appointment (i) execute an appointment appointing and directing under the relevant clause of the Trust deed and all other relevant powers that the following part of the trust fund as defined in the Trust deed (the "relevant part of the trust fund") namely the Distribution paid to the Beneficiary on or about two years after the Appointment Day and all rights of recovery in respect of that sum or any property representing it are held in trust for the Beneficiary absolutely and (ii) to resolve under the powers conferred by the relevant clause of the Trust deed and all other relevant powers that the income (if any) of the relevant part of the trust fund which has arisen since the distribution shall be held in trust for the Beneficiary absolutely.

(e) for the avoidance of doubt, nothing in this order prejudices or affects the payments specified in Part Two of the schedule to be attached to this order made pursuant to previous Court orders;

(f) the Purported Trustees transfer to and vest the Trust's assets in HSBC;

(g) the Retired Trustee be directed to appoint the New Trustee as trustee of the Trust in place of the Retired Trustee on such terms as to (i) the indemnification of the Retired Trustee and (ii) the transfer to and vesting of the Trust's assets in the new trustee as they may agree and in the absence of agreement that there shall be liberty to any party (including the New Trustee) to apply for the Court to determine the nature and extent of such terms;

(h) each of the Purported Trustees and the Retired Trustee's reasonable costs of the Beneficiary's application (including as to legal fees and disbursements) be paid on

the trustee indemnity basis out of the Company;

(i) the Beneficiary's reasonable costs of his application (including as to legal fees and disbursements) be paid on the indemnity basis out of the Company;

(j) Advocate Dickinson's reasonable costs of the Beneficiary's application (including as to legal fees and disbursements) be paid on the indemnity basis out of the Company;

(k) All parties have liberty to apply.