Erinvale PTC Ltd v B via his court-appointed delegate C

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith OBE, Jurats Crill, Christensen
Judgment Date:	28 August 2021
Neutral Citation:	[2021] JRC 241
Court:	Royal Court

Text

[2021] JRC 241

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE, **Esq., Commissioner, and** Jurats Crill **and** Christensen

In the Matter of the Representation of Erinvale Ptc Limited

and

In the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between
Erinvale PTC Limited
Representor
and
B via his court-appointed delegate C
First Respondent

and

D
Second Respondent

and

E, F, T and G
Third Respondents

and

J
Fourth Respondent

and

Advocate Damian Evans, as Guardian *ad litem* for the minor Y, N, P, Q, R and unborn beneficiaries.
Fifth Respondents

Advocate B. J. Lincoln **for the Representor**.

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

Advocate P. C. Sinel **for the Second Respondent**.

Advocate S. A. Franckel **for the Third Respondent**.

Advocate D. Evans **for the minor beneficiaries and unborn beneficiaries**.

Authorities

Trusts (Jersey) Law 1984.

Erinvale PTC Limited and Ors [2020] JRC 213.

Matrimonial Causes (Jersey) Law 1949.

Letterstedt v Broers [1884] 9 App. Cas. 371.

Lewin on Trusts 20th Edition.

In Re Wrightson [1908] 1 Ch. 789.

In the matter of the A and B Trusts [2012] (2) JLR 253.

Trilogy Management Limited v YT Charitable Foundation (International) Limited [2014] JRC 214.

In the matter of the X Trusts [2018] SC (Bda) 56 Civ.

Public Trustee v Cooper & Others [1999] WL 1425717.

In re Drexel Burnham Lambert Pension Plan [1993] 1 WLR 32.

Financial Services (Trust Company Business) (Exemptions)) (Jersey) Order 2000.

Trust.

THE COMMISSIONER:

1 By its representation of 3rd November 2020, the Representor ("Erinvale"), a private trust company, seeks directions from the Court as to whether it would be in the best interests of the beneficiaries for it to remain as trustee of the A Settlement or for its directors to resign.

2 The Court heard the representation over three days commencing 12th July 2021 and on 15th July 2021, the Court informed the parties of its decision, namely that it would direct Erinvale to remain as trustee and for the directors to remain in office. The Court now gives that decision formally and sets out its reasons.

Background

3 Much of the background is set out in the Court's judgment of 15th October 2020 (*Erinvale PTC Limited and Ors* [2020] JRC 213) in which it set aside a decision of Erinvale not to add the second respondent ("D") as a beneficiary of the A Settlement in her own right. We will refer to this as the "Addition Judgment".

4 At the centre of this matter are divorce proceedings in Jersey between the first respondent ("B") and D, in which she is seeking ancillary relief. B and D married in 1997 and have one adult child, namely J. B has two children by an earlier marriage, namely J and F. E has two adult children, namely T and G. There are five minor beneficiaries represented by Advocate Evans, namely B's great-granddaughter, Q, the daughter of T, his great-granddaughter Y, daughter of G, his great-grandson N, son of G, his granddaughter P, daughter of J and his grandson R, son of J.

5 B created the A Settlement on 17th September 2012 at a time when he was resident in Country 1 and according to his letters of wishes, subsequently settled into it the whole of his free estate. The assets within the A Settlement are currently valued by Erinvale at *circa* £58 million. The original trustee was Vivat Trustees Limited ("Vivat").

6 The A Settlement is a discretionary settlement governed by Jersey law, the beneficial class being described as follows:

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

7 B, as settlor, has the right to appoint and dismiss trustees. The power of the trustee to exclude or add beneficiaries is subject to the trustee first obtaining the consent of B, as settlor, if alive and of full capacity but in the event of him suffering from mental incapacity, the consent of the person duly empowered to manage his affairs.

8 The current trustee of the A Settlement is Erinvale, a private trust company, which was incorporated in Jersey on 15 th December 2015, in order to act as trustee in place of Vivat both of the A Settlement and a number of other family trusts established earlier by B. Erinvale is in turn owned by a purpose trust established by B known as the H Purpose Trust (the "Purpose Trust") Equiom (Jersey) Limited ("Equiom"), a regulated entity, is responsible for the administration of Erinvale. The original directors of Erinvale were B, C (a long-term business associate of B and who was formerly a director of Vivat) and L.

9 Over the years, B and D have lived at various addresses in the United Kingdom, the Country 2 and Country 3 and Jersey, to which they moved more recently. Upon their move to Jersey, B was given a licence to occupy an apartment as a consequence of his employment by ("Company B"), a Jersey incorporated and regulated finance company, owned as to 90% by the A Settlement.

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

> *"Provision for [D] – Please set aside a fund of assets totalling £4 (four million pounds) for [D].* I would like [D] to be able to withdraw up to £1m (one million pounds) from this fund to spend as she wishes. The remainder should please be invested by you to maximise the income return and provide [D] with a monthly income which is distributed to her."

11 He also expressed the wish that D should be entitled for the rest of her life to use Property 1 owned by another settlement he had created known as the K Settlement.

12 B's health was beginning to deteriorate and by 2017, the marriage had broken down. On 4 th April 2017, Erinvale, as trustee of the K Settlement, appointed out to D ownership of Company C, which in turn owned Property 1. D also jointly owned with B and their son J a family property in County 1.

13 On 25 th April 2017, B's English solicitors wrote to D, saying that B had decided to live in Jersey on his own and that she could no longer therefore have access to the Jersey apartment. There followed unsuccessful efforts by Erinvale and D to obtain consent for her to remain there for the duration of the matrimonial proceedings.

14 On 30 th May 2017, B issued divorce proceedings in Jersey which were subsequently amended on the 22 nd June 2017 and thereafter were not defended, with the *decree nisi* being pronounced on 16 th August 2017.

15 B agreed not to apply for the pronouncement of the decree absolute as it would result in D ceasing to be a beneficiary of the A Settlement as she would no longer be his spouse. She had not been named as a beneficiary of the A Settlement in her own right. The situation that D was in was described by Advocate Sinel as a *"black hole"* in that, if B were to die before the decree was made absolute, then under Article 24 of the Matrimonial Causes (Jersey) Law 1949 the matrimonial proceedings would abate, with the bulk of the family assets being held within the A Settlement of which she would cease to be a beneficiary. Similarly, if B were to die after the making of the decree absolute, but before orders for ancillary relief were made, the matrimonial proceedings would continue pursuant to Article 27(1) of the same Law, but again she would cease to be a beneficiary of the A Settlement, as she would no longer be his spouse.

16 On the 14 th December 2018 B was found by the Court to lack capacity and C was appointed his delegate.

17 The usual procedural steps were taken in the matrimonial proceedings, including the filing of affidavits of means and the issuing of schedules of deficiencies. Issues in the matrimonial proceedings include the validity of the A Settlement, which is being challenged by B, the extent, if any, that E has contributed to the assets of the A Settlement, and the extent those assets fall to be discounted as pre-marital property.

18 On 10 th January 2019, B applied by way of representation in the Samedi Division convening Erinvale and invoking the supervisory jurisdiction of the Court over the A Settlement (amongst others) and seeking the following orders:

(i) Disclosure of information by Erinvale to enable the Court seized of both her representation and of the divorce proceedings to do justice to the same.

(ii) The appointment of D as a beneficiary in her own right.

(iii) That *"D's settlement"* would be paid to D. This would be calculated by reference to:

"(a) the longevity of [D's] relationship with [B].

(b) [D's] contribution as partner, mother, and wife;

(c) The nature and size of the matrimonial assets; and

(d) The availability both presently and historically of assets held directly or indirectly for either or both parties both before and after marriage.

The calculation referred to above to be unaffected by gratuitous dispositions made before or during the marriage."

19 *"Matrimonial assets"* was defined as follows:

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

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

21 By a consent order of 16 th April 2020, it was ordered, *inter alia*, that D's application in her representation to be appointed as a beneficiary of the A Settlement in her own right should be dealt with as a *cause de brièveté*. At the same time, Erinvale was convened as a party to the matrimonial proceedings.

22 On the 19 th June 2017, B and C resigned from the board of Erinvale, and were replaced by V, a director of Equiom, and M. The current directors are therefore L, V and M.

23 L is a long-term business associate of B and heads up Country 3 side of the group of companies which are ultimately owned by the A Settlement ("Company A"). M is currently an employee of Company B and owns the remaining 10% of it. M was formerly employed within the Vivat group, but did not as part of his role there work on any of the H structures. There is an agreement by which L receives 15% of the net proceeds of sale of any disposal of Company A, but neither he nor M receive separate remuneration for their role as directors

of Erinvale.

24 D's application to be appointed a beneficiary of the A Settlement was heard on the 3 rd and 4 th September 2020 and on 15 th October 2020, for the reasons set out in the Addition Judgment, the Court did intervene in the administration of the A Settlement, by setting aside the decision of Erinvale not to add D as a beneficiary in her own right, because the Court found that the only reasonable decision would have been to appoint her as a beneficiary. Following that decision, Erinvale did appoint D as a beneficiary in her own right on 23 rd October 2020 and the decree was made absolute on 23 rd November 2020.

25 The interlocutory proceedings in the Matrimonial Causes Division and the Samedi Division had been heard at the same time, and combined Acts of Court issued in respect of both matters. On 11 th September 2020, for reasons set out in an unpublished judgment, Commissioner Clyde-Smith directed that henceforth, the two sets of proceedings should be dealt with separately before differently constituted courts. At that time, there were listed to be heard in the Samedi Division proceedings a general discovery summons issued by D and an application by B seeking a stay of her representation, pending the outcome of the matrimonial proceedings.

26 By letter dated 8 th October 2020, Advocate Sinel gave notice that D would be amending her representation so as to include a prayer for the removal of Erinvale as trustee, and/or to remove its powers under the A Settlement. By letter of 9 th October 2020, he requested that the directors resign in favour of replacement directors. Erinvale proceeded to consult with the other adult beneficiaries regarding these matters and some of the views received were vehemently opposed to a change of trustee or a change of directors.

27 On 3 rd November 2020, Erinvale filed this representation, seeking the Court's directions as to whether or not it should retire as trustee and whether or not it would be in the best interests of the beneficiaries of the A Settlement for the present directors to resign.

28 On 11 th November 2020, E and F (who we will refer to as “the Intervenors”) were given leave to intervene in the matrimonial proceedings. On 16 th November 2020 and by consent, D's representation was stayed, save in relation to the issue of costs arising out of the Addition Judgment and an application by D to appeal the decision of the Bailiff, an application which was subsequently refused.

29 On 30 th November 2020, the Matrimonial Court issued directions for *inter alia* the filing of pleadings by D, B, Erinvale and the Intervenors and for a case management hearing before the judge appointed to preside over the matrimonial proceedings.

30 That case management hearing took place on 18 th May 2021 before Sir William

Bailhache, Commissioner, and directions were issued to progress the matrimonial proceedings. For the reasons set out in an unpublished judgment of Sir William Bailhache of 21 st May 2020, the dates for the final hearing of the matrimonial proceedings had to be vacated and it is thought that it will take place in the early part of 2022.

Position of the parties

31 By seeking the directions of the Court on the issue of its trusteeship, Erinvale surrendered its discretion to the Court (which the Court accepted) and whilst not accepting that there had been anything wanting in its or the directors' respective stewardships of the A Settlement, it was neutral on the issue of whether it should be directed to resign. The directors, although not parties to the proceedings, said through Advocate Lincoln that they felt able to continue in office, although they helpfully indicated that they would resign if the Court said it was appropriate for them to do so.

32 D's position was that Erinvale should be removed as trustee of the A Settlement and a new trustee appointed. Tentative discussions had taken place between Advocate Sinel's firm and Affinity Private Wealth in Jersey, whose group provide trust and company services. All of the other beneficiaries, including notably, D's son J, were opposed to any alteration in the *status quo*, save that C, as delegate for B, was prepared to countenance a change in the directors of Erinvale in an attempt to find a tolerable compromise which left no scope for further procedural disruption and which left a clear path to resolve B's claims in the matrimonial proceedings.

The Law

33 There was no dispute that the Court had jurisdiction to remove and appoint trustees, both under its inherent jurisdiction and pursuant to Article 51(2)(ii) of the Trusts (Jersey) Law 1984 (“the Trusts Law”). The guiding principle in exercising such a power is the welfare on the beneficiaries as a whole and the competent administration of the trust in their favour. Quoting from the oft cited judgment of Lord Blackburn in the Privy Council case of *Letterstedt v Broers* [1884] 9 App. Cas. 371 at 386–387:

> ***“It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising … is merely ancillary to its principal duty, to see that the trusts are properly executed … And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed …***
>
> ***…. As soon as all questions of character are as far settled as the nature of the case admits, it appears clear that the continuance of the trustee would***

be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; … .

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case .

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees …" *(emphasis added)*

34 *Lewin on Trusts* 20th Edition states (at 14–076 – 14–077):

" The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity .

The views of the beneficiaries may be relevant to an exercise of the court's inherent jurisdiction, though it rarely suffices to say that a beneficiary has fallen out with a trustee. Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee's duties, the court may come to the conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed. In assessing the significance of friction or hostility between original trustees or executors and a beneficiary, it is relevant to have regard to the fact that they were chosen by the settlor or testator and evidence as to his reasons for that choice …" (emphasis added)

35 Thus the existence of friction or hostility between the beneficiaries and the trustee is not enough to justify removal (per Lord Blackburn). *In Re Wrightson* [1908] 1 Ch. 789, Warrington J stated (at 803):-

> ***"… disagreement between the cestuis que trust and the trustees, or the disinclination on the part of the cestuis que trust to have the trust property remain in the hands of a particular individual is not a sufficient ground for the removal of the trustees.*** You must find something which induces the Court to think either that the trust property will not be safe, or that the trust will not be properly executed in the interests of the beneficiaries." (emphasis added)

36 The views of the beneficiaries as a whole are obviously relevant to the Court's discretion. In the case of *In the matter of the A and B Trusts* [2012] (2) JLR 253, the Court had been influenced by the fact that the Representor beneficiaries and the *"overwhelming majority of the other adult beneficiaries"* supported removal (at paras 3 and 8).

37 As Commissioner Page said in *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2014] JRC 214 at paragraph 143:

> ***"143 The well-known authority of*** *Letterstedt v Broers* (1884) 9 App Cas 271 ***(a decision of the Privy Council on appeal from the Supreme Court of the Cape of Good Hope) shows that the Court has jurisdiction to replace a trustee if the beneficiaries of the trust have lost confidence in the trustee by reason of its administration and management of the trust.*** Loss of confidence alone is not, however, without more, enough. Lord Blackburn observed in *Letterstedt* ***itself (at page 389) that:-***
>
> ***'…friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees.'***
>
> ***On the other hand, a breakdown in relations between an executor and a beneficiary will be a factor to be taken into account, in the exercise of the court's discretion, if it is obstructing the administration of the estate, or even sometimes if it is merely capable of doing so.*** This was explicitly apparent in a more recent application of the *Letterstedt* ***authority*** : *Kershaw v Micklethwaite* [2010] EWHC 506, ***a decision of Newey J. translated into the context of the foundation itself, this means that a breakdown in relations between YT and the trustees of the sub-trusts is a factor if it obstructs the carrying into effect of the charitable objects of the foundation (meaning, after the 2004 compromise, the charitable objects of the sub-trusts.)***

38 The private trust structure with a private trust company acting as trustee of the A Settlement was established in accordance with the wishes of B, but as Commissioner Page said at paragraph 144:

> ***"144 We are naturally aware that removing YT from the trusteeship would***

have the effect of removing control of the foundation from the four individuals who were chosen as executors by OM. That too is a factor which it is right to take into account, along with the other aspects of OM's wishes to which we are enjoined to have regard. But in the end the dominant consideration is whether the trusts are being properly executed, and ultimately OM's selection of executors should not be determinative."

39 Whether the Court exercising its supervisory jurisdiction over trusts has jurisdiction over the directors of Erinvale is a novel issue in Jersey, but it was considered recently by the Supreme Court of Bermuda in the case of *In the matter of the X Trusts* [2018] SC (Bda) 56 Civ, where the trustees, private trust companies, sought the directions of the court as to whether they should remain in office or retire, on which they adopted a neutral position, or whether the directors should resign. The directors had offered to resign if the Court thought it appropriate. In that case, the following points were ultimately agreed:

"(a) the Court has no jurisdiction to direct the removal of the directors from the relevant corporate boards. That power lies with the relevant shareholders .

(b) the Court has jurisdiction to indicate that it would be in the best interests of the Trusts if the directors were to resign in circumstances where they have agreed to be bound by any such indication by this Court in deciding the present application." (emphasis added in the judgment)

40 However, in his judgment, Ian Kawaley CJ made these helpful observations at paragraphs 34 – 37:

"34 Mrs Talbot Rice QC in opening and in reply submitted that it would be jurisprudentially unsound for the Court to direct the removal of a director from one or more of the Trustees' boards. Mr Green QC described the removal claim referred to in Mr Brownbill QC's Skeleton as analogous to a 'dog-leg claim' as a non-point, not pursued in oral argument. These arguments did not do justice to the subtlety of the point advanced by Mr Brownbill QC in oral argument. He submitted that the Court 'can take any step to secure the proper administration of a trust. And this … supervisory jurisdiction when it comes to a trust is regularly exercised in completely new and novel situations'. This point was buttressed by a reference to, inter alia , *Crociani v Crociani* [2014] 17 ITELR 624 (Privy Council) ***and the following pronouncements by Lord Neuberger:***

'36 In the case of a clause in a trust, the court is not faced with the argument that it should hold a contracting party to her contractual bargain. It is, of course, true that a beneficiary, who wishes to take advantage of a trust can be expected to accept that she is bound by the terms of the trust, but it is not a commitment of the same order as a contracting party being bound by the terms of a commercial contract. Where, as here, (and as presumably would usually be the case), it is a beneficiary who wishes to avoid the clause and the

trustees who wish to enforce it, one would normally expect the trustees to come up with a good reason for adhering to the clause, albeit that their failure to do so would not prevent them from invoking the presumption the court has an inherent jurisdiction to supervise the administration of the trust – see e.g . *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [204] 1 AC 709 ***para 51, where Lord Walker of Gestingthorpe referred to 'the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts'.*** This is not to suggest that a court has some freewheeling unfettered discretion to do whatever seems fair when it comes to trusts. However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries, which represents a clear and, for the present purposes, significant distinction between trusts and contracts."

35. The breadth and flexibility of the Court's supervisory jurisdiction over trusts is confirmed rather than undermined by the concession made in the instant case. The directors of corporate Trustees, whom the Court has no power to formally remove, have expressly conceded that the Court may validly decide whether or not it is desirable for them to resign, if a case for removing the Trustees is made out .

36 It would be surprising if the Court could not validly make similar findings in circumstances where the directors did not expressly agree to any directions the Court might give as to the desirability of a resignation. It is also difficult to conceive that the Court could not, in circumstances where (a) a corporate trustee's directors served multiple clients, and (b) a prima facie case for removal of the corporate trustee was made out, direct (or signify) that a director's continued deployment in the administration of a particular trust would be inconsistent with the due administration of the relevant trust. There is no need to resolve these questions in the present case but in general terms the oral submissions of Mr Brownbill QWC on the flexibility of this Court's supervisory jurisdiction over trusts were fundamentally sound .

37 In summary, I find that the Court has no jurisdiction to direct the removal of one or more of the directors. The Court does possess the inherent jurisdiction in supervising a Bermudian trust to signify that rather than removing the corporate trustees it would be desirable if one or more of the directors resign. The existence of this jurisdiction was implicitly conceded by the Trustees in the present case."

41 In the case before us, the issue of whether the Court has the power to order directly the removal of directors of a private trust company does not arise, because the directors of Erinvale, although not convened before the Court, have agreed to resign if the Court signifies that they should. The power to remove the directors of Erinvale vests in the shareholders, in this case, the trustee of the Purpose Trust established by B, which is not before the Court. In an appropriate case, the Court would arguably have jurisdiction to direct the trustee of the Purpose Trust, assuming it was before the Court, to exercise its

powers as shareholders of Erinvale to remove the directors, but for present purposes, and for the same reasons as put forward by Kawaley CJ, we find, as conceded by counsel, that this Court does have the inherent jurisdiction in supervising this trust to signify that it would be desirable if one or more of the directors of Erinvale were to resign.

The evidence

42 There were some ten affidavits with exhibits before the Court, one by D, one by E, one by C, three by V, two by M and two by L. Those affidavits were not tested by cross examination and given the extent of the issues raised by D, cross examination would not have been feasible in the time allotted for the application. It was common ground that in these circumstances, it was not open to the Court to make formal findings of fact, such as whether Erinvale had acted in breach of trust or that Erinvale be exonerated from all and any allegations made against it by D. The Court had to look at the position that exists in the present day and make a pragmatic decision as to what was in the interests of the beneficiaries as a whole. The Court was generally bound to accept that each deponent believed the truth of their sworn assertions, and the Court could only resolve actual contentions or draw disputed inferences where a controversial contention was either clearly right or clearly wrong.

D's contentions

43 By way of overview, D contended that the A Settlement had been established with the intention, or at least a motive, of defeating her claims in divorce proceedings. She asserted that Erinvale was controlled by B, through the directors he appointed, who were hopelessly conflicted and partial to B. Erinvale, which was unregulated, uninsured and with no assets, had interfered in and controlled the matrimonial proceedings, acting as a hostile partial gatekeeper, with whom D could no longer deal. Erinvale had to be taken out of the equation, playing no part in the proceedings other than the provision of information. As Advocate Sinel put it, they wanted Erinvale out of the way.

44 Referring to Erinvale's DNA and its raison d'être, Advocate Sinel said it was apparent that the prime driver behind the formation of the A Settlement and the appointment of Erinvale as trustee was to minimise D's access to trust assets in the event of widowship or divorce. The trust instrument was bespoke, with B keeping as much control as he could. Documents discovered showed that B, with the knowledge and assistance of Vivat, V (who had been involved with H trusts at a high level for nearly a decade), C, B's English solicitor Ms Palmer, L, Collas Crill and Carey Olsen, had structured his affairs in anticipation of a claim for ancillary relief. B and his advisers were contemplating divorce since 2012 and Erinvale came into existence with that in mind.

45 The decision not to appoint D as a beneficiary in her own right had been found by the Royal Court in the Addition Judgment to be one which no reasonable trustee could have

made, showing that Erinvale was not truly impartial, but was in form and in practice doing B's bidding in the context of the matrimonial proceedings and acting in accordance with its raison d'être and its DNA.

46 A serious tax issue had arisen within the context of the matrimonial proceedings and referred to by Sir William Bailhache at paragraph 8 of his unpublished judgment, namely whether at the time assets were settled into the A Settlement, B had lost his domicile of choice in Country 1, which would have revived his domicile of origin in the United Kingdom, the tax implications of which were significant, affecting all of the beneficiaries. Erinvale was not, of course, trustee when the A Settlement was established and funded, but D was highly critical of Erinvale for not taking tax advice on this issue at the earliest opportunity and resolving it. Advocate Sinel devoted a substantial amount of time to this issue.

47 There appeared to be no signed agreement with L over his asserted entitlement of 15% of the net proceeds of sale of Company A, an arrangement apparently agreed with B before Company A was settled into the A Settlement, an arrangement subsequently honoured by Erinvale, notwithstanding the absence of a signed agreement. A competent, regulated, impartial trustee, Advocate Sinel said, is not one run by people who have shares in the underlying assets.

48 There were a number of inaccuracies in the schedules produced showing distributions to E, J and B, and in particular, a distribution of £1.5 million incorrectly recorded as being made to B. There were also variations in valuations produced for the trust assets. All of this showed a lack of competence.

49 Whilst Erinvale stated in paragraph 4 of its Answer that it was taking a neutral stance overall, in relation to the substance of D's claim to ancillary relief, this was “unless and until the Invalidity Contention has been determined”. Erinvale went on to raise procedural concerns and made certain denials in relation to B's alleged control of Erinvale and was not truly adopting a neutral stance. Erinvale had furthermore made no application to the Court for directions and had no mandate from the beneficiaries or from the Court for its stance, or activities within the matrimonial proceedings. As Erinvale had no assets or insurance, in essence D faced another well heeled, risk free opponent.

50 E has his own claims to assets within the A Settlement, as reflected in the Answer filed by the Intervenors and in a letter of wishes signed by B, which Erinvale had failed to clarify, let alone document.

51 Advocate Sinel gave this summary of Erinvale's partiality in his skeleton argument:

> *“(i) It participated in [D's] eviction from the trusts without demur.*

(ii) When asked to appoint [D] as a beneficiary in her own right, it:

(a) deliberately sat on the application and did not make a decision for many months;

(b) threatened to defend the application;

(c) insisted on, in effect, writing directly to [D];

(d) made a decision that no reasonable Trustee would have made and was reversed by the Royal Court.

(iii) It is and always will be hopelessly conflicted and partial in favour of [B] and [E], it cannot be otherwise given its history.

(iv) It does not know what is in the Trust fund by reference to [E's] claims.

(v) Its record keeping on major issues including [E's] entitlement is dangerous.

(vi) It has and continues to mishandle the tax and domicile equations which represent a multi-million pound actual or prospective liability.

(vii) Its actions and inactions have impeded the Matrimonial Proceedings and any prospect of early settlement.

(viii) It has adopted what is, in effect, both a hostile and obstructive stance to [D] in the Matrimonial Proceedings.

(ix) It has approached the Court without clean hands – one could go so far as to say by attempting to suppress material facts.

(x) It has until now failed to seek directions when any competent, let alone a competent and impartial trustee would have done so years ago; even now it seeks not to surrender its discretions but give the parties effectively a stay or go option.

(xi) It continually puts impediments in the way of a free flow of information, not only in relation to its aetiology but also the distribution of trust funds.

(xii) It is uninsured.

(xiii) It has no assets of its own

(xiv) It has no competent or competent and unconflicted personnel.

(xv) It engenders mistrust and conflict in a fashion which no neutral third-party trustee would.

(xvi) It brings nothing to the table.

(vii) It has failed to gather together material and salient records relevant to its trusteeship.

(xviii) It shows no sign of getting better despite the elapse of years and much poignant criticism not just from [D].”

52 The informal arrangements between B, L, M and E were exacerbating factors and it was D's contention that in all these circumstances, the inescapable picture is of a trustee which she cannot reasonably be expected to trust. Quite apart from ordinary notions of human decency, Erinvale was wrong at every level and as a matter of public policy, the Court should say *“enough is enough”*.

53 D recognised that Erinvale acted as trustee of other earlier family settlements created by B of which she was not a beneficiary and that the knock-on effect of changing its directors would be felt beyond the A Settlement. That side effect was easily obviated, she said, by simply replacing Erinvale as trustee of the A Settlement.

Discussion and decision

54 In the view of the Court, a view shared by counsel for all of the beneficiaries other than D, there were powerful practical reasons for maintaining the *status quo*, pending the finalisation of the matrimonial proceedings.

55 It was not just a question of removing Erinvale as trustee. That would leave the A Settlement without any trustee at all. A new trustee would have to be appointed in its place, and the selection of that new trustee would of itself be problematical, bearing in mind the opposing camps comprising D on the one hand and all of the remaining beneficiaries (“the Remaining Beneficiaries”) on the other hand.

56 Those difficulties were illustrated by D's unilateral approach to Affinity as a prospective trustee. According to Sinels' letter to Mourant Ozannes of 8 th June 2021, Affinity had been approached initially to act as a trustee of a new trust for D to hold the settlement she anticipated achieving in the matrimonial proceedings, but subsequently it was approached to act as trustee of the A Settlement in the place of Erinvale. No note was kept of what was said in meetings between Sinels and Affinity, but this email from Affinity on 25 th November 2020 showed that it regarded D as *“the client”* and expressed the need to make good the wrongs felt by her:

> *“Clearly this trustee will carry a lot of challenges.* I have discussed this with Justin and in principle we are interested in the role, in fact we naturally relish these opportunities not because of the agitating factor of them but more to try to make good the wrong felt by the client and restore some faith in our sector. That said, the challenge here is that one client will likely hold those views while the other will believe the trustee is doing a marvellous job!
>
> *I think the next steps could be a follow up call but certainly some information*

about expectations of a trustee, maybe the accounts and the way your client would wish the conflict of interest be dealt with between her and the deputy of her husband should the trusteeship alter.

It may be that a move by you to alter the trustees and confirmation you have another trustee interested could be the key to a settlement and therefore the desire/need to alter trustee vanishes."

It could be anticipated from this that the Remaining Beneficiaries might well object to Affinity's appointment.

57 The process of identifying and appointing a new trustee would need to be supervised by the Court, with the background briefing to potential trustees being prepared on a joint and impartial basis. The Court could envisage this process taking some time, with the potential for the issue of which new trustee should be appointed having to be resolved at a further hearing before the Court.

58 Once a new trustee had been identified and had agreed in principle to act as trustee, it would have to undertake due diligence. This would not be a straightforward exercise. In addition to having divided camps within the beneficial class, the A Settlement is involved in litigation in which, inter alia, the validity of the A Settlement itself is being challenged. The new trustee would be required to become a party to the matrimonial proceedings, where pleadings have already been filed by the current trustee. It is inevitable that any prospective trustee in this situation would need to obtain legal advice adding to the number of lawyers already engaged in the matter.

59 Assuming a new trustee completed its due diligence and was prepared to be appointed, the issue of security for Erinvale would need to be addressed. Even if removed as trustee, Erinvale is entitled under Article 43A(1) of the Trusts Law to be provided with reasonable security for liabilities that are existing, future, contingent or otherwise before surrendering the trust property, and again there is the potential for this issue to be resolved by the Court.

60 Assuming all of these hurdles were overcome, any appointed new trustee may well wish to revisit pleadings filed by the previous trustee and the real possibility arises of the new trustee applying for an adjournment of the matrimonial proceedings for that purpose. Advocate Sinel stated that Erinvale's Answer in the matrimonial proceedings was untrue and would need to be redrafted.

61 The priority of all concerned is to get the matrimonial proceedings completed as soon as possible, and all in all, any change in the trusteeship of the A Settlement at this stage had the potential of being prejudicial to that objective and adding to the already substantial legal costs of some £5.5 million that have been funded out of the A Settlement to date. As Advocate Evans submitted, costs involved in a transfer of administration to a new trust are always a factor weighing against removal. As Warrington J said in *Re Wrightson* at 802 and

803:

> ***"At the present moment nothing remains for the trustees to do except to wind up the estate: the testator's widow is dead; the whole of the estate is divisible amongst a number of persons who are sui juris …***
>
> ***… is it for the welfare of the trust generally and not merely the plaintiffs, that these trustees should be removed?*** I think it is not. The trustees were undoubtedly guilty of a breach of trust, and they undoubtedly in the statement to which I have referred expressed views which have occasioned the blame which has been attached to the trustees both by Buckley J and myself, but having regard to the fact that a large proportion of the beneficiaries do not require the trustees to be the Court has now the power of seeing that the trust is properly executed, to the fact that a large proportion of the beneficiaries do not require the trustees to be removed and further (and this is of great importance), to the extra expense and loss to the trust estate which must be occasioned by the change of trustees, I think it would not be for the welfare of the cestuis que trust generally, or necessary for the protection of the trust estate, that these trustees should be removed. I must therefore refuse the application … .. (emphasis added)

In the case before us, only one beneficiary requires the removal of Erinvale as trustee.

62 We cannot cover in this judgment every aspect of D's criticisms of Erinvale and its directors, but we address the substance of her concerns under the headings which follow.

The Addition Judgment

63 This represents the high point of D's case for removal in that the Court made a finding that the decision by Erinvale not to add D as a beneficiary in her own right was not one which a reasonable trustee would make. Advocate Sinel relied on this finding as showing that Erinvale was not wholly impartial but in form and in practice doing B's bidding in the context of the matrimonial proceedings, acting in accordance with its *raison d'être* and its DNA.

64 The directors of Erinvale accept that they took a wrong turning in making this decision, but once the Addition Judgment was handed down, it was not appealed, and D was promptly added as a beneficiary in her own right.

65 It is noteworthy that the Court subsequently declined to deprive Erinvale of its costs as D contended it should be, for the reasons set out in its judgment of 25th January 2021 ([2021] JRC 021). Quoting from paragraphs 33–35 of that judgment:

> ***"33 In the case of*** *In the matter of the Piedmont Trust and the Riviera Trust*, ***Commissioner Birt, after considering the abovementioned cases, provided the following clarification at paragraph 37:***

'Although there is a similarity of language in describing one of the tests for finding the exercise of a power of appointment invalid ('irrational' or 'outside the band of reasonable decisions') and the ground for depriving a fiduciary of his indemnity ('misconduct' or 'acting unreasonably', it is a mistake to consider the tests as being the same. They are not. As the cases referred to above make clear, the mere fact that a trustee has been found to be in breach of trust does not necessarily mean that he should be deprived of his indemnity. As Beloff JA said in *MacKinnon* ***in the passage cited at para 18(2) above, it is a matter of fact and degree in every case.*** The Court must have regard to the overall circumstances of the case and decide whether the nature and gravity of his misconduct is such that he should lose his indemnity and/or be ordered to pay the costs of the parties. It is very much a matter of discretion for the Court having regard to the particular facts of the case .

34 In this case, there are a number of reasons why, in my judgment, Erinvale should not be deprived of its indemnity, namely:-

> ***(i) Erinvale had consulted all the beneficiaries on [D's] request and the decision reflected the views of some of them*** .
>
> ***(ii) [D] was already a beneficiary in her capacity as [B's] spouse*** .
>
> ***(iii) The decision was carefully considered, as reflected in the detailed minute*** .
>
> ***(iv) It is clear that the directors (two of whom were de facto lay trustees) were guided in the process by legal advice*** .
>
> ***(v) Erinvale's conduct in general towards [D] was reasonable, in that it was supporting her financially and paying her legal fees (fees that at the time of the judgment had amounted to some £1 million).*** The allegation that they were motivated by malice was rejected by the Court .
>
> ***(vi) Erinvale's conduct of the proceedings had been reasonable and having reached a considered decision, it was reasonable for Erinvale to defend that decision supported by some of the beneficiaries*** .
>
> ***(vii) The directors had not been affected by any conflict of interest*** .

35 In essence, there had been no finding that Erinvale acted in bad faith or for any improper purpose or with disregard, let alone reckless regard, of its fiduciary duties. There was no finding that it had adopted an excessive role or acted in a partisan manner. The nature and gravity of Erinvale's conduct has not reached the point where it should be deprived of its indemnity. It can, therefore, have recourse to its indemnity to discharge its own costs and will not be ordered to pay the costs of [D] or any of the other convened parties."

66 D herself was only awarded 60% of her costs in making her application, as a consequence of her own conduct of the proceedings (paragraph 23 of the judgment).

67 As to the support given by Erinvale to D throughout these proceedings, it is worth reiterating that she receives £3,000 per month directly from the A Settlement and another £2,000 from another settlement via B; a total of £5,000 per month. In addition to this, Erinvale pays her legal fees, the running costs of her apartment in the UK, her flights and travel and her medical expenses. As of 7 th January 2021, the date of V's second affidavit, she had received around £1.6 million from the A Settlement, accounted for by way of loan for English tax reasons.

B's alleged control of Erinvale as trustee

68 This allegation has been addressed by the directors in their affidavits, and in particular, the affidavits of V, who confirms that there was as might be expected, an ongoing dialogue between Vivat and B, as settlor, in respect of the A Settlement and its assets and investments. When Erinvale was first appointed, B was a director and was therefore involved in decisions taken at trustee level, although since he retired as a director, in June 2017, she deposed that Erinvale ensured that B has not been involved in decision making in respect of the A Settlement and its assets. The minutes we have seen show that the meetings of the directors since his retirement were not attended by C, as B's delegate, or as one might expect bearing in mind his incapacity, by B himself.

69 The Court has not seen any support for the allegation that B's retirement as a director was only in form and not in substance, and in any event, it is counter intuitive to suggest that B could be exercising control of Erinvale, bearing in mind his incapacity, age and failing health. Advocate James informed the Court that it was not possible to communicate in any meaningful way with B.

Alleged conflict of the directors

70 The issue of the conflict of L as an employee of Company A, and M as a shareholder in and employee of Company B, was addressed in the Addition Judgment, which made reference to the leading case of *Public Trustee v Cooper & Others* [1999] WL 1425717, a case in which one of the trustees personally owned shares in the same brewery company in which the trust had invested. Quoting from paragraphs 75 – 78 Addition Judgment:

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

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

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

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

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

> ***'Had the whole body of trustees been exposed to individual conflicts of a similar nature.*** I think I might have been inclined to at least a provisional view that the proper course would be for them to have surrendered their discretion to the court, and the mere fact that the settlement contemplated or must have contemplated the possibility that the trustees might have such personal shareholdings would not by itself have dissuaded me from that provisional view. That is not, however, this case.'

78 We conclude, however, that on the evidence, the decision of the directors not to appoint [D] a beneficiary in her own right was not

influenced by the personal interest of [L] and [M] in companies within the trust fund and was made independently of that private interest."

71 There can be no objection, therefore, in principle to L and M having an interest in the trust assets and the Court can appreciate the value to the beneficiaries of the A Settlement of having as directors of the corporate trustee persons who are involved in the underlying trading entities in respect of which they are intimately involved and who are a source no doubt of valuable information and expertise. It is clear from the affidavits of L, which go into detail as to the history of his involvement with B, the key role he has played in Company A, which comprises trading entities the majority of which have now been sold with L receiving or due to receive 15% of the net proceeds. M plays a similarly important role in the other trading entity in which the A Settlement has an interest, namely Company 2.

72 The Court accepts that L and M have a long connection with B, as indeed does V, but that does not mean that they will exercise Erinvale's powers as trustee in an improper manner. It is often the case that a settlor will wish to appoint persons who he knows and in whom he has confidence to act as trustee or in this case as directors of the corporate trustee, and the evidence we have seen does not indicate any animus on their part towards D, as exemplified by the substantial financial support she has been given and continues to receive.

73 Advocate Sinel placed great emphasis on the duty of Erinvale to act impartially, citing in support Article 23 of the Trusts Law, which is in these terms:

"23 Impartiality of trustee

Subject to the terms of the trust, where there is more than one beneficiary, or more than one purpose, or at least one beneficiary and at least one purpose, a trustee shall be impartial and shall not execute the trust for the advantage of one at the expense of another."

74 As can be seen, this duty is subject to the terms of the trust, and in the context of a discretionary settlement such as the A Settlement, as opposed to a fixed trust, it is inherent that the trustees will exercise their powers partially for the advantage of some beneficiaries and at the expense of others. Indeed, Clause 12.1 of the A Settlement provides:

"12 Exercise of Powers

12.1 The Trustees shall exercise the powers and discretions vested in them as they shall think most expedient for the benefit of all or any one or more to the exclusion of the other or others of the Beneficiaries and may exercise (or refrain from exercising) any power or discretion for the benefit of any one or more them without being obliged to be impartial and the Trustees may execute the trusts, powers and provisions hereof for the advantage of one Beneficiary at the expense of another or for the benefit

of any one or more of them without being obliged to consider the other or others."

75 Accordingly, by the very nature of a discretionary settlement, a trustee is not under a duty to act impartially as between beneficiaries, but it must exercise its powers for the purpose for which they were created, taking into account relevant considerations and ignoring irrelevant considerations, and acting with due diligence, as would a prudent person, to the best of the trustee's ability and skill and observing the utmost good faith (Article 21 of the Trusts Law) and not in circumstances where its interests and duty conflict.

76 In respect of conflict, the classic statement is that of Lindsay J in *In re Drexel Burnham Lambert Pension Plan* [1993] 1 WLR 32:

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

77 It was a concern to the Court, appreciated we believe by the directors, that at the point at which the Court in the matrimonial proceedings makes an award in favour of D and she then applies to the trustee of the A Settlement for a distribution to meet it, a conflict could arise for L and M because of the impact a distribution to her could have on the assets in which they may have an interest. In this respect, the directors helpfully confirmed to the Court that without fettering the future exercise of Erinvale's discretions, when B applies for a distribution following a final order in the matrimonial proceedings it would be the intention of Erinvale to apply to the Court for directions as to whether or not to make the distribution requested, and in that application, it would intend to surrender its discretion.

78 In the meantime, it is not anticipated that the directors will have any personal interests which will conflict with their duties as directors of the corporate trustee of the A Settlement.

The nature of a PTC

79 Advocate Sinel was very critical of the nature of the private trust company structure employed in this case. It is true that Erinvale has no material assets in its own name, and it is the only material asset of the S Trust which owns it. It is uninsured and neither L nor M are professional trustees. V is a professional trustee and alone of the directors has Directors and Officers insurance cover. Advocate Sinel said this entitled Erinvale to " *free hits without risk*". That is not accurate in that to the extent that Erinvale is found liable in breach of trust, it may well be entitled to seek an indemnity from the directors involved in

that breach and this for breaches of their own fiduciary duties as directors to Erinvale, one of whom, V, is insured and the others of whom would be personally liable.

80 Leaving that aside, it is the case that private trust companies are a well-established mechanism for the provision of trustee services in the Island, exempt from the prohibition on carrying on unauthorised financial service business under the Financial Services (Trust Company Business) (Exemptions)) (Jersey) Order 2000, Article 4 of the Schedule being in these terms:

> ***"4 Private trust company business***
>
> ***A person being a company –***
>
> ***(a) the purpose of which is —***
>
> ***(i) solely to provide trust company business services in respect of a specific trust or trusts, or***
>
> ***(ii) to act for that purpose and to act as a member of the council of a foundation or of foundations (otherwise than as a qualified member, as that term is defined by the Foundations (Jersey) Law 2009);***
>
> ***(b) that does not solicit from or provide trust company business services to the public; and***
>
> ***(c) the administration of which is carried out by a registered person registered to carry out trust company business*** ,
>
> ***when providing a service specified in Article 2(4) of the Law where the name of the company is notified to the Commission."***

It was not in question that Erinvale meets the criteria required to operate as a private trust company, with the administration being carried on by Equiom, which is a registered person.

Disclosure issues

81 D accuses Erinvale of providing incomplete, not up to date or at the height of her allegations, false, information in relation to the matrimonial proceedings. Erinvale, on the other hand, maintains that it has discharged all information requests appropriately made by D in relation to the A Settlement, recognising that she is, and has always been, a beneficiary of the A Settlement as B's spouse. Advocate Lincoln says the information disclosed has been extensive and went beyond information to which a beneficiary would ordinarily be entitled.

82 Sir William Bailhache addressed the disclosure issues in paragraph 25 of his unpublished

judgment of 21 st May 2021, where he said this at paragraph 25:

> ***"25 It is fair to say that all the parties before me complain about the disclosure arrangements so far.*** The Petitioner, Third Party and Intervenors complain that the Respondent has in colloquial terms thrown the kitchen sink at the claims which she wishes to bring and that she has had disclosure of an inordinate amount of material as a result of which the costs of the litigation have been very substantially increased. The Respondent, on the other hand, asserts that the other parties have failed in their disclosure obligations time and again, resulting in a serious lack of trust on her part in the ability or desire of the other parties to deal fairly with her. I can readily identify with the sentiments advanced by all the parties, and at the same time I do not feel that I am able to adjudicate upon them without a very intensive exercise in studying all requests for disclosure and the manner in which they had been dealt with. It does not seem to me that this is a profitable way forward, whether for me or for the parties who would obviously have to address me in detail on those matters."

83 This Court is in the same position, recognising that disclosure in the matrimonial proceedings is a matter for the matrimonial Court. However, this Court is not aware of any judicial criticism of Erinvale of the disclosure it has made to D or of its conduct generally in either set of proceedings, save as set out in the Addition Judgment.

Tax Issues

84 Erinvale had no involvement in the establishment of the A Settlement in 2012 and the subsequent transfer of assets to that settlement which took place between 2012 and 2014. According to the briefing note prepared by Mourant Ozannes in May 2021, it had always been Erinvale's understanding that B was domiciled by choice in Country 1 during the material period and that had been supported by two opinions of English tax counsel.

85 The issue was raised in the matrimonial proceedings and has been the subject of further and conflicting advice procured by Mourant Ozannes on behalf of Erinvale. This is a significant issue for everyone involved in the A Settlement and is a key issue in the matrimonial proceedings (see paragraphs 8, 9 and 10 of Sir William Bailhache's unpublished judgment), but even if there has been delay in Erinvale grappling with this issue, as asserted by D, it is manifestly not an issue of Erinvale's making and will be a very difficult and complex issue to resolve, bearing in mind that it centres on the intentions of B, who was first diagnosed with a brain disease in 2012 with his health deteriorating to the point that in December 2018, he was found to lack capacity. Advocate Sinel's accusation that Erinvale on its own could have put this issue *"to bed"* in 2015 seems unrealistic. Again, this Court has not seen any judicial criticism of the role Erinvale is playing in addressing this difficult issue with the other parties.

Poor accounting

86 V addressed the allegations of poor accounting in her third affidavit from which it would seem that there have been some minor bookkeeping errors as a consequence of human error, but she says that Erinvale has responded to queries raised by D's accountant directly and in a cooperative manner.

87 Particular criticism was made by Advocate Sinel in relation to the recording of the distribution of £1.5 million made on 14 th March 2018, and which led to this explanation from Advocate Lincoln on 15th June 2020:

> *The Trustees would, however, like to take this opportunity to correct certain inaccuracies in the schedule of distributions and loans enclosed with your letter (the Schedule) which, in turn, it appears arise from inaccuracies in the 2018 Trust Accounts (for which the Trustee apologises).* In particular, you will note that a distribution of £1.5 million on 14 March 201 has been wrongly designated as a distribution to [B], when in fact that distribution was to [E]. Enclosed with this letter are the updated 2019 financial statements for the Trust, which include the restated 2018 comparatives. For ease, we have also included a table detailing the correct figures. Please note that the schedule of distributions that was provided to you on 24 March 2020 also notes the correct position in respect of the distribution from the Trust."

88 It would seem, therefore that there had been an error in the way this distribution was recorded in the accounts, which was corrected, but that the original information given to Advocate Sinel was accurate.

89 None of this leads the Court to be concerned as to the competent administration of the A Settlement and of its assets.

D's occupation of the Jersey apartment

90 Advocate Sinel described the way D was evicted from the Jersey apartment as a bizarre way of treating a beneficiary, humiliating and destabilising for D and showing an absence of any form of impartiality by Erinvale.

91 In fact, D's occupation of this apartment was dependent on her continuing to reside with B, who was the holder of the relevant housing licence, and because B was no longer living at the property, it would have been unlawful for D to remain there in the absence of a consent from the Population Office. Erinvale made a joint application with D to the Housing Minister for such consent, without success. It would seem from Sinels' letter of 30 th October 2017 to the Housing Minister that D only wished to continue occupying the Jersey apartment for a short time to allow for the conclusion of the matrimonial proceedings, and that it was her intention to move back to the UK to be close to her adult children (in addition to J, she has

two other children from an earlier marriage) and her grandchildren. As of the 4 th April 2017 she owned [Property 1] where she has lived ever since.

Erinvale's stance in the matrimonial proceedings

92 D is critical of the stance taken by Erinvale in the matrimonial proceedings, which Advocate Sinel says is not truly neutral. Whilst the merits of Erinvale's answer as filed in the matrimonial proceedings is a matter for the Matrimonial Court, this Court can see no reason to be concerned as to the propriety of the position it has taken in its pleaded Answer. Its role is neutral on the substance of D's claim, but it understandably wishes to be heard on the allegation that the A Settlement is invalid and otherwise seeks to give assistance to the Matrimonial Court where it is in a position to do so. It has been advised by Mourant Ozannes throughout the process.

93 There is little, if any, support for D's allegation that Erinvale has interfered in and controlled the matrimonial proceedings. Indeed, it was convened to the matrimonial proceedings at the instance of D and by consent.

Conclusion

94 The issue of the directors resigning and the impact of that upon the other family settlements of which Erinvale is trustee does not arise, as D seeks only Erinvale's removal as trustee.

95 D's approach is to regard the A Settlement as invalid, created to defeat her claims in the matrimonial proceedings, and she therefore sees everything that Erinvale does as an obstruction, and wants it out of the equation. However, until such time, if ever, that the Court declares the A Settlement invalid, Erinvale is bound to discharge its duties on the basis that it is a valid trust and to conduct itself accordingly. To do so is not to be obstructive and that should be understood by D.

96 This Court is not in a position to make findings as to the validity of the A Settlement, and the motives for its creation and the creation of the private trust structure. It takes into account the allegations made by B but at the same time notes the evidence, in particular, of C, a close adviser to both B and D, and of B himself (before he lacked capacity) as to its purpose, but these are matters for another day.

97 In the meantime, the A Settlement and the private trust structure have to be respected and no public policy issues arise. This Court is simply concerned with whether it should remove Erinvale as trustee of what is, certainly for now, a valid trust and to appoint a new trustee and this at the instance of D.

98 It is anticipated that B will be given a clean break settlement in the matrimonial proceedings, to be funded out of the A Settlement. Assuming that is the case, then on receipt of a distribution in the amount of that settlement, it is the expectation that D will be excluded as a beneficiary. This was noted in the minute of the directors of Erinvale of 22 nd October 2020, which resolved to add D as a beneficiary in her own right:

> *"6.3 Those present further noted that, in view of the temporary vulnerability identified by the Judgment and which [D's] addition at this time would remedy, and [D's] express confirmation that she wishes to be added as a beneficiary only until the conclusion of the Matrimonial Proceedings, the Trustee, without fettering its discretion to consider its position afresh at the conclusion of the Matrimonial Proceedings, presently expects to reconsider [D's] status as a beneficiary and to exclude [D] as a beneficiary of the Trust after the financial aspects of the Matrimonial Proceedings are concluded and [D] has received her payment in respect of the same from the Trust.* This is on the basis that [D's] addition now is intended to address the temporarily limited vulnerability discussed in the Judgment and summarised above If and when the rationale for the addition has passed because [D] has received such award as may be made in her favour in any final resolution of the Matrimonial Proceedings, it will likely then be an appropriate juncture for the Trustee to consider [D's] removal as a beneficiary in her own name."

99 It is likely, therefore, that D will only be a beneficiary of the A Settlement for the relatively short period between now and the conclusion of the matrimonial proceedings, which is a factor weighing against a change in trusteeship against the wishes of the Remaining Beneficiaries. This adds to the practical reasons set out above, all of which militate heavily against a change of trustee now. Furthermore, a change of trustee now will add materially to the already substantial costs incurred, and this for no discernible benefit, and it would not assist, indeed would be likely to complicate, the task of the Matrimonial Court.

100 Despite the criticisms raised, we are satisfied that Erinvale is competent to administer the A Settlement and its assets and in discussion it was not anticipated that there will be any significant trust related issues that are likely to arise between now and the conclusion of the matrimonial proceedings, but in any event Erinvale helpfully confirmed to the Court that pending the outcome of the matrimonial proceedings, the assets of the A Settlement will be retained within the trust fund, save in the ordinary course of business and in relation to payments made to B and D for their maintenance and their legal costs.

101 For all these reasons and noting the confirmations given to the Court by Erinvale, we find that the welfare of the beneficiaries as a whole and the competent administration of the A Settlement in their favour dictates that the status quo should be maintained and we therefore direct Erinvale to remain in office as trustee and signify that it would not be desirable for the directors to resign.