The E, L, O and R Trusts

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	11 September 2008
Neutral Citation:	[2008] JRC 150
Reported In:	[2008] JLR 360, 12 ITELR 1
Court:	Royal Court
Date:	11 September 2008

Text

In the Matter of the E, L, O and R Trusts

Between
BA, SA and HA
Representors
and
(1) Verite Trust Company Limited
Respondents
(2) Appleby Trust (Jersey) Limited

and

(3) Advocate P. D. James (guardian ad litem and representative of the minor and unborn beneficiaries)
First Party Cited

[2008] JRC 150

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Le Breton **and** Liddiard.

ROYAL COURT

(Samedi Division)

Authorities

E Trust [2008] JRC 053.

Bristol & West Building Society v Mothew [1996] 4 All ER 698.

Eiro v Equinox Trustees Limited

Lewin on Trusts (18th Edition).

Letterstedt v Broers [1884] 9 AC 371.

Hunter v Hunter [1938] NZLR 520.

Advocate M. J. Thompson **for the Representors**.

Advocate L. J. Springate **for the First Respondent**.

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

Advocate N. Santos-Costa **for the Third Respondent**.

The Deputy Bailiff

1 This application arises out of two representations raising the issue of whether the first respondent ("Verite") should retire or be removed as trustee of the four trusts. Shortly before the matter was due to be heard Verite agreed to retire as trustee. However the representors submit that Verite has acted unreasonably in not retiring earlier and that accordingly its remuneration and legal costs incurred in connection with the two representations should not be payable out of the trust funds. Furthermore, they submit that Verite should be ordered to pay the costs of the other parties on an indemnity basis. The application requires the Court to consider the position of a trustee who is requested to resign.

2 A preliminary issue arose in connection with the proceedings and this was dealt with in a judgment delivered on 3rd April 2008 at [2008] JRC 053. To the extent necessary, we propose to repeat some of that judgment when summarising the facts. Intending no discourtesy, we shall for convenience refer to the parties by their first names as they were during the hearing.

Background

(i) Before the request to resign

3 J and H are brothers. They are the children of BA and his wife SA. In May 1993 twelve discretionary settlements governed by Jersey law were established; six by BA and six by SA. In each case Verite was the trustee. These twelve trusts are referred to as the 'Family trusts'. The settlor of each trust settled one share in a company ("the Company"). The Company is the parent company of a group of companies which carry on a successful business. J is the chairman and chief executive of the Company. By reason of the exercise of various options, the Family trusts between them hold approximately 89% of the issued share capital of the Company. Apart from modest amounts of cash, the sole asset of each Family trust is its share holding in the Company.

4 The Family trusts were all in broadly similar form. Thus the beneficiaries included (a) the widow or widower of the settlor as appropriate; (b) the children and remoter issue of the settlor; and (c) the spouses, widows or widowers of the children and remoter issue of the settlor. Furthermore, there was a power in each case for the trustees revocably or irrevocably to declare that the beneficiaries should cease to include any particular beneficiary or class of beneficiaries, in which case such persons became Excluded Persons and not entitled to benefit. In the case of a revocable exclusion, such persons remained Excluded Persons for so long as their exclusion remained un-revoked.

5 As can be seen therefore, J and H and their respective families were initially beneficiaries of all twelve of the Family trusts. However, some were earmarked for the benefit of J's family and some for that of H. This was achieved through letters of wishes. The settlor (being the relevant parent) of each trust signed a letter of wishes on 27th April 1994. The Family trusts were divided into three groups. Four of the Family trusts were clearly intended for J and his family but there was provision for the benefiting of directors and employees of the Company if J so wished. The second group of four family trusts were clearly intended solely for J and his family and the settlor's wishes in that respect were said to be 'irrevocable'. The final group of four (which are the four trusts with which we are concerned) were intended to benefit H and his family and the letter of wishes contained the following material provisions:-

> (i) the trustee should consult J on the management, administration and investment policy of the relevant trust;
>
> (ii) the relevant trust had been set up for the benefit of H and his family and consequently all the benefit under the trust should go to him;
>
> (iii) nevertheless, if J requested the trustee to pass some or all of the benefit under the trust to other beneficiaries, the trustee should follow his wishes; and
>
> (iv) although the trust had been set up for the benefit of H and his family, the trustee should seek the wishes of J in relation to the trust and he might from time to time change his wishes.

6 The position changed in 1999. This occurred because H wished to achieve greater certainty that only he and his immediate family could benefit from the four trusts earmarked for him. On 25th May 1999 Verite as trustee executed revocable deeds of exclusion whereby the beneficiaries of the four trusts which are the subject of the representation in this case were confined to the relevant settlor's widow/widower, H and his issue and any spouses etc of H and his issue. We shall refer to these four trusts as the ‘H Family trusts’. Similarly, in relation to the remaining eight trusts, the beneficiaries were confined to the settlor's widow/widower, J and his issue and the spouses etc of J and his issue. We shall refer to these eight trusts as the ‘J Family trusts’. Although the deeds were revocable, those in respect of the J Family trusts cannot be revoked during J's life unless he has given his written consent and after his death may only be revoked with the consent of such person as J may have nominated for that purpose during his life or by will. There are matching provisions in the deeds relating to the H Family trusts so that the deeds can only be revoked with H's consent during his life and thereafter with the consent of the person nominated by him. Thus the H Family trusts (which own approximately 20% of the share capital of the Company) are held only for H and his family and the J Family trusts (which own approximately 69% of the share capital of the Company) are held only for the benefit of J and his family. In each case the settlor's widow or widower may still benefit.

7 There were accompanying changes to the letters of wishes. The first was on 3rd December 1998 signed by J. It was an over-arching letter of wishes which was expressed to apply to all twelve Family trusts. The key provision was that the letter expressed J's overriding wish that the shares in the Company held by the Family trusts should not be disposed of other than as part of a disposal of the entire family interest in the Company, including any shares held in various UK trusts for the benefit of the family. The letter also expressly requested the trustee not to divide the Company shares into smaller holdings, for example by passing blocks of shares to individual beneficiaries or by selling part of the shares to pass on a cash benefit to one or more beneficiaries. J expressed the view in the letter that any division or part disposal would reduce the overall value of the Family trusts and might create problems by having dissident shareholders. On 1st February 1999 J signed further letters of wishes in respect of all twelve Family trusts. One letter dealt with the H Family trusts and stated that the letter was subject to J's wishes concerning the shares in the Company as set out in the letter of 3rd December 1998. The letter then made it clear that it was J's irrevocable wish that the trustee should have regard to H's wishes with regard to any distributions from those trusts whether during his life or following his death. The position was of course formalised by the execution of the deeds of the exclusion on 25th May 1999. As to other matters, the letter made it clear that J might wish to change his wishes concerning the management policy of the H Family trusts and that if he did he would write again, although he would like the trustee to obtain H's consent before a new memorandum of wishes was substituted in place of that one.

8 On 10th November 2000 J executed a further overriding letter of wishes dealing with all twelve trusts, which was expressed to replace that of 3rd December 1998. However the material provision about keeping the holding of shares in the Company together was not

altered. H counter-signed the letter of wishes so as to consent to it in respect of the four H Family trusts. The reason for giving J this stronger position in relation to the management of the trusts was said to be that he had been instrumental in arranging for the benefit of the options to acquire the shares in the Company being vested in the various trusts in the first place.

9 For the past few years J and H have been in dispute in relation to the affairs of the Company. Since 2005, together with their parents, they have been discussing ways in which they might resolve their differences, but so far to no avail.

10 From the creation of the Family trusts in 1993, the sole trustee has been Verite. However, against the background of the disagreement between the two brothers, the parents exercised their respective powers as settlor and appointed a co-trustee to each of the Family trusts to act with Verite. On 13th December 2005 Appleby Trust (Jersey) Limited ("Appleby") was appointed co-trustee with Verite of the four H trusts and Jemma Trust Company Limited ("Jemma") was appointed as co-trustee of the eight J Family trusts.

(ii) The request to resign

11 In order to assess the reasonableness of Verite's conduct in not resigning earlier, it is necessary to record the sequence of events leading up to the issuing of the proceedings in this case.

12 During the latter part of 2005, Verite was informed that problems had arisen between J and H although no real detail was given to them. Without warning, Verite received deeds of appointment dated 13th December 2005 executed by the settlor of each trust appointing Appleby as co-trustee of the H trusts and Jemma as co-trustee of the J trusts. After some exchanges of correspondence concerning this appointment, a meeting was held in Jersey on 16th February 2006 at the offices of Appleby. It was attended by a number of people including Mr Machan of Verite, H and his English solicitor Mr Hilton Mervis of SJ Berwin & Co. A number of matters were discussed but for our purposes the relevant aspect was that, whilst emphasising that H had a very good relationship with Verite, Mr Mervis said that tensions between J and H in relation to the Company meant that there was a potential conflict for Verite in remaining as trustee of all twelve trusts. Mr Thompson points out that it is of note that the immediate reaction of Mr Machan was to state at the meeting that, if Verite were to step down, it could prejudice its position because other parties could state that its action in stepping down could be prejudicial to the value of the other trusts of which it was trustee. Mr Machan recorded in his file note that it was clear that Verite was likely to be asked to step down at some point, possibly sooner rather than later. It was made clear to Verite at the meeting that H wanted the meeting to be kept confidential from J.

13 On 24th March 2006 SJ Berwin wrote to Verite asking it to resign. The letter recorded that for the last year J and H had been involved in a dispute which might involve a formal

petition under Section 459 of the Companies Act 1985. It was stated that recent developments had led the dispute to escalate to the point where litigation appeared to be a very real prospect. The letter went on to say as follows:-

> *"It is therefore clear that the interest of the primary beneficiaries, under the family trusts are now in actual conflict.* In light of this, it is not appropriate for you to continue to act as a trustee under all twelve trusts. We understand that there is already information and instructions which H, the primary beneficiary under four of the family trusts, would like to convey to you, in your position as trustee of those trusts, which it would currently be inappropriate for him to do, given that you are also a trustee of the trusts which hold assets for the primary benefit of J.
>
> *Furthermore, if formal proceedings are commenced under Section 459 of the Companies Act 1985, you will end up as a claimant to the formal petition and also a possible 'defendant' (in your role as a trustee of the trusts that hold the controlling shareholding of [the Company] in respect of which J is the primary beneficiary)."*

The letter went on to request that, having regard to the conflict of interest referred to, Verite should resign immediately. It was emphasised that a failure to resign could damage the settlement process. The letter also emphasised that it was a confidential communication which should not be disclosed to anyone else (by which was clearly meant J).

14 On 25th April Mr Mervis sent an e-mail to Advocate Bennett of Bedell Cristin indicating that, although he had tried to keep the matter informal and in the spirit of co-operation, he would need to commence immediate proceedings in Jersey for Verite's removal if the self-evident need to resign was not acted on that week. He explained that the matter had become urgent because of the critical stage negotiations had reached between the parties. He explained that effectively H was cut off from involving his trusts and was being forced to act in their interests and on their behalf without being able to communicate with them because of Verite's role as trustee. He said that he would be instructing Jersey advocates if Verite did not resign.

15 On 28th April Advocate Bennett replied to SJ Berwin indicating that Verite would not resign. He pointed out that the parties were apparently negotiating without involving Verite and it was therefore unclear how Verite continuing as co-trustee could adversely impact upon such negotiations. He said that Verite was not in receipt of any information which ought to be brought to the attention of H. Finally he asked Mr Mervis to set out the reasons which would be relied upon to support any application to remove Verite as co-trustee of the H Family trusts. This produced a letter from Ogier dated 16th May which repeated that a conflict had arisen and that H did not wish to liaise and disclose information to Verite given its position as co-trustee of the J Family trusts. The letter repeated that Verite had a clear conflict of interest in acting as a trustee under both sets of trusts. It threatened proceedings if Verite did not resign by 12th May.

16 Advocate Bennett replied to Ogier the next day. He said that, contrary to what was stated in

Ogier's letter, Verite had not been given full reasons as to why it should resign. Such information had been requested but had not been provided. He repeated the point that, as Verite had had no involvement with any discussions, it was unclear how Verite continuing as a co-trustee could adversely impact on any continuing negotiations between the family. He repeated the request for full information as to why Verite should resign and said that it was not willing to do so until that was received. This request produced a detailed letter from Advocate Meiklejohn of Ogier dated 6th June. Advocate Meiklejohn began by saying that he thought that the position was self-evident. He then summarised the position in the following passage:-

> *"With regard to the dispute between H S and J, we confirm that:*
>
> *Settlement has not been reached – it is being negotiated*.
>
> *If there is no settlement, your client will be asked to consider and become part of an application to bring a section 459 petition in the English court as against J.* This will seek a right for H (through the H Trusts) to buy out the remaining shareholdings of the J Trusts or to require those trusts to split the assets of [the Company] or buy out the shareholding of the H Trusts.
>
> *Our client, H, wishes to share with your client and its co-trustee the detailed evidence obtained on the merits of the case*.
>
> *On the basis that settlement may be reached, provisions will need to be negotiated on behalf of all the family trusts to enable a split of the assets.* There will need to be agreements as between [the Company] and the H Trusts. It is quite probable that sensitive commercial information will be given to your client which will show that the corporate group, which remains after the proposed asset split, ought not to agree to the terms proposed by our client. In such circumstances, your client would have a duty (as a trustee of J Trusts which would, in effect, represent the balance of the shares in the remaining corporate group) to bring this to J's attention. That duty would, of course, be directly contrary to your client's duty (as a trustee of the H Trusts) to approve the proposals of our client.
>
> *There are potential examples of the converse position – namely where our client would want the impartial input of your client to assist in pushing for terms which are beneficial to the H Trusts and not the existing group (reflected by the J Trusts)."*

The letter went on to say that any costs borne after 6th June should no longer be borne by the Family trusts as they would not have been incurred in the best interests of the beneficiaries (who clearly wanted Verite to retire) but in Verite's own interests. The letter reserved the right to insist that any fees taken on this issue after that date be paid back into the trusts.

17 Advocate Springate of Bedell Cristin replied on 14th June repeating that Advocate Bennett had sought additional information in order that Verite could better understand the reasons

for the request for it to resign and that this was particularly important given the absence of criticism of Verite's administration of the trusts. However, Advocate Springate accepted that the correspondence from Ogier had made it clear that there was the potential for Verite to be placed in a position of conflict and accordingly it proposed to issue a representation before the Royal Court on 23rd June seeking directions as to whether it should resign. Advocate Springate went on to say this:-

> *"Pending the determination of our client company's Representation, I would be grateful if you would bear in mind the conflicting duties which are owed by our client to different family members given their existing dispute and if you would refrain from providing any information to our client company which you would not wish to see duly referred to in the context of this application."* [emphasis added]

On 22nd June, Advocate Springate wrote to say that the preparation of the affidavit evidence had taken longer than she anticipated and accordingly she would be presenting the representation at a later date. A draft representation was forwarded to Advocate Meiklejohn on 28th June and Advocate Springate indicated that she was still preparing the affidavit evidence.

18 On 7th July, Advocate Le Cocq responded on behalf of Ogier. He pointed our forcefully that his client saw no need for Verite to make an application to the Court. He contended that the position was obvious and that Verite should resign immediately. He repeated that all the adult beneficiaries and the settlors had requested Verite's immediate resignation and there was a co-trustee which could continue the administration of the trusts, namely Appleby. He said that his clients would be opposing any suggestion that Verite should be indemnified in respect of the costs of the representation because it was not necessary. The letter also referred to the fact that Verite appeared to have informed J of the representation.

19 Advocate Springate replied on 10th July. She repeated the point that there had been no criticism of Verite's administration of the H Family trusts and that, as Verite had had no involvement in the negotiations, it was not clear how its continuing to act as co-trustee could adversely affect any negotiations. She repeated the point about those representing H not providing any information to Verite which they would not wish to see referred to in the context of the forthcoming application and went on to say this:-

> *"[Verite] has now been advised that the position has been reached whereby an application needs to be made to the court in view of the difficult position which it finds itself in.* On the one hand, it has been requested by your clients to resign as co-trustee of the H Family Trusts notwithstanding the absence of any criticism in relation to its administration over the last 13 years. On the other hand, it has been requested by certain beneficiaries of the J Family Trusts to remain as co-trustees of both the H and the J Family Trusts. In view of the competing interests of the beneficiaries of both the H and J Family Trusts, I do not believe that it has any other option than to apply to the court for directions……."

20 On 18th July Advocate Le Cocq replied. His letter set out in compelling form the reasons why Verite should resign and we think it convenient to set out the relevant parts of the letter in full:-

> *"(1) The Conflict*
>
> *At the top of the second page of the Letter Advocate Springate has stated that your*
>
> *".....client [Verite] recognises that there is potential for it to be placed in a position of conflict in relation to the administration as co-trustee of the H and J Family Trusts."*
>
> *There is a dispute between H and J on which they are negotiating.* That dispute concerns the shares in [the Company]. Any settlement will need to involve the trustees who will be asked to consent to a proposed settlement because that settlement is likely to affect the shares which are assets of the respective trusts. In addition, if the matter were not settled, the likelihood is that there will be litigation in which it is contemplated that the H trustees will be claimants because they own shares in the company. That litigation will be against J and would potentially affect the assets in each trust. In addition, confidential information and legal advice would in the normal course be made available to the trustee of the H trusts for them to consider and act upon in their capacity as trustees in relation to the settlement negotiations, the claims which arise from their legal ownership of the shares in the company which are trust assets, and any litigation. There is a real risk that, were Verite to remain as trustee of the H trusts as well as the J trusts, this information might be used by Verite when acting as trustee of the J trusts and there is the possibility that the information might be inadvertently disclosed to J or those acting for him in the course of Verite's dealings as trustee of the J trusts.
>
> *Indeed, it may be that Verite, in its role as the trustee of the J trusts, would, in such circumstances, be under a fiduciary duty to use such information for the benefit of the beneficiaries of the J trusts*.
>
> *In the Letter, Advocate Springate recognises the difficulties of providing Verite with information which should not be made available to J and the beneficiaries of the J trusts*.
>
> *The J trusts do not affect Verite's responsibilities*
>
> *At page 2 of the Letter, paragraph 2 final sentence, Advocate Springate states that the beneficiaries of the J trusts might argue that it was prejudicial to their interests for Verite to resign as trustee of the H trusts.* It seems to us that the only interests that should be taken into account in deciding whether Verite should resign *as trustee of the H trusts are the interests of the beneficiaries of those trusts.* Patently only considerations of the interests of the H Trusts can and should as a matter of law inform your clients deliberations in that regard. The

> fact that Advocate Springate mentions this possible argument by beneficiaries of the J trusts itself indicates that it is appropriate that Verite resigns. Verite's fiduciary obligations to act loyally towards and in the interests of the beneficiaries of H's trusts should not be compromised by other trusteeships held by Verite. It is inappropriate that your client should consider the interests of the beneficiaries of another trust when considering whether to resign. It is already in a position of conflict."

Advocate Le Cocq went on to say that, in an effort to bring matters to a conclusion, there would be no objection to Verite's fees being paid provided that it withdrew the representation and resigned immediately, but that if it continued with the representation, the beneficiaries would resist any payment of fees and would seek their own costs from Verite.

21 On the same day Ogier sent Verite a revised letter of wishes signed by BA and SA as settlors in respect of the H Family trusts. In that letter they referred to the fact that in the original letter of wishes of April 1994, they had said that the trustee should consult J on the management, administration and investment policy of the four trusts and went on to say that they now revoked that previous wish and asked that the trustee consult with H alone with regard to the management, administration and investment policy of the four H Family trusts and that after his death they should consult with the person nominated by H.

22 On 7th August Advocate Springate replied. She repeated that Verite had had no involvement to date in the discussions between the different family members and accordingly did not consider itself in a position of conflict. It did not see how continuing to act as co-trustee could adversely affect any negotiations. It would continue to maintain a neutral position.

23 For various reasons which are not relevant for our purposes, the representation and accompanying affidavit were not filed until 10th October. A hearing date was originally fixed for 4th and 5th December but was subsequently adjourned at the request of the beneficiaries first until a date in March and subsequently to dates at the end of May 2007.

24 On 5th February 2007 Bedell Cristin wrote to the Judicial Secretary stating that the representation was withdrawn. Ogier sought clarification and Bedell Cristin responded indicating that the representation had been withdrawn because H had failed to provide funds to Verite to meet the costs of the representation. It was made clear that Verite would therefore be remaining as trustee. H then offered to pay any outstanding fees provided that the representation was reinstated but this was rejected by Verite. Accordingly, on 20 th March 2007, H and the settlors brought the present representation, which seeks the removal of Verite as trustee of the H Family trusts. A date in July was fixed for the hearing of that representation but in April 2007, at the request of Ogier, those dates were vacated on the basis that agreement for a de-merger had been reached between J and H. In November 2007 Verite was informed that the negotiating process had broken down and accordingly the matter was eventually re-fixed for hearing on the 21st and 22nd May 2008 with a preliminary application by J to intervene being heard on 10th March. That application was

refused in the judgment already referred to. On 10th April 2008 Bedell Cristin gave preliminary notice of the fact that Verite would be willing to resign on certain conditions. There were then various discussions between the parties and the upshot was that Verite finally agreed to resign without conditions on 13th May 2008.

25 It was in those circumstances that the matter which came before us was the issue of the costs of both Verite's representation and the present representation together with the issue of whether Verite should be entitled to remuneration and its legal fees in respect of the resignation/removal issue including both representations.

The Law

(i) Fiduciary duty

26 Because the ground given for requiring Verite to retire relates to an alleged conflict of interest, it is helpful to remind oneself of the nature of a fiduciary duty. A convenient summary of certain key aspects of such a duty is to be found in the judgment of Millett LJ in *Bristol & West Building Society v Mothew* [1996] 4 All ER 698. The passage at 710 – 715 repays reading in full. The following summary is drawn from Millett LJ's observations which, in our judgment, are equally applicable under the law of Jersey.

> (i) The expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. For example, the obligation of a trustee (who is undoubtedly a fiduciary) to use proper skill and care in the discharge of his duties is not a fiduciary duty nor is the duty of a director (who undoubtedly owes fiduciary obligations to his company) to exercise skill and care in the performance of his duties.
>
> (ii) A fiduciary duty is one which is special to fiduciaries which attracts those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.
>
> (iii) The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.
>
> (iv) This duty of loyalty gives rise to certain specific obligations:-
>
> > (a) A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other. This is sometimes described as the ‘double employment rule’. Breach of the rule automatically constitutes a breach of

fiduciary duty.

(b) Even if a fiduciary is properly acting for two principals with potentially conflicting interests (i.e. because he has their consent) he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other. This is 'the duty of good faith'. But it goes further than that. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal. Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. Millett LJ referred to this as the 'no inhibition principle'.

(c) The fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. This can be referred to as 'the actual conflict rule'.

(ii) Retirement and removal of a trustee

27 In *Eiro v Equinox Trustees Limited*, this Court approved (albeit by reference to the 17th Edition) the following passage from Lewin on Trusts (18th Edition) para 13–49 and 13–50:-

> ***"13–49 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 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 .
>
> ***13–50 Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for 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 over-charges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustees' duties, the court may come to the conclusion that it is necessary, for the

welfare of the beneficiaries, that a trustee should be removed."

This Court has also regularly had regard to the observations of Lord Blackburn in *Letterstedt v Broers* [1884] 9 AC 371 at 386–387.

28 The Court may of course remove a trustee where he has failed to recognise a conflict of interest. See *Hunter v Hunter* [1938] NZLR 520. Clearly, when faced with a request to retire, a trustee should bear in mind the principles applied by the Court in connection with its jurisdiction to remove trustees.

(iii) Trustee costs

29 A trustee may only be denied an indemnity for its costs if it has acted unreasonably, which is a high hurdle. In *Hunter* the court also made it clear that a trustee who defends proceedings which are brought to secure his removal and in which his defence fails, may not only be deprived of his costs, but may be ordered to pay the plaintiff's costs.

Application to the facts of this case

30 Mr Thompson's submission was simple. He said that, once there was a risk of litigation between J and H, it was obvious that there was a conflict of interest between them and that Verite could not remain as co-trustee of both the H and J Family trusts. The reasons were clearly set out in the original letter of 24th March 2006 from SJ Berwin. They were repeated in the various letters from Ogier, in particular that of 6th July 2006. The letters were sufficient to alert Verite to the fact that its position was impossible. There had in fact been no material change in the position between 2006 and the date in April 2008 when Verite indicated a willingness to retire. If it was necessary for Verite to retire in 2008, it should have retired in 2006. All the costs incurred since then had been unreasonably incurred. Verite should have retired upon receipt of the letter from SJ Berwin on 24th March failing which upon receipt of the letter from Ogier of 6th July failing which, at the very latest, upon receipt of the amended letter of wishes from the settlors on 18th July 2006. Mr Robertson and Mr Santos-Costa supported Mr Thompson's submissions.

31 Mrs Springate submitted that Verite had acted reasonably and therefore should not be deprived of its costs. She emphasised that there had been no criticism of Verite in relation to its performance as trustee prior to the request in March 2006 that it should resign. She accepted that, once a dispute between J and H had arisen, there was a potential for Verite to find itself in a position of conflict of interest but submitted that this had not in fact occurred by the time the first representation was issued in October 2006, nor by the time of the second representation in March 2007. This was shown by the fact that the negotiations had nearly succeeded in April 2007 when a possible de-merger appeared to have been agreed in principle and the proceedings were adjourned at the request of H and J. The fact that Verite was a co-trustee had not prevented this occurring. She pointed out that, until 18th

July 2006, the letter of wishes in relation to the H Family trusts had said that the trustees should consult J in relation to the management, administration and investment policy of the trusts. This had survived the fact that J no longer had any interest in the H trusts. J had made it clear that the family shareholding should be held as a block and should not be broken up. It was therefore reasonable for Verite to have regard to J's views when deciding whether to resign. Furthermore, there was a risk that retirement by Verite would cause damage to the J Family trusts if the Company was subsequently broken up as a result. The Company was a very substantial asset and in the circumstances it had not been unreasonable for Verite to seek the directions of the Court when deciding whether it should retire as requested by H. The position had changed recently in that negotiations had broken down, H had made it clear that no meetings could be held until Verite resigned, H's second and third affidavits provided more detail of the conflict of interest and Verite had also heard the submissions of Mr Thompson as to the conflict of interest during the course of J's application to intervene and had also noted the comments of the Court. Whilst it was therefore now accepted that Verite should retire, the position was different from that which had existed when the two representations had respectively been launched.

32 We have carefully considered the points which Mrs Springate has made together with the affidavits of Mr Machan, a director of Verite. However we have no hesitation in concluding that, during the course of 2006, Verite found itself in a position of plain and obvious conflict of interest and it should have retired without seeking an order from the Court. Its decision not to do so was wrong to the extent that it can properly be characterised as unreasonable.

33 Our reasons are essentially those put forward in the written and oral submissions by Mr Thompson but we would summarise them as follows:-

(i) From 1999 at the latest, Verite was wearing two hats. In relation to the four H Family trusts, it held its minority interest in the Company on trust for the beneficiaries of those trusts, namely H's family. In exercising its powers and duties in relation to those trusts, it had to have regard solely to the interests of H's family as beneficiaries. In relation to the J Family trusts, the position was reversed. Verite had to have regard solely to the interests of J's family when considering how to exercise its powers and duties in relation to those trusts.

(ii) Until 2006 this caused no difficulty. Verite was not aware of any matter which might give rise to a conflict of interest between the two sets of trusts. Furthermore all the beneficiaries were content that Verite should act as trustee of all twelve trusts.

(iii) However, from April 2006 onwards, all that changed. For the reasons put forward in the succession of letters (described earlier) from SJ Berwin and then Ogier, it should have been obvious to Verite that it was in an impossible position because of the dispute which had arisen between H and J. It was in breach of the ‘double employment rule’. We cannot improve upon the way in which it was put in the various letters from SJ Berwin and Ogier. We would summarise the position as follows:-

(a) The dispute arose out of the conduct of the affairs of the Company, which

was the sole asset of all the various trusts. H made it clear that he was considering bringing proceedings under S459 of the Companies Act. Such proceedings would have been against the J Family trusts as the opposing shareholders. The H Family trusts would have had to consider whether to join H in bringing such proceedings. There was a clear conflict between the H Family trusts and the J Family trusts; yet Verite was a trustee of both.

(b) H wished to share with the trustees of the H Family trusts the merits or otherwise of the possible claim. This was a necessary step in order that the H Family trusts could decide whether to join him in any action. Yet he was unable to do so because Verite was also a trustee of the J Family trusts, against whom any possible action would be taken.

(c) Even if proceedings did not transpire, any settlement was likely to require action by the trustees of H and J Family trusts respectively. For the reasons set out in the third and fourth bullet points of the letter from Ogier dated 6th June 2006 this too placed Verite in a position of conflict.

(iv) Verite and its advocates have on various occasions asked for more detail about the alleged conflict. In our judgment that request was unreasonable. The various letters supplied all the information that was required in order to make it obvious that Verite was in an impossible situation.

(v) Ironically, the fact that Verite should have realised that it was already in a position of conflict is highlighted by the fact that, in her letters of 14th June and 10th July, Advocate Springate asked Ogiers to bear in mind the conflicting duties which Verite owed to different family members given their existing dispute and to refrain from providing any information to Verite which H would not wish to see referred to in the context of the forthcoming proceedings before the Court; in other words Verite was already in a position where, because of its conflict, she accepted that H should not disclose to it any information which he did not wish to be disclosed to J.

(vi) Verite and its advocates repeatedly asserted that, as there had been no criticism of its trusteeship, there was no reason for it to retire. But this was to miss the point. Verite was not being asked to retire because it had done anything wrong; it was being asked to retire simply because, for reasons wholly outside its control and for which it bore no responsibility, it found itself in a position of conflict such that it could not properly continue as trustee of both the H and J Family trusts. The fact that there had been no criticism of Verite's performance as a trustee is simply irrelevant.

(vii) Verite relied upon the fact that negotiations took place between J and H without Verite's involvement and pointed out that these negotiations came close to success in April 2007. In our judgment, this too is beside the point. The fact that negotiations nevertheless succeeded does not alter the fact that Verite was conflicted; indeed the fact that Verite felt unable to become involved in the negotiations because of its position in both camps emphasises the position of conflict that it was in. This deprived H of the opportunity of consulting with his trustees on how the negotiations should be conducted and it is in fact very surprising to find such important negotiations for the

trust fund being carried on without the involvement of the trustee. In a normal situation one would have expected the trustee to be closely involved in discussions which could have such an important effect on the trust fund; yet because of its position of conflict, Verite was unable to contribute or play any part.

(viii) Similarly, Mrs Springate's point that the trust assets were very substantial and that accordingly it was reasonable for the trustee to seek the directions of the Court, is not correct. If a trustee is in a position of obvious conflict of interest, it must retire, regardless of the size of the trust assets.

(ix) Further support for the proposition that Verite was in a position of conflict is found in the fact that, in breach of the 'no inhibition principle' referred to at para 26(iv)(b) above, Verite listened to the concerns of strangers to the H Family trusts (i.e. J) and considered the effect of its retirement from the H Family trusts on the beneficiaries of the J Family trusts. Mr Machan raised this concern at the meeting on 16th February 2006. It was referred to again by Bedell Cristin in their letter of 10th July when they referred back to the concern expressed by Mr Machan and went on to indicate that one of the reasons Verite had been advised to apply to Court was that it had been requested by certain beneficiaries (later disclosed as J) of the J Family trusts to remain as co-trustees of both the H and J Family trusts. The letter went on to say that Verite had to seek the directions of the Court "…….. in view of the competing interests of the beneficiaries of both the H and J Family trusts……". That was a clear breach of the principle that, when deciding how to act in relation to the H Family trusts, Verite had to have regard solely to the interests of the beneficiaries of those trusts. That error was perpetuated in paragraph 50 of Mr Machan's affidavit of 10th October 2006 when he repeated his concern that, if Verite were to resign as co-trustee of the H Family trusts, it could be argued by the beneficiaries of the J Family trusts that its action in resigning was prejudicial to the value of the assets of the J Family trusts.

(x) The Court pressed Mrs Springate on what had changed between 2006 and 2008. What new information had come to Verite's attention which had led it to agree that it should retire in 2008 but not in 2006. She referred first to the second and third affidavits of H. Whilst these affidavits went into slightly more detail, they did not identify any ground for alleging a conflict of interest which had not been clearly set out in sufficient detail in the 2006 correspondence. We do not therefore find them sufficient reason to explain the change in mind. She referred next to the fact that negotiations had broken down at the end of 2007 so that litigation (in respect of which she accepted that there was a conflict) was more likely. However, that is to ignore the fact that, for the reasons given earlier, Verite was in a position of conflict even during the negotiations and also because of the possibility of litigation. Finally, she referred to paragraph 29 of Mr Machan's second affidavit where he identified the submissions made by Mr Thompson during the hearing of J's application to intervene on 10th March 2008 and to the comments of the Court in its judgment on that application as being two additional factors which had led to Verite's change of mind. However these latter two matters did not bring any new information to Verite's attention; they simply articulated the existing concerns. In summary, we find that no new information of material importance came to Verite's attention between 2006 and 2008. Verite had all the information in 2006 which should have made it realise that it had no choice but to

retire.

(xi) Mrs Springate also referred to the letters of wishes. She argued that Verite was in a difficult position until 18th July 2006 because, although by then H's family were the only beneficiaries of the H Family trusts, the letter of wishes stated that the trustee should consult J in relation to matters of management and investment policy. The issue of whether to hold on to the shares of the Company as a single block was clearly a matter of investment policy and J had made his views on this very clear, namely that the trustees should in no circumstances break up the family holding. However, that is to ignore two matters. Firstly, a letter of wishes cannot override the fiduciary duties of a trustee and in this case, that involved having regard solely to the interests of the beneficiaries of the H Family trusts. Secondly, even if Verite retired, Appleby as continuing trustee would still be able to have such regard to the letter of wishes as it thought fit. The letter would continue to be considered regardless of the identity of the trustee from time to time. In any event, on 18th July 2006, that letter of wishes was revoked by the settlors and replaced with one which said that the trustees should henceforth have regard to the views of H on matters of management and investment policy. Accordingly, even if the point had any original validity, it did not avail Verite after 18th July 2006.

34 We accept that Verite acted in good faith. It was not being deliberately obstructive. It genuinely believed that the best interests of the family as a whole might be assisted by its remaining as a co-trustee. However, for the reasons we have given, this was an elementary case of a plain and obvious conflict of interest. The brothers were in dispute, there were complex negotiations on the future of the Company where the interests of the trusts were obviously adverse and there was the real prospect of litigation under the Companies Act where the H Family trusts and the J Family trusts were likely to be on opposite sides of the fence.

35 The position was so obvious that there was no justification for Verite seeking the directions of the Court. The costs of the first representation were unreasonably incurred and accordingly we find that Verite is not entitled to be indemnified for its legal and other costs in connection with the first representation, nor do we think that it is entitled to charge remuneration for time spent in connection with those proceedings. The second representation, brought by the settlors and H, arose only as a result of the withdrawal of the first representation and the continued refusal of Verite to retire. Accordingly the same principles apply and Verite must bear personally its legal costs incurred in connection with those proceedings and may not charge fees for time spent in relation to those proceedings.

36 Given our finding that the first representation was unnecessary and unreasonably brought, we also order Verite to pay the costs of the other parties incurred in those proceedings. However, we do not think that Verite's conduct in relation to those first proceedings was such as to justify an award of indemnity costs and accordingly we award them on the standard basis.

37 The position in relation to the second representation is somewhat different. In our judgment there was no justification for Verite to withdraw unilaterally the first representation simply because it was not receiving its fees and costs. If, as it says, it believed that there was a genuine issue which required the Court's attention, namely whether it should retire as trustee or not, it was incumbent upon it, on the particular facts of this case, to see the matter through to conclusion. There were ample trust assets from which it could ultimately have received remuneration. Its decision to withdraw the proceedings was thoroughly unreasonable and resulted in extra costs being incurred by the settlors and H in bringing the second representation. In our judgment, such conduct does merit an award of indemnity costs in relation to the second representation. However we think that the extra work was confined to the settlors and H. We do not see that the time spent by Appleby or Mr James was noticeably greater because of the fact that a second representation was brought rather than the first one being seen through to conclusion. Accordingly we order Verite to pay the costs of those two parties on the standard basis.

38 Finally we come to the question of exactly when in 2006 Verite should have recognised the inevitable and agreed to retire. This may be of significance because, although we have already ruled in relation to the costs of and incidental to the representations, there may be costs incurred by Verite in seeking advice on its position which were unreasonably incurred but pre-dated the first representation. Mr Thompson argues that Verite should have agreed to retire upon receipt of the SJ Berwin letter of 24th March, failing which the Ogier letter of 6th June. At the very latest it should have done so on receipt of the amended letter of wishes of 18th July. We can understand Mr Thompson's submissions but, as against that, we think that a trustee faced with an allegation of conflict of interest is entitled to make reasonable enquiries and take legal advice on whether a conflict does in fact exist and whether it should retire. Whilst it should respond reasonably promptly to such an issue, it is not necessarily reasonable to expect it to reach a decision overnight or forthwith. We do not agree that Verite should have retired on receipt of the SJ Berwin letter. There is a strong case for saying that it should have agreed to retire following receipt of the Ogier letter of 6th June but the test in connection with depriving Verite of its remuneration and the indemnity for its legal fees is one of unreasonableness. Whilst we think Verite should have agreed to retire earlier, we have in the end just been persuaded that it only became unreasonable for it not to retire following the strong letter from Ogiers on 18th July. Allowing a few days for Verite to consider the material supplied on 18th July, we hold that, whether or not such costs were incurred in connection with the representation, Verite is not to be indemnified in respect of any legal costs incurred after 25th July in connection with the issue of whether it should retire and is not entitled to charge remuneration for time spent on that issue.

39 We would emphasise that our decision is concerned only with fees and disbursements (including legal fees) of Verite relating to the issue of whether it should cease to act as trustee. The representors accept that Verite is entitled to charge remuneration and recoup its disbursements in relation to its ordinary activities as trustee until the date of its retirement.

40 In relation to the costs of Verite's representation, we consider that we have jurisdiction to

award costs in respect of that representation despite the fact that it has been withdrawn. Rule 6/31(1) of the Royal Court Rules provides that, except with the consent of the other parties, an action may not be withdrawn or discontinued without the leave of the Court. This is in order to ensure that the Court can deal with the costs of an action which is withdrawn or discontinued. Verite purported to withdraw its representation unilaterally on 5 th February 2007. It did not obtain the leave of the Court nor the consent of the other parties. In our judgment, the Court cannot have been deprived of its jurisdiction to award costs in respect of that representation by means of a purported withdrawal made in breach of Rule 6/31(1).

Postscript

41 We would not wish our judgment in this case to be taken as support for the proposition that a trustee must retire immediately upon being requested to do so and that it will be deprived of its costs if it seeks the directions of the Court before agreeing to retire. That is most definitely not the case. Our decision in this case is based upon the fact that the conflict of interest referred to by the beneficiaries was as plain as could be and it was thoroughly unreasonable of the trustee not to recognise that it was in an impossible position and had no option but to retire.

42 In many cases the position will be far less clear. There may be any number of reasons for tension to have arisen between a trustee and the beneficiaries and it will often be entirely reasonable for a trustee to seek a decision from the Court before agreeing to retire or to oppose any application for removal. In many cases, even where the Court's decision is that the trustee should retire or be removed, the Court will not conclude that the trustee has acted in such a way that it should be deprived it of its costs or remuneration. Everything will depend upon the facts of the specific case but the general approach remains that a trustee which is acting in good faith in what it perceives to be the best interests of the trust and the beneficiaries as a whole will not be deprived of its costs unless it has behaved unreasonably. That includes differences over whether the trustee should continue in office or not.