

# **Madam Kan Lai Kwan Kay v HSBC International Trustee Ltd and Poon Lok to Otto and Poon Wing Yun Karen and Advocate S. A. Franckel (substituted on this Appeal for Advocate M. C. Goulborn) (as representative of unborn and unascertained beneficiaries)**

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bompas JA
<b>Judgment Date:</b>	20 May 2015
<b>Neutral Citation:</b>	[2015] JCA 109
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## **Text**

Between  
Madam Kan Lai Kwan Kay  
Appellant/Second Respondent  
and  
HSBC International Trustee Limited  
Representor/Trustee  
  
and  
  
Poon Lok To Otto  
First Respondent  
  
and  
  
Poon Wing Yun Karen  
Third Respondent

and

Advocate S. A. Franckel (substituted on this Appeal for Advocate M. C. Goulborn) (as representative of unborn and unascertained beneficiaries)  
Fourth Respondents

[2015] JCA 109

Before:

Sir Hugh Bennett., **President**; George Bompas, **Q.C.**, and David Doyle., **First Deemster of the Isle of Man.**

COURT OF APPEAL

Trust — application against decision of the Royal Court dated 19 December, 2014.

**Authorities**

*Representation of Otto Poon Trust* [\[2014\] JRC 254A](#).

*Public Trustee -v- Cooper* [\[2001\] WTLR 901](#).

*Tamlin -v- Edgar* [\[2011\] EWHC 3949](#).

*Brudenell Bruce -v- Moore & Cotton* [\[2014\] EWCA Civ 1312](#).

*National Westminster Bank Plc -v- Lucas & Ors* [\[2014\] EWCA Civ 1632](#).

*Re S Settlement* [2001] JLR N 37.

*Re Y Trust* [\[2011\] JLR 464](#).

Lewin on Trusts 18th edition.

*Re the Trusts (Guernsey) Law*, [2007].

[AAA] Childrens' Trust (8th January 2014) [2015] WTLR 683.

*Re the C Trust* [\[2012\] JRC 086B](#).

*Re Rabaioiti (1989) Settlement* [\[2000\] JLR 173](#).

*Re F, Court of Appeal No. 462*, 10th September 2013.

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**Advocate A. Morley-Kirk for the Appellant.**

**Advocate A. Kistler for the Representor.**

**Advocate S. A. Franckel appeared in person.**

**The First and Third Respondents did not appear and were not represented.**

Bompas JA

## **Introduction**

This is the judgment of the Court.

- 1 This is an appeal against an Act of Court made by the Royal Court (Sir Michael Birt, Kt, Bailiff, with Jurats Kerley and Liston) on the 22nd October 2014. The Royal Court set out its reasons in a judgment dated the 19th December 2014 ( *Representation of Otto Poon Trust* [\[2014\] JRC 254A](#)) (“the Judgment”). We would like at the outset to express our admiration for and agreement with the Judgment.
- 2 The Royal Court had heard an application by HSBC International Trustee Limited (“the Trustee”) for approval of its decision (i) first, to make a substantial distribution out of the Otto Poon Family Trust (“the Trust”) to the First Respondent (“Mr Poon”) in order to enable him to meet a lump sum order in favour of the Second Respondent (“Madam Kan”) made against him in divorce proceedings in Hong Kong, and (ii) second, to exclude Madam Kan as a beneficiary of the Trust.

## **The background**

- 3 Mr Poon and Madam Kan are now aged 74 and 75 respectively. They were married in 1968 and had three children. Tragically two of the children died, leaving no issue. The deaths of these two children led to their parents becoming distanced from each other and ultimately to the breakdown of the marriage. The third child (“Karen”) is now 43. She currently has no issue.
- 4 Mr Poon built up a successful business operated through a group of companies. The parent company (“the Company”) is incorporated in Bermuda. Mr Poon is chairman of its board of directors.
- 5 The Trust was established by deed dated the 25th July 1995 (“the Trust Deed”), made between Mr Poon (as settlor) and the Trustee. It is a conventional discretionary trust, governed by Jersey law. Mr Poon is also the protector and has power to appoint and remove trustees. The beneficiaries are defined as Mr Poon, Madam Kan, their three children, and any other person born thereafter who is a lineal descendant of Mr Poon.

There is a power to add beneficiaries, and this was exercised on the 26th January 1996 by adding the Hong Kong Polytechnic University. The Trust's main asset is an 84.63% shareholding in the Company.

- 6 The marriage between Mr Poon and Madam Kan had irretrievably broken down by 2009. Divorce proceedings were commenced in Hong Kong and a decree absolute was granted on the 1st September 2010. There were also contested proceedings for ancillary relief in which Madam Kan claimed a substantial order by reference to (among other things) the value of the assets in the Trust. As a result, the High Court in Hong Kong joined the Trustee to those proceedings.
- 7 In 2011 the Royal Court approved the Trustee's decision to submit to the jurisdiction of the Hong Kong courts and to participate in the ancillary relief proceedings there. It also approved the general principle of providing disclosure to Madam Kan, but it made no specific order in that regard. In the event the Trustee was represented in the ancillary relief proceedings. In these proceedings the principal question was as to the extent of the property to be treated as available to Mr Poon, and as to the proportion of that property to be applied for Madam Kan.
- 8 The ancillary relief proceedings in Hong Kong culminated in a judgment of the Court of Final Appeal ("CFA") on the 17th July 2014, which held that the entire Trust fund should be regarded as a financial resource available to Mr Poon, that there was no reason to depart from the principle of equality in dividing the matrimonial assets between Mr Poon and Madam Kan, and that Madam Kan was accordingly entitled to 50% of the combined matrimonial assets, including those of the Trust.
- 9 By the time of the hearing in the CFA Mr Poon had already paid Madam Kan a total of HK\$380 million pursuant to the ancillary relief orders made by the lower courts. These payments had been funded by dividends paid by the Company to the Trustee, which were then passed on by the Trustee to Mr Poon as loans. The Trustee had also lent Mr Poon HK\$5 million in respect of legal costs.
- 10 Further, by the time of the hearing in the CFA Mr Poon had provided to the Trustee a letter of wishes in which he had expressed the following request, a request which was precisely in line with the decision summarised in paragraph 2 above:—

*"My former wife Kay should receive in aggregate an amount equal to the amount awarded by the Hong Kong Court under the Judgment of the High Court .... ("the Judgment") as varied and finally determined on appeal by the Court of Appeal or the Court of Final Appeal (as the case may be) less any amounts already advanced or paid to her under or in respect of these proceedings. For the purpose of calculating the amounts paid to Kay under the Judgment, amounts advanced to myself by way of distribution or loan and paid by me to Kay shall be deemed as amounts paid by the Trustee to Kay. On payment of the*

amount awarded to Kay under the Judgment (as varied and finally determined on appeal as aforesaid) it is my request that Kay should be excluded from further benefit under the Trust.”

- 11 By October 2014, the time of the hearing in the Royal Court, the full amount due from Mr Poon to Madam Kan pursuant to the judgment of the CFA had not been finally quantified, but it was thought likely to amount to about HK\$770.5 million together with legal costs. Mr Poon procured the Company to declare a sufficient dividend to enable the outstanding balance of this obligation to be discharged. He asked the Trustee to make a distribution to him so that he could satisfy the CFA judgment, and he also asked the Trustee to exclude Madam Kan as a beneficiary by exercising its power under clause 3(a) of the Trust Deed. This provides:–

*“The Trustee may with the consent in writing of the Protectors by instrument in writing revocable or irrevocable before the Vesting Date declare that any person within the definition of Beneficiaries in clause 1 hereof shall cease to be a Beneficiary and as from the date upon which such instrument is expressed to take effect, such person shall cease to be a Beneficiary for all purposes of this Deed.”*

- 12 The Trustee decided to accede to Mr Poon's requests, and it applied to the Royal Court for directions in relation to three proposed steps:–

- (i) to treat the loans so far made to Mr Poon as distributions to him;
- (ii) to make a further distribution to Mr Poon to enable him to satisfy the outstanding balance of the CFA judgment (including any costs order against him);
- (iii) to exercise its power under clause 3(a) by excluding Madam Kan as a beneficiary irrevocably, such exclusion to have effect only after Mr Poon had fully discharged his obligations under the CFA order.

- 13 Mr Poon was convened but he did not appear in the court below (nor has he appeared in this court). Nevertheless, since the Trustee's decisions were taken in accordance with his requests it is obvious that he supports them. Karen was convened, but she did not appear nor has she made any representations either. Before the Royal Court Advocate Goulborn for the unborn and unascertained beneficiaries supported all three of the proposals. Advocate Robinson for Madam Kan supported the proposal to make a distribution and did not oppose treating the loans as a distribution, but did oppose Madam Kan's removal as a beneficiary.

### **The test for approving momentous trustee decisions**

- 14 Where a trustee has made a momentous decision, that is a decision of real importance for

the trust, and seeks the court's approval for the decision, the legal test to be applied by the court is well established in this jurisdiction. As explained in *Re S Settlement* [2001] JLR N 37, the court must satisfy itself (i) first, that the trustee's decision has been formed in good faith, (ii) second, that the decision is one which a reasonable trustee properly instructed could have reached, and (iii) third, that the decision has not been vitiated by any actual or potential conflict of interest. A similar approach is taken in England:– see *Public Trustee -v- Cooper* [2001] WTLR 901.

- 15 It was submitted to us on behalf of Madam Kan that English case-law, ( *Tamlin -v- Edgar* [2011] EWHC 3949, *Brudenell Bruce -v- Moore & Cotton* [2014] EWCA Civ 1312, and *National Westminster Bank Plc -v- Lucas & Ors* [2014] EWCA Civ 1632), has recently developed an additional requirement (refinement, as it was put by her advocate, Advocate Morley-Kirk, in oral argument), namely that the trustee must also prove in detail that it has given proper consideration to the matter under scrutiny, setting out in detail the steps taken by the trustee and the considerations which informed the trustee's decision. The reason for this submission is that in the present case, as explained later, there is little challenge by Madam Kan in relation to the substance of the three requirements as stated above. Madam Kan's real challenge is to the evidence put before the Royal Court as to the making of the decision, and lying behind that a challenge to the process followed by the Trustee.
- 16 We do not consider that Madam Kan's submission as to the applicable law to be well founded. The English case-law speaks with one voice in recognising the test outlined in paragraph 13 above, although different judges have expressed in different language the various ways in which a trustee might go about proving to the court that that test has been satisfied in any given case. One necessary element of the test is that there has indeed been a decision of the trustee which the court is being asked to approve, because after all it is a decision which the court is being asked to approve. The decision must naturally be a “proper” one. This indeed is inherent in the first limb of the test. But of course that decision may not be final, in that implementation of the decision may be conditional upon the court's approval; and this, along with other circumstances of the particular case, may give colour to the degree of formality with which the court requires the decision to be proved and the degree of detail which the court requires to be given.
- 17 We do not read the English case-law as introducing a new and additional requirement that a trustee must in all cases prove anything other than that the three-part test set out above has been satisfied. Furthermore, we consider that it is both unnecessary and undesirable to introduce a separate requirement for a trustee to prove in all cases precisely what it has done in giving consideration to the matter under scrutiny: a decision-maker can consider matters carefully and still reach an irrational decision, and conversely an entirely rational decision can be reached on the basis of superficial thought processes.
- 18 When the court is to give approval for a momentous decision the court needs to be satisfied as to the rationality of the decision; the lengths to which the court must go in examining the process by which the trustee arrived at the decision must depend upon the particular decision. In some cases the decision may be a difficult and doubtful one, requiring fine

judgment in the face of competing considerations; in others the decision may be obvious. In the former cases the quality of the decision-making process will be more important than the latter. For that reason, we do not consider that the additional requirement for which Madam Kan contends should be introduced to the law of this jurisdiction, even if it were to be adopted in England.

- 19 That is not to suggest that the court should take a lax approach, or that it should approve any trustee's applications without due consideration. There is a threshold that must be crossed: the court is required properly to scrutinise the proposed exercise of the trustees' power on the evidence. As was pointed out in *Re Y Trust* [2011] JLR 464 (citing with approval *Lewin on Trusts* (18th ed.), at paragraph 29–299) (a similar approach is taken in Guernsey: see *Re The Trusts (Guernsey) Law* 2007 and [AAA] *Children's Trust*, Royal Court, 8<sup>th</sup> January 2014 [2015] WTLR 683) the result of the court giving its approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust, or to set it aside as flawed. Furthermore, when trustees are seeking approval for a decision they have already reached, the beneficiaries are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in proceedings to challenge the exercise of the power once made. For that reason, the trustees should put before the court all relevant considerations (supported by evidence) and they should explain their reasons for reaching the decision, even though they are not otherwise obliged to make such disclosure to the beneficiaries. But the process by which the trustees satisfy the court that the legal test has been met should not be confused with the substance of the test itself. Furthermore, each case will need to be decided on its own facts, and the degree of detail that is required from a trustee cannot be uniform in all circumstances. In some cases, a trustee's decision may come out of the blue, and if so it may require both the beneficiaries and the court to be given the background and the context in considerable detail: in other cases, such as this, a trustee's decision may emerge from a situation that is well known to the interested parties, and that is likely to have an impact on the degree of detail required from the trustee by the court.
- 20 In her oral submissions on behalf of Madam Kan Advocate Morley-Kirk highlighted various passages from judgments in certain of the authorities referred to in Madam Kan's Skeleton Argument, in particular *Brudenell Bruce* [2014] EWCA Civ 1312 in the English Court of Appeal and *Re the Trusts (Guernsey) Law*, [2007] and [AAA] *Children's Trust* (8th January 2014) [2015] WTLR 683 in the Guernsey Royal Court. In both those cases the question was whether the court should approve a momentous decision taken by trustees. In both those cases there was discussion as to the need for detail in the evidence put forward concerning the relevant decision. In the former case the trustees were given the requested approval, while in the latter the court was not satisfied as to the evidence concerning the decision and refused the requested approval. Importantly, however, the facts were very different from the present:—in each case the subject of the relevant decision was the sale of trust property in difficult circumstances and where there were widely divergent and strongly (and perhaps reasonably) held views as to the way in which the property should be disposed of. Not only did the court need to be satisfied that the decision was within the range of possible decisions which could reasonably be made, but also that the actual decision was arrived at by the trustee in such a way that from the range of possible decisions it was likely to be a



good decision, perhaps even the best possible or “right” decision.

- 21 In the course of discussion about the effect of these authorities Advocate Morley-Kirk accepted, we think correctly, that each case must depend upon its own facts: what may be sufficient in one may be inadequate in another. The present case is to be contrasted on its facts with the two just referred to, as the choices for the Trustee following the judgment of the CFA were really quite simple and easy to make. Should the Trustee enable Mr Poon to make the ordered payments to Mrs Kan and, if so, should the making of the payments mark the end of her involvement with the Trust (as Mr Poon had requested in his letter of wishes of 12 November 2013)?
- 22 The exercise of a power to exclude a beneficiary is unusual. Other than in exceptional circumstances it is unlikely to operate for the benefit of the person excluded, and its justification is accordingly likely to rest on the benefit to be gained by the other beneficiaries or by the harmonious administration of the trust estate as a whole. Where the interests of those excluded have not been properly taken into account, a decision to exclude can be struck down: see for example *Re the C Trust* [\[2012\] JRC 086B](#).
- 23 However, in the course of argument in the Royal Court the Bailiff asked Madam Kan's advocate, Advocate Robinson, whether the present case might not be taken as an example of “a classic case where a power of exclusion can properly be exercised”, there having been a divorce with the trust assets being included in the overall assets available for sharing, and shared, between the spouses. Advocate Robinson's only response was to the effect that the position of Madam Kan as an object of the Trust was “quite separate and apart from” the ancillary relief claim in the matrimonial proceedings. We explain below why we consider this response to be mistaken: the matrimonial proceedings and the ancillary relief claim were directly connected with the Trustee's decision, as the Trustee was proposing to exercise powers for the purposes of and against the background of those proceedings. An important element of the ancillary relief claimed and ordered was that there was to be finality, with a clean break between Mr Poon (part of whose assets were treated as comprising the trust fund) and Madam Kan.

### **The proceedings in the Royal Court**

- 24 Before the Royal Court the following was put forward on behalf of Madam Kan in the written submissions of her advocate: it was said, in paragraph 32 of those submissions (emphasis added), that “the Court should only bless this proposed step [namely that of excluding the wife as a beneficiary] if it considers that the exclusion ... on the basis of the evidence set out in Susan Chung's affidavit is a proper exercise of a Trust power which (a) is made in good faith; (b) is one which — in the circumstances of the case — a reasonable trustee could have reached and (c) is not vitiated by any conflict of interest.”
- 25 The argument just quoted seems to us correct in principle. The reference to “*the evidence*



*set out in Susan Chung's affidavit*" is a reference to the affidavit made on behalf of the Trustee in support of its Representation seeking the Royal Court's assistance. According to this argument, the relevant legal test for the Royal Court was that which we have described above, and the question was whether the Trustee's evidence was sufficient to enable the Royal Court to be satisfied that the test had been met.

- 26 The challenge, repeated before us on this appeal, was directed to the quality of the Trustee's decision making process as explained in the evidence, rather than at the substance of what was proposed (namely whether the proposal was within the bounds of what might be proposed by a reasonable trustee). Further, the challenge sought to dissect what was proposed into constituent parts, to treat there as being three separate decisions (to treat loans to Mr Poon as distributions, to make a further distribution to him, and to exercise the power of exclusion) rather than as parts of a single decision, or plan, as to what should be done with the Trust, and to criticise the proposal to exercise the power of exclusion. As to this, the challenge, as it had been before the Royal Court, was one directed at the proposed exercise of the power of exclusion alone, both as to the way the proposal was decided upon and whether this could be something a reasonable trustee could do (see paragraphs 19 and 22 of the Judgment): there was no dispute as to the reasonableness of the Trustee's decision so far as concerned the loans and the further distribution to allow Mr Poon to satisfy the judgment of the CFA.
- 27 The Trustee's reasons for its decision, including the proposal to exercise in relation to Madam Kan the power of exclusion, were explained in the affidavit of Susan Chung referred to above. She explained what the Trustee was minded to do, and its reasoning, as regards the loans and distributions and continued, briefly at paragraph 29 of the affidavit, as follows: "In the light of the substantial sums which have been or will ultimately be paid to Madam Kan out of the Trust, the Trustee would then regard it as being in the interests of the beneficiaries of the Trust as a whole for Madam Kan to cease being a beneficiary and to be excluded from further benefitting from the *Trust*". It will be seen that Susan Chung did not state why the Trustee had formed the view she described or the steps taken to form the view.
- 28 Before the Royal Court Advocate Robinson for Madam Kan strongly criticised the exiguous nature of this reasoning, and he offered three arguments for opposing her exclusion:—
- (i) First, he said that the Trustee's reasoning was flawed, because the distributions from the Trust fund were not being made to Madam Kan: they were being made to Mr Poon and for his benefit by enabling him to meet his liabilities.
  - (ii) Second, Madam Kan has been deprived of relevant information to which she is entitled as a beneficiary (citing *Re Rabaiotti (1989) Settlement* [2000] JLR 173) in relation to the Company's up-to-date financial position. She believed that the Company's position has improved since the Hong Kong court made its valuation, and as such any enhancement in its value would not be reflected in the lump-sum payment ordered by the CFA.

(iii) Third, she considered that in the future she would have an important role in monitoring and supervising the exercise of the Trustee's discretion, even if she were not to benefit financially from any distributions at all. She contended that the position of Karen needs to be protected and that the Trustee took an unduly partisan approach in the ancillary relief proceedings in Hong Kong by siding with Mr Poon.

29 In the Judgment the Bailiff acknowledged that the reasoning expressed in the affidavit made by Susan Chung on behalf of the Trustee **“could have been fuller”**. In this we think he was being kind: the affidavit was inadequate, and in other circumstances might well have been held to be insufficient and led to a rejection of the application. However during the hearing before it the Royal Court accepted as evidence the further explanation set out in the Trustee's skeleton argument, which it was told on instruction formed the basis of the Trustee's decision; and the Royal Court dispensed with any need to confirm the same information in the form of a further affidavit or affirmation (see paragraphs 26 to 27 of the Judgment). This was because at the hearing the Royal Court had decided that adjourning the hearing for the purpose of enabling the Trustee to confirm the statements in the Trustee's skeleton argument, a course which the Royal Court recognised (correctly) as being open to it, was unnecessary as a pointless formality in the particular case before it, where the Royal Court regarded the Trustee's proposals as obvious good sense in the circumstances of the Trust and the Trustee's decision as not having required fine judgment.

30 Dealing with each of Madam Kan's three complaints:–

(i) The Royal Court held that, although as a matter of form the distribution was made to Mr Poon, the reality of the position was that the money would end up with Madam Kan (see paragraph 28 of the Judgment).

(ii) The Royal Court did not consider that any lack of up-to-date financial information provided a reason to refuse consent (see paragraphs 29 to 30 of the Judgment).

(iii) The Royal Court did not consider that there was any justification for Madam Kan remaining as a beneficiary in order to hold the Trustee to account: the Trustee had not been partisan in the Hong Kong proceedings, and Karen was an adult with a business career of her own who did not need her mother as a beneficiary to assist in protecting her interests (see paragraphs 31 to 38 of the Judgment).

31 Finally, in the Judgment the Bailiff observed (in paragraph 42 of the Judgment) that Madam Kan is 75 years old and that she will have received HK\$832.5 million in her own right under the divorce settlement. In all the circumstances, the Royal Court concluded that the Trustee cannot be accused of having acted irrationally in deciding that her financial needs do not require her to remain as a beneficiary.

## The grounds of appeal

- 32 No complaint is made with regard to the Royal Court's approval of the first parts of what has been decided upon by the Trustee, listed in paragraph 11 above; indeed we were told that those parts have now been put into effect. As mentioned above, Madam Kan supported before the Royal Court the second and did not resist the first, and there is no complaint made about these. The argument in this court was concerned only with the question of Madam Kan's exclusion as a beneficiary, the proposition repeatedly urged on us by Advocate Morley-Kirk for Madam Kan being that there was before the Royal Court altogether insufficient evidence presented by the Trustee as to the making of its decision, and that therefore the Trustee's application should have been dismissed. However, we question whether it is correct to dissect the Trustee's decision as Madam Kan seeks to do: if the decision as to exclusion was fatally flawed, so also must it have been as regards the distribution and the loans in respect of which the evidence was of the same quality as that put forward as to exclusion.
- 33 Further, although the argument in the Royal Court was limited to the question whether the Trustee had acted reasonably, in this court Madam Kan seeks to raise the following specific grounds of appeal:–
- (i) First, she says that the Royal Court was wrong to hold that the Trustee acted honestly and within the ambit of its power.
  - (ii) Second, she says that the Royal Court was wrong to consider that the Trustee had taken into account all relevant considerations when –
    - (a) the reasons given were insufficient,
    - (b) no evidence was provided in support of the decision-making process so that it was impossible to say that the Trustee had taken all relevant considerations into account, and
    - (c) there was no evidence as to the Trust fund's current financial position.
  - (iii) Third, the Trustee and the Royal Court had taken into account irrelevant matters, namely comments made in the Hong Kong courts which had not been appealed because they were *obiter dicta*.
  - (iv) Fourth, the Royal Court was wrong to reach the conclusion that this was a decision that a reasonable trustee properly instructed could have made.

### The test on appeal

- 34 Although the Royal Court had a discretion whether to approve the Trustee's decision, the exercise of that discretion was necessarily driven by its assessment (a) of the evidence as to the decision taken by the Trustee and (b) of whether a reasonable trustee properly instructed could have made such a decision. Before us the challenge is to this assessment. This assessment involved a question of mixed fact and law.

- 35 In contrast, insofar as the Royal Court decided not to insist upon an adjournment of the hearing in order to have the propositions in the Trustee's skeleton argument verified by affidavit or affirmation, but instead accepted the propositions as evidence, that decision involved the exercise of discretion. On this appeal that decision is not challenged.
- 36 If we consider (a) that the Royal Court could not properly have drawn the conclusions it did as to the Trustee's "**momentous**" decision from the evidence before it (including for this purpose, in the light of the Royal Court's decision mentioned in the previous paragraph, the Trustee's skeleton argument), or (b) that a reasonable trustee properly instructed could not have made that decision, then the appeal would be allowed. In this context, we therefore do not consider it helpful to import the test that is normally applied when an appellant seeks to overturn the exercise of a direction by the Royal Court. Essentially the question in this court is identical to the question before the Royal Court: we are reviewing the conclusions to be drawn from the evidence both as to the Trustee's decision and as to the rationality of the Trustee's decision, not the rationality of the Royal Court's assessment (see by analogy the decision in Guernsey in *Re F, Court of Appeal No. 462*, 10th September 2013). The appeal concerns a case where there is no dispute as to primary facts, and what is at issue is the judgment to be formed in respect of those facts, a judgment which the appeal court is as well placed to make as the court appealed from.

### The core issue

- 37 Before dealing with the various grounds of appeal, we should say first that we consider Madam Kan's objection to her removal as a beneficiary to be positively inconsistent with her support for the Trustee's proposal to make a distribution to allow Mr Poon to satisfy the judgment of the CFA. The basis on which the Trustee can properly justify its proposal to make such a distribution is that the CFA was invited by Madam Kan, and agreed, to treat the Trust fund as part of the combined matrimonial assets to be divided equally between Mr Poon and wife in order to achieve a clean break between them. That division produced a fixed sum due from Mr Poon to Madam Kan, based on a valuation of the matrimonial assets (including the Trust fund) at a certain date. In order to enable Mr Poon to pay her that fixed sum, Madam Kan has agreed that the Trust fund should be diminished, and she has supported the Trustee's proposal to diminish it by making a distribution to Mr Poon, for onward transmission to her. Since she accepts that as the rationale for the propriety of the Trustee's proposal to make the distribution, she cannot logically also complain if she now ceases to be a member of the class of beneficiaries capable in the future of benefiting from the Trust fund. The amount left in the Trust fund after that date is an amount which the CFA has treated as being beyond her entitlement in the ancillary proceedings. If she seeks to rely on the logic of the CFA judgment to justify the Trustee in using the Trust fund to put Mr Poon in a position to meet his obligations to her (as she does), she must necessarily accept that the same logic dictates that what is left in the Trust fund is an asset in relation to which she has no expectation or hope of benefit. That logic then justifies her exclusion as a beneficiary.

38 For this reason, we consider not only that there is a conceptual flaw at the heart of Madam Kan's objection to her exclusion, but also that the justification for the Trustee's decision to exclude her is not only rational but compelling. This is not a case where Madam Kan has any real grievance at all. Her exclusion as a beneficiary flows logically from her success in the CFA. We regard her attempt to find grounds for criticising the way in which the Trustee presented its decision to the Royal Court as without any merit or legal substance.

## Ground 1

39 The first ground of appeal is that the Royal Court was wrong to hold that the Trustee acted honestly and within the ambit of its power.

40 As to the first limb of this complaint, there is no basis at all for impugning the honesty of the Trustee's decision, and none has been suggested.

41 As to the second limb, the suggestion that the Trustee was not acting within the ambit of its power adds nothing to Madam Kan's underlying complaint about the rationality of the decision to exclude her. That complaint is fundamentally flawed, for the reasons given in paragraphs 30 and 31 above.

## Ground 2

42 The second ground of appeal is that the Trustee failed to take into account all relevant considerations. There are three limbs to this argument. The first is that the Royal Court was wrong to consider that the Trustee gave adequate reasons for its decision. In our judgment, this complaint must be rejected. We agree with the Royal Court that the reasons set out in the affidavit made on behalf of the Trustee could, indeed should, have been fuller. Nothing in this judgment or in the Judgment given by the Royal Court should be taken as encouraging trustees to take a casual approach to this kind of application.

43 Nevertheless, we consider that the logic of the reasoning set out in paragraphs 30 and 31 above emerges fully from that Trustee's Representation and from Susan Chung's affidavit read as whole; and we think that in this case it was open to the Royal Court to allow the Trustee to expand the explanation of its reasoning by relying on the matters set out in its skeleton argument dated the 20th October 2014, and to decide not to insist on formal evidence to verify those matters. These were case management decisions that were well within the court's discretion. In our judgment no purpose at all would have been served by requiring the Trustee to verify the reasoning set out in its skeleton argument in the form of evidence (as Madam Kan now suggests the Royal Court should have required). Furthermore, since this was a simple binary choice between exclusion or not, and the Trustee's decision emerged logically from the conclusion of the Hong Kong proceedings in the CFA, this is not a case in which the court would expect the Trustee to deploy any

granular explanation of its reasoning.

- 44 The second limb of this complaint is that the Royal Court was wrong to approve the decision without the Trustee having given details of its decision-making process. For the reasons given in paragraphs 14 to 18 above, we do not consider that a trustee in this kind of case must as a matter of principle always give disclosure of its decision-making process. The evidential demands of each case will depend on the facts. In this case, the reasonableness of the decision can readily be assessed on its own terms, and there was no need for the Trustee to give any further disclosure than it did.
- 45 The third limb of this complaint is the absence of any evidence of the Trust fund's current financial position. This too must be rejected. The Trustee's decision to exclude Madam Kan as a beneficiary was not based in any way on the current value of the Trust fund, and as a result her ability to impugn the Trustee's decision would not be enhanced by having any more up-to-date information in that regard.
- 46 Mentioned in Madam Kan's skeleton argument for this appeal was an argument, made by Advocate Robinson before the Royal Court and repeated before us by Advocate Morley-Kirk in her oral address. This is that Madam Kan should appropriately continue as a beneficiary under the Trust "*to protect Karen*" by being able to monitor the Trust and hold the Trustee to account. This was based partly on a complaint that the Trustee had participated in the ancillary relief proceedings in Hong Kong and had taken a partisan position by supporting Mr Poon, and partly on the suggestion that Karen might be unable to look after her own interests.
- 47 We reject this argument. The position the Trustee took in the Hong Kong court involved nothing other than a fair effort to protect the equitable interests of each beneficiary. The fact that the CFA treated the entirety of the fund as matrimonial assets, and ordered Mr Poon make a payment to Madam Kan of an amount arrived at as including approximately half of the fund, does not in any sense reflect badly on the Trustee. Indeed, the Hong Kong Court of Appeal commented (in paragraph 23 of its judgment) that the Trustee had adopted a position of neutrality.
- 48 Contrary to Madam Kan's position, we consider that the process in Hong Kong rather cuts the ground from under her present argument that she should remain as a beneficiary in order to protect Karen's interests in the Trust. The Royal Court specifically approved the Trustee's participation in the Hong Kong proceedings so that it could protect the interests of the beneficiaries of the Trust other than Mr Poon and Madam Kan (see paragraphs 10 and 13 of the judgment of the 25th August 2011), and that is what the Trustee did. It was the success of Madam Kan's own appeal in the CFA that has reduced the available fund in which Karen and the University are discretionary beneficiaries, and which the Trustee was seeking to protect.



49 Looking to the future, the Trustee is a professional organisation and Karen is an adult and a successful businesswoman, and in the circumstances we see no basis for suggesting that the Trustee has acted unreasonably in rejecting the argument that Madam Kan should remain a beneficiary in order to exercise some kind of supervisory function for Karen's benefit. Rather, the impression is conveyed to us that Madam Kan's aim is to remain as a beneficiary in order to be able to continue hostilities with Mr Poon. This point was reinforced by the frank acknowledgment made to us by Advocate Morley-Kirk, that if the Trustee were refused the approval which the Royal Court had given by its Act of Court dated 22 October 2014 and then (as the Trustee could) exercised the power in the Trust Deed to exclude Madam Kan as a beneficiary, quite probably the Trustee would be sued by Madam Kan.

### Ground 3

50 The third ground of appeal is that the Trustee and the Royal Court wrongly took into account an irrelevant matter, namely the fact that certain dicta in the Hong Kong High Court had not been disapproved on appeal. The remarks in question (paragraph 134 of the High Court judgment) expressly contemplated that the Trustee might choose to exclude Madam Kan as a beneficiary, subject to the supervision of the courts in this jurisdiction. Madam Kan objects that these *dicta* could not have been appealed because they were *obiter*, and it was therefore wrong for the Trustee and of the Royal Court to have taken into account the fact that the remarks made by the judge in the Hong Kong High Court were not disapproved on appeal.

51 There is nothing whatever in this complaint. No credible suggestion can be made either that the Trustee or the Royal Court considered that the Hong Kong court was making any form of ruling that dictated the exercise of the Trustee's discretion. All that the Hong Kong court was doing was pointing out that the exclusion of Madam Kan was an issue that the Trustee would no doubt wish to address, under the supervision of the courts here. That is what has happened.

52 Furthermore, the remarks of the Hong Kong High Court were entirely well judged, because they alluded to exactly the point discussed in paragraphs 31 and 32 above. If Madam Kan's submission is an indirect attempt to suggest that that point should be ignored, we would reject it out of hand.

53 Finally, we would also add that Madam Kan's suggestion that it was wrong of the Royal Court to take into account the Hong Kong court's observation in this regard on the technical ground that it was *obiter* and therefore could not be appealed is misconceived. The question whether a judicial observation forms part of the *ratio* of a judgment or is merely *obiter* is significant only in determining questions of precedent authority in the common law of the jurisdiction in which the judgment is given. The significance of the Hong Kong court's observation in this context is the fact that it was made and the fact that it is entirely logical (because of its resonance with the point set out in paragraphs 31 and 32 above), not its

status in the common law in Hong Kong as *obiter* or *ratio*. Furthermore, the logic and force of that remark is not lost simply because the ultimate outcome of the ancillary relief proceedings was somewhat different in the CFA from what it had been in the lower courts in Hong Kong.

#### Ground 4

- 54 The final ground of appeal is that the Royal Court was wrong to reach the conclusion, on the basis of the reasons given, that a reasonable trustee properly instructed could reach the decision to exclude Madam Kan as a beneficiary. This adds nothing to the previous points, and we reject it.

#### Conclusion

- 55 Finally, we would express our agreement with the observations made in paragraph 42 of the Judgment. Bearing in mind Madam Kan's age and the amounts she will have received under the divorce settlement, the Trustee cannot be accused of having acted irrationally in deciding that her financial needs do not require her to remain as a beneficiary. Furthermore, since the financial settlement made by the Hong Kong court was intended to achieve a clean break, Madam Kan's continued presence as a beneficiary is likely to make it harder for everyone to move forward and put the divorce behind them. Her pursuit of these proceedings demonstrates just that risk.
- 56 For these reasons, the appeal is dismissed.