Jasmine Trustees Ltd v M

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Ramsden, Olsen, Birt
Judgment Date:	05 October 2021
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Text

[2021] JRC 248

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, and** Jurats Ramsden **and** Olsen

In the Matter of the Piedmont Trust & Riviera Trust

Between
(1) Jasmine Trustees Limited
(2) Lutea Trustees Limited
Representors
and
(1) M
(2) N
(3) Q
(4) O, P, V, R, S, W

(5) U
(6) Advocate Damian James as Guardian ad Litem of X
(7) Advocate Simon Franckel as Representative of the unborn and remoter issue
(8) Rysaffe Fiduciaries S.à.r.l.
Respondents

Advocate N. M. Sanders **for the Representors**

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

Advocate J. P. Speck **for the Second and Third Respondents**

Advocate M. P. Renouf **for the Fourth Respondents**

The Fifth Respondent did not appear and was not represented.

Advocate D James **in person**.

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

Advocate R. S. Christie **for the Eighth Respondent**

Authorities

Re Piedmont Trust [2015] (2) JLR 52.

Representation of Jasmine Trustees Limited [2015] JRC 196.

Re Piedmont Trust [2018] (2) JLR 306

Representation of Jasmine Trustees re Piedmont and Riviera Trust [2018] JRC 210.

Re Onorati Settlement [2013] (2) JLR 324.

Pitt v Holt [2012] Ch 132.

Pitt v Holt [2013] 2 AC 108.

Kan v HSBC International Trustee Limited 2015 (1) JLR N 31

Rep of Otto Poon Trust [2015] JCA 109.

Hawksford Jersey Limited v A [2018] JRC 171.

Re Esteem Settlement [2003] JLR 188.

Investec Co-Trustees (Jersey) Limited v Kidd [2012] JRC 066.

Lewin on Trusts (20th Ed).

Re Rabaiotti 1989 Settlement [2000] JLR 173.

Re A and B Trusts [2012] (2) JLR 253.

GB Trustees Limited v Stock [2021] JRC 048.

Ogier Trustee (Jersey) Limited v CI Law Trustees Limited [2006] JRC 158.

Holden on Trust Protectors.

Trusts (Jersey) Law 1984.

Rawcliffe v Steele 1993–95 MLR 426.

S v L E & Bedell Cristin Trustees Limited [2005] JRC 109.

Re The X Trusts [2021] SC (Bva) 72 Civ.

Garnham v PC [2012] (1) JLR 204.

Children's Investment Fund Foundation (UK) v Attorney General [2020] 3 WLR 461.

Trust — application for the approval of the Court to appoint all the assets of the trusts amongst the beneficiaries in specified proportions

THE COMMISSIONER:

1 This is an application by the Representors as trustees of two trusts for the approval of the Court of their decision to appoint all the assets of the trusts amongst the beneficiaries in specified proportions. Although all the beneficiaries are agreed that the trusts should be terminated, there is disagreement as to how the trust funds should be allocated as between different beneficiaries.

2 Among other matters, the application has required the Court to consider whether the Representors are disqualified from making their decision because of a conflict of interest and should therefore surrender their discretion to the Court; the role of a protector in circumstances such as these; and the significance of the letters of wishes.

3 Following the adjourned hearing on 22 July, the Court announced its decision on 26 July to the effect that the Representors did not have to surrender their discretion to the Court and that the Representors' decision was approved. What follows constitutes our reasons for reaching that conclusion.

Factual background

4 There have been previous proceedings in relation to the two trusts, two of which are reported, namely *Re Piedmont Trust*, [2015] (2) JLR 52, [2015] JRC 196 ("the 2015 judgment") and *Re Piedmont Trust* [2018] (2) JLR 306, [2018] JRC 210 ("the 2018 judgment"). Full details of the factual background are to be found in those judgments to which recourse may be had as necessary. For present purposes, we would summarise the factual background as follows.

5 Jasmine Trustees Limited ("Jasmine") is the sole trustee of the Piedmont Trust ("the P Trust"). Jasmine and Lutea Trustees Limited ("Lutea") are the co-trustees of the Riviera Trust ("the R Trust") (together "the Trusts"). Unless it is necessary to do otherwise in a specific context, we propose to refer simply to "the Trustees" to cover the trustee(s) of both Trusts or whichever Trust is relevant in context.

(i) The P Trust

6 The P Trust was established by a relative of the beneficiaries of the Trust ("the P settlor") by deed dated 4 April 2000. Since 11 th February 2011, Jersey law has been the proper law of the Trust.

7 The Trust is a discretionary trust which is revocable by the P settlor. It appears to have been established at the instigation of the father ("the father") of the First, Second and Third Respondents. The father died in April 2020. He had three children, namely the First Respondent ("the daughter"), the Second Respondent ("the elder son") and the Third Respondent ("the younger son") (together "the sons"). Each of the sons has three adult children and together they comprise the Fourth Respondents ("the Adult Grandchildren"). The sons and the Adult Grandchildren are resident in the US. The daughter has one child ("the daughter's child"), who is a minor aged 6, and Advocate James has been appointed as her guardian ad litem. The daughter and the daughter's child reside in the UK.

8 The class of beneficiaries was defined in the trust deed as being the father, the father's children and remoter issue, and any persons added as beneficiaries under the power conferred by the trust deed. The father was named as the original protector.

9 Shortly before the hearing, the assets of the P Trust were valued at some US$34.8m. This included a loan to the daughter of some US$1.35m (including interest) and a loan to the father of some US$1.1m, with the balance being made up of an investment portfolio.

(ii) The R Trust

10 The R Trust was established on 18 th June 2010 by deed between a different family relative ("the R settlor") and Jasmine and Lutea as trustees. It is governed by the law of Jersey and is also a revocable discretionary trust. The class of beneficiaries is the same as

the P Trust with the addition of the R settlor and the Fifth Respondent, who is a long-standing companion of the father. The father was named as the original protector.

11 Approximately 48% of the R Trust was contributed by the R settlor. The balance of approximately 52% was received by way of appointment in 2010 out of a further trust known as the S Trust. This had been established by the S settlor (another relative of the beneficiaries) in 2000 at the same time as the P Trust had been created. The S Trust too was a revocable discretionary trust and was in similar terms to the P Trust with similar beneficiaries.

12 Shortly before the hearing, the assets of the R Trust were valued at approximately US$7m.

(iii) Letters of Wishes

13 In relation to the P Trust, there have been three letters of wishes signed by the P settlor. In broad summary (so far as relevant) they provide as follows:

> (i) The first (LOW 1) is dated 4 th April 2000, i.e. the date of creation of the P Trust. In LOW 1 the P settlor states that the intention of the Trust is to provide for the great grandchildren of the father's parents. He expresses the wish that distributions should only be made during the father's lifetime at the father's request. He further expresses the wish that upon the father's death, the trust fund should be divided into three equal parts, one in respect of each of the father's children. As to the one-third part attributable to each son, he expresses the wish that that part should be distributed equally among that son's children in stages upon such children attaining specified ages, with the balance of each such child's share being distributed upon the child attaining the age of forty. The daughter had no children at the time. The letter provides that, if she should have children before 3 September 2004 (when she would be 40), the one-third share should be held for the daughter's children on broadly the same (but not identical) terms as the children of the sons. The letter further expresses the wish that if the daughter should not have children before 3 September 2004, the one-third share should be distributed to the daughter at specified ages. The letter further expresses the wish that each child of the father should be appointed as protector of the one-third share intended for that child's family.
>
> (ii) The second letter of wishes (LOW 2) is dated 14 th February 2006 and expressly cancels LOW 1. The P settlor again states that the intention of the P Trust is to provide for the great-grandchildren of the father's parents. Although not in identical language, it expresses broadly similar wishes as LOW 1. Thus, the letter requests the trustees to consider sympathetically any requests made by the father for distributions to him or other beneficiaries during his life. Following his death, the P settlor wishes the trust fund still to be divided into three equal parts, one part to be attributable to each of the father's three children, i.e. the two sons and the daughter. He wishes the elder son to be appointed protector of his family's one-third, with similar wishes in

respect of the younger son and the daughter for the other thirds. The share attributable to each son is again to be held equally for the children of the relevant son with distributions at various ages including the balance at the age of forty. At this stage the daughter still had no children. The letter requests that should she have children, the one third share attributable to her should be held for her children in terms similar to those in respect of the children of the sons. There is no longer any reference to the date of 3 September 2004. The letter again expresses the wish that if the daughter should not have children, the one-third share should be distributed to her at various ages.

(iii) The third letter of wishes (LOW 3) is dated 7 th July 2010. By then, as discussed later, the father and the daughter had fallen out. This letter expresses the wish that upon the death of the father, the trust fund should be divided into two equal parts, one half for the children of the elder son and one half for the children of the younger son. The daughter, and any children of hers, are no longer mentioned.

14 In relation to the R Trust, there has only been one letter of wishes ("the R letter of wishes") dated 7 July 2010, i.e. the same date as LOW 3. In that letter, the R settlor expresses wishes in similar terms to those expressed in LOW 3, i.e. the daughter and any children of hers are not mentioned.

15 Finally, in relation to the S Trust, which part funded the R Trust, there is a letter of wishes by the S settlor dated 22 nd October 2000 ("the S Trust LOW"). This is in broadly similar terms to LOW 1 but there are differences. Thus, whilst LOW 1 refers to the P Trust being intended for the benefit of the great grandchildren of the father's parents, the S Trust LOW refers to the S Trust being intended to provide primarily for the grandchildren and the great grandchildren of the father's parents. Furthermore, whilst it is similar to LOW 1 in requesting a division into thirds after the death of the father, it differs from LOW 1 in requesting that each third should be held primarily for the benefit of the relevant child of the father during his or her lifetime and that the Trustees should distribute all or part of that third to such child should he or she so request. Following the death of the relevant child (or earlier if so requested by the relevant child) the remaining assets of each third should be distributed equally amongst the relevant child's children at specified ages, as in the case of the P Trust.

(iv) Previous proceedings

16 By 2010, serious differences had arisen between the father and the daughter. It was at that time that, as recited above, the letter of wishes in relation to the P Trust was changed so that it thereafter referred only to the sons and their families and the letter of wishes in relation to the R Trust (to similar effect) was signed.

17 Subsequently, the daughter commenced litigation in New York against the father and one of the sons, and in Vermont against the father and both sons. Those proceedings were in

connection with companies in those states which she alleged were partly owned by her but had been converted to the use of the father and/or the sons.

18 In 2014, as protector, the father purported to remove Jasmine and Lutea as trustees of the Trusts and to appoint a New Zealand trustee in their place. Subsequently, he resigned as protector of the Trusts. Before doing so, he purported to appoint the sons as protectors of the R Trust and all the adult beneficiaries of the P Trust (except the daughter) executed a deed appointing the sons as protectors of the P Trust. These appointments were challenged by the daughter and this Court subsequently issued the 2015 judgment, in which it declared the appointments of the New Zealand company as trustee and of the sons as protectors to be invalid. The upshot was that Jasmine remained as trustee of the P Trust and Jasmine and Lutea remained as trustees of the R Trust. A further consequence of the Court's decision was that there was no protector of either Trust because the resignation of the father was valid but the appointment of the sons as successor protectors was invalid.

19 It proved impossible for the parties to agree on the identity of a new protector and accordingly the matter came back before this Court (differently constituted) in June 2017. On 21 st November 2017, the Court issued its reasoned judgment in which it ruled that the Eighth Respondent ("Rysaffe") should be appointed as protector of both Trusts (the Court having given its decision without reasons on 22 June 2017). However, after the hearing and the decision referred to but before the reasoned judgment was issued, revocation notices signed by the P settlor and the R settlor respectively in relation to the Trusts were sent to the Trustees and received by them on 14 th August 2017. In the circumstances, the appointment of the new protector for the Trusts was not proceeded with at that stage.

20 The daughter challenged the revocation notices and alleged that they had been executed in each case under the undue influence of the father. On 15 th November 2018, for the reasons set out in the 2018 judgment, the Court upheld the daughter's contentions and ruled that the revocation notices were invalid as having been executed under the undue influence of the father. The Trusts therefore had not been revoked and continued to exist.

21 Following the 2018 judgment, the appointment of Rysaffe was proceeded with and it became the protector of both Trusts on 14 January 2019 ("the Protector").

Events leading up to the Trustees' proposal

22 Immediately following the issue of the 2018 judgment, Appleby, on behalf of the daughter, wrote to the Trustees' advocates requesting that the Trustees exercise their discretion to terminate the Trusts and make a distribution equally between the three branches of the family, i.e. the branches of the elder son, the younger son and the daughter. In support of the request, Appleby referred *inter alia* to the risk of adverse US tax consequences should the P settlor die and the level of hostility and breakdown in relations that existed between the family members.

23 The daughter had in fact made an earlier request for the partition of the Trusts in September 2016, but the Trustees had not acted on this. According to Mr Jenner, the director of Jasmine and Lutea with lead responsibility for the Trusts, this was because there was no protector in place at the time and because, following receipt of the purported revocation notices by the Trustees on 14 th August 2017, there was uncertainty as to whether the Trusts continued to exist, which uncertainty was only resolved by the 2018 judgment.

24 According to Mr Jenner, following receipt of the request on behalf of the daughter in November 2018, he engaged in widespread consultation with the beneficiaries. This involved travelling to various parts of the United States where he met all the US resident beneficiaries other than one of the Adult Grandchildren. He met the daughter in London. He also arranged for updated US tax advice to be obtained from the firm of Fox Rothschild.

25 During the course of the consultations, the Adult Grandchildren put forward a proposal ("the Adult Grandchildren's proposal") in response to the daughter's suggestion of an equal three-way split. Their proposal for the P Trust was that the daughter should repay her loan with interest and that the trust fund should then be divided:

(i) 5.33% to each of the elder son, the younger son and the daughter;

(ii) 12% to each of the seven grandchildren, i.e. the sons' six children and the daughter's child.

26 As to the R Trust, they suggested that the father should receive sufficient for his ongoing medical and living expenses and that, subject to that, 14.3% should be allocated to each of the seven grandchildren.

27 Following these consultations, the boards of the Trustees met on 11 th November 2019 and formulated what has been referred to as the 'November 2019 Proposal'. This was as follows:

P Trust

(i) 4.8% to be appointed to each of the elder son, the younger son and the daughter (with the loan and interest to the daughter to be waived as part of her distribution); this percentage appears to have been calculated broadly (although not exactly) by reference to the amount of the daughter's outstanding loan and interest.

(ii) 11.5% to each of the Adult Grandchildren;

(iii) 16.6% to the daughter's child.

The R Trust

(i) 30% to the father;

(ii) 20% to the Fifth Respondent;

(iii) The balance to be divided equally between the father's seven grandchildren, i.e. the six Adult Grandchildren and the daughter's child.

28 There then followed further discussion and consultation. As a result of this, it became clear that the Protector was not willing to consent to the November 2019 Proposal. Furthermore, the situation changed when the father passed away in April 2020.

29 Accordingly, the Trustees decided to consider the matter afresh. Before doing so, they wrote to the beneficiaries in November 2020 inviting any further submissions as to how they thought the trust funds should be distributed. On 12 th January 2021, the Trustees circulated a further proposal ("the January 2021 proposal") to the beneficiaries and the Protector inviting comments. This proposal was formally considered by the boards of Jasmine and Lutea on 8 th February 2021. The boards agreed in principle, subject to the consent of the Protector, the approval of this Court, and detailed consideration of the exact manner of distribution to each beneficiary (e.g. a payment directly to the beneficiary or to a trust for his or her benefit), to terminate the Trusts and to distribute them as follows ("the Proposed Distributions):

The Proposed Distributions

The P Trust

(i) 11% to be distributed to each of the elder son, the younger son and the daughter (with the loan and interest to the daughter being waived as part of her distribution);

(ii) 9% to be paid to or for the benefit of each of the six Adult Grandchildren;

(iii) 13% to be paid to or for the benefit of the daughter's child.

The R Trust

(i) US$500,000 to be paid to the Fifth Respondent;

(ii) The balance to be distributed equally between the father's seven grandchildren, i.e. the Adult Grandchildren and the daughter's child.

The Protector consents to the Proposed Distributions.

30 According to the schedule produced at the hearing, on current values, this would result in

approximately $3.83m being distributed to each of the elder son, the younger son and the daughter (less the amount of her loan and interest in the case of the daughter), $4.06m to each of the Adult Grandchildren, and $5.46m to the daughter's child. These amounts are rounded and will of course vary according to the value of the trust funds at the time of distribution.

31 The Trustees seek the Court's approval to the Proposed Distributions and it is that application which first came before the Court on 24 th May 2021. There is no dispute that termination of the Trusts in circumstances where there is strong disagreement amongst the beneficiaries is a momentous decision and that it is reasonable for the Trustees to seek the Court's blessing.

Course of these proceedings

32 When the matter came before the Court on 24/25 th May, the Trustees made it clear that they were approaching the matter in two stages. In stage 1, they were seeking the Court's approval to the percentage split between the various beneficiaries as set out in the Proposed Distributions. Thereafter, in stage 2 the Trustees would work with individual beneficiaries to consider the tax position of each beneficiary and the best way in which that beneficiary's distribution should be made, i.e. directly to a beneficiary, to a trust for the benefit of that beneficiary or in some other manner.

33 The general approach of the parties at that stage was as follows. The sons and the Adult Grandchildren did not agree with the Proposed Distributions. The sons felt that the distributions should principally benefit the seven grandchildren on an equal basis. The Adult Grandchildren felt that the November 2019 Proposal was preferable and should have been maintained by the Trustees. On the other hand, the daughter submitted that the Trustees should have followed the terms of LOW 1 and essentially divided the trust funds into three equal parts, with one part being held for the benefit of each branch of the family. Advocate James, on behalf of the daughter's child, supported the points made by the daughter.

34 During Advocate Robertson's submissions on behalf of the daughter, it emerged that there might well be substantial UK Capital Gains Tax payable by the daughter and the daughter's child in respect of the distributions to them. It further transpired that the Trustees had not taken UK tax advice at this stage and were not aware of the exact tax position. They had been intending to take such advice as part of stage 2 when determining the best way in which to make the distributions to the various beneficiaries.

35 The Court was not happy at being asked to bless an appointment where the Trustees had not taken UK tax advice on the effect of the proposed appointments and where the tax consequences to the UK beneficiaries were unclear. It had in mind its judgment in *Re Onorati Settlement* [2013] (2) JLR 324, where at paragraph 12 the Court approved the

observation of Lloyd LJ in the English Court of Appeal in *Pitt v Holt* [2012] Ch 132, where at para 115 (subsequently approved by Lord Walker of Gestingthorpe in the UK Supreme Court on further appeal in *Pitt v Holt* [2013] 2 AC 108 at para 65) he said:

> ***"In Sieff v Fox … I said that I was in no doubt that 'fiscal consequences may be relevant considerations which the trustees ought to take into account.*** I remain of that view. Although it is often said that decisions as regards the creation and operation of trusts ought not to be dictated by considerations of tax, the structure and development of personal taxation in the UK over the past decades, the use of trusts in order to deflect or defer the impact of taxation, and in turn the development of taxation as it applies to property held by trustees, have been such that there can be few instances in which trustees of a private discretionary trust with assets, trustees or beneficiaries in England and Wales could properly conclude that it was not relevant for them to address the impact of taxation that would or might result from a possible exercise of their discretionary dispositive powers."

36 The Court therefore adjourned the Trustees' application in order for UK tax advice to be obtained and then considered by the Trustees. That has subsequently occurred and at a board meeting held on 28/30 June 2021 ("the June meeting") the Trustees decided to maintain their decision as set out in the Proposed Distributions. The Protector has maintained its consent to the Trustees' decision. The Trustees' application came back before the Court on 22 nd July.

37 It is convenient at this point to summarise the tax position as presented to the Court.

(a) US tax

38 Prior to the first hearing, the Trustees had obtained detailed US tax advice from Fox Rothschild which has been updated since then. In very broad and simple terms, we would summarise the effect of that advice as follows:

(i) The P Trust is a foreign grantor trust in that it is revocable by the settlor (grantor) who was and is a non-US person. This has very advantageous tax consequences. So long as the P settlor is alive and not incapacitated, distributions to US beneficiaries (which term includes the daughter and the daughter's daughter because they are US citizens) are free of US tax, both federal and state.

(ii) Following the death or incapacity of the P settlor, the P Trust will be converted into a foreign non-grantor trust. The consequence of this is that distributions to US beneficiaries will attract significant US tax. Federal tax will be payable by all the beneficiaries and state tax will also be payable on such distributions by US residents, i.e. all the beneficiaries except the daughter and the daughter's child.

(iii) The tax position in relation to the R Trust is the same insofar as the portion settled by the R settlor is concerned, because she is a non-US person and has the power to revoke the R Trust. However, the portion derived from the S Trust would be considered as a foreign non-grantor trust with the result that distributions attributable to this portion would attract significant US tax, as described above in relation to the P Trust following the death of the P settlor. In the event of the death or incapacity of the R settlor, the remaining part of the R Trust would be converted into a foreign non-grantor trust and therefore significant US tax would be payable on all distributions from the R Trust in the same way as for the P Trust after the death of the P settlor.

39 It is therefore agreed by all parties that there is considerable urgency in both Trusts being distributed in full as soon as possible so as to minimise the risk of either settlor dying or becoming incapacitated before such distributions are made, with the resulting serious adverse US tax consequences described above. This is particularly important in relation to the P settlor as he is quite elderly and the value of the P Trust is much greater than the value of the R Trust.

(b) UK tax

40 Following the adjournment of the first hearing, the Trustees have obtained UK tax advice from UK tax counsel, Mr Peter Vaines, and the daughter has obtained tax advice from Mr Michael Lewis of EY Frank Hirth Limited ("Frank Hirth"). There appears to be no material dispute between them as to the position and we have had the advantage of seeing the opinions of both advisors, as well as the summary of their opinions contained in the minutes of the June meeting.

41 In very short and simplified form, we would summarise our understanding of the position as follows:

(i) A UK resident beneficiary of a non-resident trust is liable to pay capital gains tax (CGT) if he receives a capital distribution at a time when there are accumulated ("stockpiled") capital gains in the trust.

(ii) Since April 2018, distributions to non-UK resident beneficiaries of such a trust no longer have the effect of reducing the stockpiled gains of the trust. Thus, in principle, all the stockpiled gains of the Trusts will be attributed to the distributions to the daughter and the daughter's child, not simply a pro-rata proportion of those gains.

(iii) However, if the distributions to the daughter and the daughter's child are made in the same UK tax year as the relevant Trust is terminated by distribution to the beneficiaries, the stockpiled gains will be attributed rateably to the distributions. Thus, if the daughter were to receive a distribution of 11% of the P Trust, only 11% of the stockpiled gains in that Trust would be attributed to her distribution and therefore attract CGT.

(iv) Frank Hirth has carried out calculations by reference to the present values of the Trusts and the stockpiled capital gains. The daughter's tax liability in relation to the Proposed Distributions is calculated as being US$499k if the P Trust is terminated in the same tax year as her distribution, but it increases by $263k if the P Trust is not terminated within the same tax year.

(v) In relation to the daughter's child, Frank Hirth calculates that, in the event of a direct distribution to her, she would face UK tax liabilities of $590k and $205k in respect of the distributions from the P Trust and the R Trust respectively, with an increase of $310k if the P Trust is not wound up in the same year as the distribution from that Trust.

(vi) If the distributions for the daughter's child are paid to a new trust for her benefit rather than to her directly, the relevant stockpiled gains will be transferred into the new trust and no tax would be payable at present. Tax would be deferred until distributions are made to her from the new trust. If at some stage in the future she were to become a non-resident of the UK for tax purposes, there might be scope for the tax to be mitigated.

(vii) If the father of the daughter's child was not domiciled in the UK at the date of her birth (as to which we are told there is a question) the daughter's child would be regarded as non-UK domiciled, in which event the potential tax liabilities on distributions to her would be considerably reduced.

42 Frank Hirth's advice went on to suggest that, if it was desired to equalise the position to take account of the UK tax payable, the distribution to the daughter from the P Trust should be ‘grossed up’ to 12.22% (with a corresponding reduction for each son to 10.39%) and the distributions to the daughter's child from the P Trust should be grossed up to 14.44% (with a corresponding reduction for each Adult Grandchild to 8.76%) and from the R Trust to 16.32% (with a corresponding reduction for each Adult Grandchild to 12.76%).

43 The suggestion of grossing up the above payments was taken up by the daughter in her representations to the Trustees but, as already mentioned, the Trustees decided at the June meeting not to vary the Proposed Distributions. The argument in favour of grossing up the distributions as suggested by Frank Hirth was renewed by the daughter and Advocate James at the resumed hearing before us and this aspect is discussed below.

Approach to blessing applications

44 The test applied by the Court when asked to approve a momentous decision by trustees is well established. It was helpfully summarised by Bompas JA in the Court of Appeal in *Kan v HSBC International Trustee Limited* 2015 (1) JLR N 31; [2015] JCA 109 at para 14 in the following terms:

“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….”***

45 As to the procedure to be followed by a trustee who is seeking approval of a momentous decision, the Court of Appeal went on to say as follows:

“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, 8th 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."

46 In this case, the Trustees have placed before the Court detailed minutes setting out their decision together with the papers placed before the boards of the Trustees when reaching their decision both on 8 th February 2021 and at the June meeting. We are satisfied that the Trustees have satisfied the procedural obligation described in the above two paragraphs from the judgment in Kan.

Conflict of interest

47 At the adjourned hearing, the daughter, supported by Advocate James, submitted that, as a result of the report from Frank Hirth, the Trustees were now in a position of conflict of interest which disabled them from taking the decision in question; they should therefore surrender their discretion to the Court. We shall turn to the grounds for the suggested conflict of interest shortly but first we need to remind ourselves of the applicable legal principles in relation to a conflict of interest.

48 The impact of the existence of a conflict of interest where a trustee seeks the Court's blessing of a momentous decision was considered in *Hawksford Jersey Limited v A* [2018] JRC 171. We would quote the following paragraphs:

"46. …..The existence of a conflict of interest does not of itself mean that trustees may not take a decision or that the Court will not bless such a decision. As Lewin put it at para 27–077 (when considering a blessing application):-

"The court may also entertain an application where the trustees have a conflict of interest, without requiring them to surrender their discretion, and if the power might rationally be exercised in many different ways, that course may save the expense of evidence and argument on the way in which the court should exercise the discretion."

47. The issue of conflict of interest was also helpfully addressed in *Representation of Centre* [2009] JRC 109 ***where, at para 30 of his judgment, Clyde-Smith, Commissioner quoted with approval the observation of Hart J in*** *Public Trustee v Cooper* (2001) WTLR 901, ***which was as follows:-***

"Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may

represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries .

Secondly, the nature of the conflict may be so pervasivethroughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court .

Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that that decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict."

48. We are satisfied that the conflict in this case falls within the third category. It is not so pervasive as to disable the Trustee from taking the decision in question and require it to surrender its discretion to the Court. However, where there is a conflict of interest and a trustee subsequently seeks the blessing of the Court to the decision which it has taken, it is of fundamental importance that the trustee address the conflict issue and be seen to do so. Thus, in the present case, we would have expected to have seen minutes in which, when reaching its decision, the Trustee acknowledged the existence of the conflict but went on to explain why, despite the conflict, it was nevertheless in the interests of the beneficiaries/trust estate that the Property be sold .

49. But the Trustee's application is completely silent about the conflict of interest. Neither the representation itself nor the affidavit of Ms Miller makes any mention of it. Both documents do of course disclose the existence of the Trustee's outstanding fees but that is not the same point. What is important is that the Trustee should be seen, when making its decision, to have been aware of its conflict of interest, to have taken it into account and to have considered clearly why, despite the conflict, it is nevertheless in the interests of the trust estate/beneficiaries to reach the relevant decision .

...

51. Where there is a conflict of interest, the Court will give heightened scrutiny to the decision for which approval is sought. We are not to be

taken as laying down a rule that, where a conflict of interest has not been acknowledged and disclosed, the Court will invariably refuse its approval. The decision may be so obviously appropriate that the Court should nevertheless approve it. However, failure to disclose and acknowledge a conflict of interest when reaching a decision, is likely to make it much more difficult for the Court to be satisfied that the decision has not in fact been influenced by the conflict."

49 The daughter alleges that, when they reconsidered the Proposed Distributions at the June meeting, the Trustees had a conflict of interest. That conflict is said to arise in the following manner.

50 At para 3.4 of its report dated 17 th June 2021, Frank Hirth stated:

> *"3.4 Major changes in UK tax laws with respect to offshore trusts were notified to the tax industry prior to them coming into effect in April 2018.* During this period, it was possible for the Trustees to undertake or propose to the beneficiaries planning (involving capital distributions to the non-UK resident beneficiaries) such that [the daughter's] and [the daughter's child's] prospective UK tax liabilities could be reduced or even eliminated. Such planning if undertaken could have significantly reduced the current tax exposure for [the daughter] and the [daughter's child]."

51 Mr Lewis of Frank Hirth has subsequently elaborated on the relevant dates in an email dated 8 th July 2021. He states that the UK government announced on 5 th December 2016 its intention to change the rules about 'matching' or 'washing out' capital gains in offshore trusts with effect from 5 th April 2017 so as thereafter to prevent stockpiled gains being 'washed out' by being distributed to non-UK resident beneficiaries. In fact, the proposed changes were not included in the draft UK Finance Bill when it was published in March 2017 but uncertainty remained as to whether the changes would subsequently be introduced and backdated. However, it became clear on 13 th July 2017 that the new provisions would not be introduced until 5 th April 2018, which is what happened.

52 Mr Lewis therefore suggested that there was an opportunity to minimise the impact of the changes in respect of the Trusts by making distributions to non-UK resident beneficiaries (thereby washing out the stockpiled gains as they would be deemed to have been included in those distributions) during the four months from 5 th December 2016 to 5 th April 2017, and from 13 th July 2017 to 5 th April 2018.

53 However, as stated above at paragraph 19, purported revocation notices in relation to the Trusts were received by the Trustees on 14 th August 2017. It follows that from that date until the matter was resolved by the 2018 Judgment, it was not known whether the Trusts remained in existence or not. Advocate Robertson accepted that it was therefore not open

to the Trustees to make distributions to any beneficiaries until it was determined whether the Trusts continued to exist.

54 He submitted therefore that the Trustees should have taken steps to minimise the UK tax payable to the daughter and the daughter's child by making distributions to the US resident beneficiaries so as to wash out stockpiled capital gains in the Trusts and that this should have been done during the four month period from 5 th December 2016 to 5 th April 2017 or in the one month period between 13 th July 2017 and 14 th August 2017. It was, he submitted, negligent of the Trustees and in breach of trust not to have done so and such breach had caused loss to the daughter and the daughter's child by reason of the UK tax which was now payable. There was therefore a potential claim by the daughter and the daughter's child against the Trustees for the unnecessary UK tax which was now payable.

55 He then referred to a letter dated 9 th June 2021 from Mourant, on behalf of the sons, to the Trustees. At paragraph 16 of her second affidavit, the daughter categorised this letter as making " *thinly veiled threats of action against the Trustees should they side with me…*".

56 Advocate Robertson submitted that, as a result of their failure to take steps to wash out the gains by making distributions to the US beneficiaries during the above periods, the Trustees had placed themselves between a rock and a hard place. If they were to decide to gross up the distributions to the UK resident beneficiaries as suggested by Frank Hirth so as to compensate them for the UK tax payable, this would expose them (the Trustees) to a claim by the non-UK resident beneficiaries to the effect that the Trustees' breach of trust in failing to wash out the capital gains (followed by grossing up the distributions to the UK resident beneficiaries to compensate them for this) had led in effect to the US beneficiaries suffering loss to the extent of the amount of the grossing up. On the other hand, if the Trustees were to decide not to gross up the distributions to the UK resident beneficiaries to compensate them for the UK tax payable, this would expose the Trustees to a claim by the UK resident beneficiaries that they had each suffered a lower net distribution from the Trusts as a result of the Trustees' breach of trust.

57 He submitted therefore that the Trustees had a direct personal interest in the decision as to whether to gross up the distributions to the UK resident beneficiaries because such decision would enable them to choose the likely plaintiff in any claim against them; the sons and the Adult Grandchildren on the one hand or the daughter and the daughter's child on the other. There was therefore a real risk that the Trustees' decision not to gross up the distributions to the daughter and the daughter's child had been influenced by their personal interest. Furthermore, the Trustees had not acknowledged this conflict in the minutes of the June meeting as required by para 49 of the judgment in Hawksford quoted at para 48 above. Accordingly the Court should direct that the Trustees surrender their discretion, so that the Court itself could take the decision.

58 The Trustees did not accept that there was a conflict of interest such as to require them to

surrender their discretion. They considered that the letter of 9 th June from Mourants was not directed towards the grossing up point; it was concerned merely with delay. There was therefore no express or implied threat at any time from the sons or the Adult Grandchildren that they would sue the Trustees if a decision was taken to gross up the payments to the UK beneficiaries. As Mr Jenner said in his fifth affidavit dated 16 th July 2021 (sworn in response to the daughter's second affidavit), the Trustees were not aware, at the time of the June meeting, that the US beneficiaries might have a claim against the Trustees if they were to decide to gross up the payments to the UK beneficiaries to compensate those beneficiaries for the UK tax payable. Their decision was therefore not influenced in any way by any perceived conflict of interest.

59 We have considered carefully the detailed submissions put forward in writing and orally by Advocate Robertson and by Advocate James, of which the above is only a brief summary. However, in our judgment this is not a case where we should require the Trustees to surrender their discretion because of a conflict of interest. We would summarise our reasons for so concluding as follows:

(i) Referring back to paragraph 51 of the judgment in Hawksford (quoted at para 48 above), even if there is a theoretical conflict of interest, we are entirely satisfied that the Trustees decision has not in fact been influenced by such conflict, as they were unaware of it at the time.

(ii) In this connection, we have considered carefully the letter from Mourants dated 9 th June 2021 upon which the daughter places great reliance. In our judgment, contrary to the daughter's assertion, there is no thinly veiled threat of action against the Trustees should they side with the daughter in connection with the grossing up issue. The letter was written before Frank Hirth's report on 17 th June, which was the first time that there was any mention of the possible failure by the Trustees to take measures to avoid or minimise the UK tax payable by the daughter and daughter's child on distributions. It follows that Mourants cannot possibly have had such matters in mind on 9 th June. Furthermore, it is abundantly clear on reading the letter that the sons' concern was the delay in the proceedings and the corresponding increased risk of catastrophic US tax consequences if the P settlor should die in the interim. In connection with grossing up, all that was said at paragraph 8 of the letter was that if the Trustees were of a mind to modify their current proposal in any way based on tax consequences, the proposal should be modified in a manner that took into account the increased risk of US tax consequences to the US resident beneficiaries caused by the delays to the proceedings.

(iii) The minutes of the June meeting refer on more than one occasion to the fact that the daughter contends that the Trustees failed to take ameliorating action concerning UK tax during the window of opportunity, but at no stage make any mention of any possible threat by the sons or Adult Grandchildren should the Trustees decide to gross up the distributions as suggested by Frank Hirth. We have no hesitation in accepting Mr Jenner's evidence in his fifth affidavit that (a) the Trustees were not

aware at the time that the US beneficiaries could have any possible claim against them in relation to any grossing up and (b) the Trustees read the letter from Mourant in the same way as the Court does.

(iv) In the circumstances we are quite satisfied that the third requirement of the test set out in *Kan* is satisfied, namely that the Trustees' decision not to gross up the distributions to the daughter and the daughter's child has not been vitiated by any actual or potential conflict of interest; the Trustees were not aware of any such actual or potential conflict because it did not occur to them that the sons and Adult Grandchildren might have a claim against them if they were to gross up the distributions to the UK beneficiaries. They were, of course, aware of the possibility of a claim against them by the daughter and the daughter's child in respect of unnecessary UK tax which they would have to pay, but that was something which pointed in favour of grossing up the distributions to the UK beneficiaries rather than maintaining the Proposed Distributions without alteration.

(v) In the circumstances, it is not necessary for us to go on to consider whether there was in fact a conflict of interest. It is often the case that beneficiaries express dissatisfaction with a proposed course of action by trustees and they may threaten action, but this cannot of itself be sufficient to put the trustees in a position of conflict such that they cannot take a decision themselves or run the risk of the decision being quashed on the ground of conflict. Furthermore, whilst we are not in a position to assess fully the strength of any claim against the Trustees, it would certainly be open to debate as to whether it would be realistic to have expected the Trustees in early 2017 or in July 2017 to have made distributions to the US beneficiaries. There had been very antagonistic litigation between the parties leading up to the 2015 Judgment and there was still continuing litigation from September 2016 onwards as to the identity of the new Protector. We can only imagine what the daughter's reaction would have been had the Trustees, during the relevant period, suggested making substantial capital distributions to the sons and/or the Adult Grandchildren.

(vi) However, we need say no more on this aspect given our clear conclusion that, even if a conflict of interest existed, it did not in fact influence the Trustees' decision to maintain the Proposed Distributions at the June meeting and accordingly their decision has not been vitiated by any actual or potential conflict of interest.

60 It follows that this is not a case where, as a result of a surrender of discretion, we must take the decision ourselves. Our role remains that of deciding whether to approve the Trustees' decision in accordance with the approach set out at paragraph 44 above, i.e. whether it is a decision which a reasonable trustee properly instructed could have reached.

61 However, before turning to consider that question, we must consider two further aspects of the applicable legal principles which the parties have raised during their submissions.

Letters of wishes

62 As will be seen, one of the main submissions on behalf of the daughter and the daughter's child is that the Trustees have paid insufficient regard to the letters of wishes and in particular LOW 1, LOW 2 and the S Trust letter of wishes ("S Trust LOW"). Accordingly, we need to remind ourselves of the part which letters of wishes should play in decisions by trustees.

63 In our judgment, the position can be summarised as follows:

(i) It has often been said in the past that trustees are entitled to take a settlor's wishes into account; see for example *Re Esteem Settlement* [2003] JLR 188 at [215]. However, the better view nowadays is that a settlor's wishes are a relevant consideration and trustees are therefore bound to take them into account pursuant to their duty to take relevant matters into account. As Lord Walker of Gestingthorpe said in *Pitt v Holt* [2013] 2 AC 108 at [66]: " ***The settlor's wishes are always a material consideration in the exercise of fiduciary duties***". See also *Investec Co-Trustees (Jersey) Limited v Kidd* [2012] JRC 066 at [63] and Lewin on Trusts (20th Ed) at 29–046.

(ii) However, a letter of wishes is not binding upon trustees. They must make up their own mind and are free to depart from the settlor's wishes. As this Court said in *Re Rabaiotti 1989 Settlement* [2000] JLR 173 at 189:

> ***"The letter is, of course, not binding.*** If trustees slavishly follow a letter of wishes, their decision can be quashed on the grounds that it is not, in truth, the decision of the trustees. The trustees must make up their own minds as to how they should exercise their discretion in the best interests of one or more of the beneficiaries…."

This observation is entirely consistent with the statement of Lord Walker in *Pitt v Holt* at [66] where, in a passage which immediately follows the sentence quoted at (i) above about the materiality of the settlor's wishes, he said:

> ***"But if [the settlor's wishes] were to displace all independent judgment on the part of the trustees themselves… the decision-making process would be open to serious question."***

(iii) The position is conveniently summarised by Lewin in the following terms at 29–049:

> ***"Trustees, however, must form their own view when exercising their dispositive powers and must not unthinkingly act as ciphers for the settlor, whether alive or dead; to do so is a breach of trust and leaves their decision open to challenge."***

To like effect is the decision of this Court in *Re A and B Trusts* [2012] (2) JLR 253 where the Court removed a protector from office inter alia on the ground that he had exercised his role in good faith but under the mistaken belief that one of his principal

duties was to ensure that the trusts were administered in accordance with the settlor's wishes. Page Commissioner said at para 6:

> ***"It can be no part of the function of a protector with limited powers of the kind conferred on S by the trust instruments to ensure that a settlor's wishes are carried out any more than it is open to a settlor himself to insist on them being carried out.*** A trustee's duty as regards a letter of wishes is no more than to have due regard to such matters without any obligation to follow them. And a protector's duty can, correspondingly, be no higher than to do his best to see the trustees have due regard to the settlor's wishes (in whatever form they may have been imparted). From the moment of his acceptance of the office of protector his paramount duty is to the beneficiaries of the trust." *[original emphasis]*

(iv) Advocate Robertson submitted that before trustees can depart from a settlor's wishes in connection with a dispositive power, there must be 'objectively justifiable grounds' for such departure. We reject that submission. In a discretionary trust, the discretionary dispositive powers are conferred upon the trustees and are not retained by the settlor. Whilst, as we have just summarised, the settlor's wishes are always a material consideration, trustees must make up their own minds. None of the authorities or text books to which we have been referred mention the need for 'objectively justifiable grounds' and we do not think that it is a helpful expression; on the contrary, it is liable to lead to endless argument as to whether the trustees' reasons for departure are 'objectively justifiable'. If a settlor establishes a discretionary trust, he and the beneficiaries have to accept that, whilst his views will be a material consideration, the decision is now for the trustees. Provided that their decision is not outside the band of decisions which a reasonable trustee, properly instructed, could reach, the Court will, on the assumption that it is a momentous decision which is reached in good faith and is not vitiated by any actual or potential conflict of interest, approve the decision.

(v) Trustees may decide to place little or no weight on a settlor's wishes if they are satisfied that such wishes are based upon an unreasonable animus against a particular beneficiary. Thus, in *GB Trustees Limited v Stock* [2021] JRC 048, this Court (Clyde-Smith, Commissioner) said:

> ***"68. Whilst it is appropriate for GB Trustees to seek the views of John William Dick 1 as the economic settlor of the trusts (he is not a beneficiary), Advocate Preston agreed that an element of caution was required when considering his views about a member of the family with whom there had been a complete breakdown in their relationship with feelings running deep on both sides. Furthermore, they were currently engaged in litigation in the US involving allegations of fraud and wrongdoing .***
>
> ***69. The wishes of a settlor are always a relevant consideration, but the trustee must guard against the possibility that a particular settlor's wishes are based upon an unreasonable animus against a***

> ***particular beneficiary because if so, the trustee might conclude that little weight should be given to those wishes as against other factors. In the circumstances here, the wishes of John William Dick 1 as to Tanya Stock's exclusion had to be considered with caution."***

64 In the present case, LOW 3 and the R letter of wishes are both dated 7 th July 2010 and were executed at a time when the father and the daughter had fallen out. Since then, there has been litigation between them and the relationship no doubt deteriorated even further. Indeed, it is of note that the daughter and the daughter's child are excluded from the father's will. Although LOW 3 and the R letter of wishes were written by the P settlor and the R settlor respectively, we are satisfied that they were greatly influenced by the father's wishes and feelings.

65 In the circumstances, the Trustees have placed no weight upon LOW 3 and the R letter of wishes and we agree that they were right not to do so. In fairness, it should be pointed out that neither the sons nor the Adult Grandchildren suggested that any weight should be placed on these two letters of wishes or that the daughter and the daughter's child should be cut out as the two letters suggest; on the contrary, their contention was that the daughter should be treated equally with the sons and the daughter's child should be treated equally with each of the Adult Grandchildren.

66 Finally on the topic of letters of wishes, we were referred to a further passage from the judgment of the Court (Birt, Deputy Bailiff) in *Rabaiotti* in which it is said at 190:

> ***"Circumstances will of course vary and the weight given to the letter of wishes will vary from case to case.*** Nevertheless, in general terms, the contents of the letter of wishes will undoubtedly form an important part of the trustees' consideration of the exercise of their powers. We are quite satisfied that a letter of wishes is a document which is closely related to the decision-making process and to the reasons for a decision, even where the trustees decide to depart from the letter. However, we disagree with Kirby, P in Hartigan (29 NSWLR at 419) ***that it is therefore a document which is to be treated as being ancillary to the trust deed.*** It is an informal document which the trustees are free to ignore. It is merely an expression of the settlor's wishes." *[emphasis added]*

67 Advocate Robertson submitted that the word 'ignore' was not consistent with the principle we have described at para 63(i) above to the effect that the settlor's wishes are always a material consideration. It should be noted that the quoted passage in *Rabaiotti* was addressing a rather different issue, namely whether a letter of wishes was to be treated as an instrument ancillary to the trust deed, but Advocate Robertson's point is nevertheless well made. Trustees are never free to ignore a letter of wishes, in the sense of not looking at it or considering whether the wishes should be followed or departed from. We agree that the sentence would be better expressed had it referred to trustees being free ' *to depart from*' a letter of wishes rather than 'to ignore' it.

68 We shall apply the above principles when considering whether to approve the Trustees' decision to make the Proposed Distributions.

Role of protector

69 The remaining matter of law concerns the position of the Protector. Both the sons and the Adult Grandchildren have raised issues over the actions of the Protector which we need to address.

70 Both Trusts confer certain powers upon the Protector including a power to remove and appoint new trustees. However, the relevant provision for present purposes is a requirement for protector consent in the case of a distribution. Thus, clause 1(a) of Schedule 1 of the P Trust is in the following terms:

> *"1. Until the Perpetuity Date the Trustees shall stand possessed of the Trust Fund and the income thereof upon the following trusts, that is to say:*
>
> > *(a) Upon trust for all or any to the exclusion of the others or other of the Beneficiaries in such shares and in such manner and subject to such limitations and provisions as the Trustees (with the written consent of the Protector) in their absolute and controlled discretion at any time or times before the Perpetuity Date by any deed or deeds revocable or irrevocable….*may appoint.…"

There is similar wording in relation to other powers of disposition to beneficiaries conferred upon the Trustees. The wording in the R Trust is not identical but its effect is the same. Thus, the written consent of the Protector is needed to any appointments of income or capital to beneficiaries.

71 We begin by summarising what occurred.

(i) The factual background

72 We were referred in some detail to exchanges between the Trustees and the Protector, or their respective lawyers (Walkers and Lenz & Staehelin) between the communication of the November 2019 Proposal to the Protector on 15 th November 2019 and the confirmation from the Protector on 10 th February 2021 of its in principle consent to the Proposed Distributions. We have carefully considered all the exchanges to which we were referred but, for the purposes of this judgment, it is only necessary to summarise the position very briefly.

73 Following receipt of the November 2019 Proposal, the Protector wrote to the Trustees on 27 th February 2020 to the effect that it would not consent to the proposal 'as currently set out' but then, by means of a memo from its lawyers, it asked a series of questions. Subsequent correspondence showed that the Protector was not in fact refusing to consent at that stage but was seeking further information in order to see whether it could consent. The attached memo posed a series of questions in relation to the US tax position and various letters of wishes. It also queried what the Trustees' reasons were in relation to the distributions envisaged in the November 2019 Proposal. It was subsequently agreed that further US tax advice was necessary and this took a considerable time, not least because of the death of the father in April 2020.

74 There were subsequently many exchanges between the Protector and the Trustees or their respective lawyers. It is clear that a point of dispute arose between them in relation to provision of the Trustees' reasons. The Protector wanted to know the reasons for the 2019 Proposal, including in particular the departure from the per stirpes distributions envisaged by the letters of wishes. The Trustees, on the other hand, whilst stating that they were happy to answer specific questions and to provide facts and information, were not willing to provide their detailed reasoning; see for example the email from Walkers dated 6 th March 2020.

75 Eventually, in an email dated 15 th September 2020, the Protector indicated that it was increasingly uncomfortable with the idea of distributions on a per capita basis rather than the per stirpes basis indicated in the letters of wishes and went so far as to put forward a proposal which gave much greater recognition to the per stirpes basis. However, the email ended by saying:

> *"We appreciate that the exercise of the trusts' dispositive powers are at the discretion of the trustees (subject to protector consent).* However, as the trustees are currently considering a revised proposal, we thought that it would be helpful for trustees to have an indication of the protector's thinking."

76 On 12 th January 2021, the Trustees provided the Protector with the January 2021 Proposal (which subsequently became the Proposed Distributions) together with a detailed explanation of the Trustees' reasoning for that proposal. Following this, the Protector indicated its in principle consent.

77 The parties' submissions raised two issues in relation to the role of a protector, namely:

(i) What documents and information ought trustees to supply to a protector; and

(ii) What is the correct approach of a protector when deciding whether to consent to proposals by trustees for a distribution?

78 We shall consider each of these in turn.

79 Before doing so, it is important to note that the trust deed of the P Trust specifically provides at clause 12 of schedule IX that the Protector shall act in a fiduciary capacity. Although the trust deed of the R Trust is silent on this aspect, the Court held at para 82 of the 2015 Judgment that the Protector's role in the R Trust was also a fiduciary one. All the parties accepted before us that this was the position. What follows is limited to where a protector is a fiduciary and we have not considered the position if that is not the case.

(ii) Provision of documents and information by trustees to a protector

80 What is at issue in the present case is whether the Trustees were correct in refusing to supply their detailed reasoning for the November 2019 Proposal to the Protector. They only provided a full explanation of their reasons when forwarding the January 2021 Proposal.

81 In *Ogier Trustee (Jersey) Limited v CI Law Trustees Limited* [2006] JRC 158, the Court held that, on the transfer of a trusteeship, the outgoing trustee is under a duty to cooperate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee and by providing any explanation to questions reasonably raised by the incoming trustee. As Holden on Trust Protectors correctly points out at page 195, this obligation is not imposed because of a unique relationship between outgoing and successor trustees, but because the outgoing trustee owes a continuing obligation to the beneficiaries to ensure that the trust is administered properly. To achieve this an incoming trustee needs to have such documents and information in order to do its job properly.

82 We are not aware of any judicial authority on the issue of what information and documents should be provided to a protector, but there is a useful discussion in Holden at paras 7.68 – 7.73; and Lewin concludes at 21-127(2) (when read with 21–129) that a protector who has fiduciary powers should in principle, as an incident of those powers, prima facie be entitled to seek information and access to documents which are reasonably incidental to the exercise of his functions and to be given such information and access unless and to the extent that disclosure is contrary to the interests of the beneficiaries as a whole.

83 In our judgment, the position described above in *Ogier Trustee* in relation to incoming trustees is in principle equally applicable to protectors. A protector owes fiduciary duties to the beneficiaries and in order to fulfil those duties, he must have access to such documents and information as are reasonably necessary for him to do so. To the extent that it is the trustees who are in possession of such information and documents, it is their duty to supply them to the protector and such duty may be enforced by the Court on the application of the protector.

84 The question then is as to what documents and information may be reasonably necessary

for the protector properly to discharge his functions? This will vary from case to case but a good starting point is what is said by Holden at para 7.69:

> ***"A protector will normally need a copy of the trust instrument; any ancillary instruments modifying the beneficial interests or the terms of the trusts; deeds of appointment, removal or retirement of trustees and protectors; and any letters of wishes addressed to the protector [or we would add, the trustees].*** The protector might also require trust accounts and documents relating to the investment of trust assets; correspondence and minutes of the meetings of outgoing protectors; correspondence and minutes of trustee meetings; and documents revealing the deliberation of former protectors and/or trustees where those discussions might impact on how the protector exercises his or her power."

85 It is of course the case that trustees are in general not obliged to supply their reasons for a discretionary decision to a beneficiary – see Article 29(4) of the Trusts (Jersey) Law 1984 and *Rabaiotti* at 185–186. However, the positions of a beneficiary and a protector holding a fiduciary position are completely different and the reasons for the existence of the rule in relation to beneficiaries have no application in relation to a protector.

86 Turning to the facts of this case, the Protector was faced with a situation where it was known that there was dispute between the beneficiaries as to how the trust funds should be distributed and where the Trustees were departing in certain respects from the letters of wishes. In the circumstances, it was in our judgment unsurprising and perfectly reasonable for the Protector to wish to be informed of the Trustees' detailed reasons for reaching the decision reflected in the 2019 Proposal in order to assist it in deciding whether the best interests of the beneficiaries required it to consent to or veto that proposal. It follows that we consider the Trustees ought to have supplied their detailed reasons for the 2019 Proposal to the Protector when requested to do so and erred in refusing to do so.

(iii) The role of protector

87 On behalf of the Adult Grandchildren, Advocate Renouf submitted that the duty of a protector with a power of veto is to ask whether the decision of the trustees to which he is being asked to consent is one which a trustee could reasonably arrive at, whether or not it is a decision the protector himself would have made; and that accordingly the role of a protector is the same as that of the Court in a blessing application and is only concerned with the rationality of the trustees' decision. If the trustees have reached a decision which a reasonable body of trustees could have arrived at, have taken account of relevant considerations and ignored irrelevant considerations, that is the end of the matter; the protector must consent. This submission was opposed by Advocate Christie who submitted that the Protector must reach its own decision in good faith in the interests of the beneficiaries. It was not confined to assessing the rationality or lawfulness of a proposed decision on the part of the Trustees.

88 No assistance is to be derived from any provision in the trust deed of either Trust and there is scant judicial authority on the nature of a protector's duties, particularly in the context of a requirement for a protector's consent. This is probably because widespread use of protectors in trusts is a comparatively recent development and also because the role of a protector varies so much, depending on the nature and extent of the powers conferred by the trust deed, with the consequence that it is difficult to develop general principles which are applicable to all protectors or to all decisions of a protector.

89 However, Advocate Renouf was unable to point to any authority which supported his submission and we have no hesitation in rejecting it. In our judgment, as Page, Commissioner said in the passage from *A & B Trust* quoted at para 63(iii) above, the paramount duty of a protector is to act in good faith in the best interests of the beneficiaries. In pursuance of this duty, as in the case of trustees, he must have regard to relevant considerations, ignore irrelevant considerations and make a decision which a reasonable protector could arrive at; but he must reach his own decision. To like effect is the observation of Acting Deemster Smith on appeal in the Isle of Man in *Rawcliffe v Steele* 1993–95 MLR 426 at 529;

> ***"Both Mr Mann and Mr Steinfeld described the protector as being a vital part of the machinery of the trust.*** I agree with that analysis. As appears from the various powers that are subject to the protector's consent, his role is clearly vital. He is there to express to the trustees the settlor's wishes as to how the trust is operated. He can do no more, however, than express his wishes. It is clear as regards his powers that he would owe a fiduciary duty to the beneficiaries (and not the settlor) as to how those powers would be exercised. Thus, it was accepted by all parties that the protector could not refuse to exercise a power because the settlor wished that to happen. The protector must bona fide consider the exercise of his powers from the point of view of the beneficiaries under the trust."

90 One of the reasons that the Court exercises a limited review function on a blessing application is that, as described in *S v L E & Bedell Cristin Trustees Limited* [2005] JRC 109 at [22], a settlor does not choose the Court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred. If the Court were to exercise a wide ranging role on such applications and decide the matter entirely for itself, the effect would be to constitute the Court as a trustee. That is not the Court's role. The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. Accordingly the Court does not simply substitute its own discretion for that of the trustee.

91 These considerations do not apply to a protector. The settlor has decided that a protector (often himself or a longstanding friend or adviser whose judgment he trusts) should be appointed pursuant to the trust deed and has specified those matters where the protector's consent is required. The settlor must be taken in those circumstances to have intended that the protector should exercise his own judgment in exercising those powers; otherwise why

bother to go to the trouble of appointed a trusted friend or adviser (or himself) as protector rather than someone with a legal qualification to judge issues of rationality. Furthermore, if the role of a protector was simply to review the trustee's decision in the same way that the Court would do, his role would be almost redundant; he would bring nothing to the table that the Court itself would not bring on a blessing application. It follows that, depending on the circumstances, a protector may well be entitled to veto a decision of a trustee which is rational, in the sense that the Court would bless it.

92 However, in the context of a power to consent, as in this case, a protector's discretion lies within a narrower compass than that of a trustee. He is not the trustee. It is for the trustee to make a decision in the first place as to distributions or in relation to the exercise of any other discretionary power conferred on the trustee. It is emphatically not the duty of the protector to take that decision himself or to force the trustee into making the decision which the protector would make if he were the trustee by stating that he will only consent to a particular decision. That would be to exceed his proper role and to use the power given to him otherwise than for its intended purpose. Such conduct would also almost certainly not be in the interests of the beneficiaries and would be likely to lead to deadlock requiring the intervention of the Court. A protector may often find that he should consent to a discretionary decision of a trustee on the basis that it is for the benefit of one or more of the beneficiaries even though, if he had been the trustee, he might have made a different decision which he thought to be even more beneficial.

93 In this connection, it is to be expected and indeed encouraged for there to be full and open discussion between trustee and protector, with a view to finding something upon which they can both agree. We see nothing wrong with the sort of discussions which took place between the Protector and the Trustees in this case. A protector is not confined to a simple yes or no to a request for consent. A protector and a trustee should work together in the interests of the beneficiaries. It is therefore perfectly reasonable for a protector to explain his concerns about a particular proposal by a trustee and the trustee may often be willing to modify his proposal to take account of these concerns or the protector may be satisfied after the trustee has explained his thinking.

94 Advocate Renouf submits that the email from the Protector of 15 th September 2020 exceeded the proper role for a protector in that it indicated a specific proposal which the Protector would consent to. If the email had indicated expressly or by necessary implication that the Protector would only consent to the suggested distributions which it was putting forward in the email, we agree that that would have exceeded the Protector's powers for the reasons we have just given. It is not for a protector to dictate to a trustee how the trustee must exercise his powers. However, we do not consider that the Protector was saying that in this case. The passage we have quoted at para 75 above makes it clear that this was merely a suggestion and that the Protector realised that it was for the Trustees to decide what distributions should be made. We see the email as part of a perfectly normal exchange of views between a protector and a trustee with a view to the good administration of the relevant trust.

95 In summary, we reject the criticisms of the conduct of the Protector in this case and we also reject the criticism of the Trustees for deciding to reconsider the November 2019 Proposal and to modify it. It was clear that the Protector was not willing to consent to the November 2019 Proposal and it was therefore perfectly proper for the Trustees to revisit that proposal and decide whether to maintain it or whether to modify it to take account of the Protector's concerns. The fact that the Protector consented to the January 2021 Proposal even though it was very different from the suggestion which the Protector had put forward in its email of 15 September 2020, shows that the Protector was not seeking to dictate the only form of distribution to which it would consent.

Consideration of the blessing application

96 Because of the adjournment of the proceedings as described at paras 34 – 36 above, the decision making process by the Trustees and the parties' submissions to this Court fall into two parts. First, there is the decision on 8 th February 2021 to make the Proposed Distributions and the parties' submissions in relation to that decision; secondly, there is the decision of the Trustees at the June meeting not to alter their original decision following receipt of the UK tax advice and the parties' supplemental submissions to this Court on that aspect.

97 For convenience, we shall follow the same pattern in this judgment, but it is of course the case that the ultimate question is whether, at the end of the day, having regard to all the circumstances including the UK tax position, the decision of the Trustees to terminate the Trusts by making the Proposed Distributions is a decision which a reasonable trustee properly instructed could arrive at.

98 The Trustees set out the reasoning behind their original decision in considerable detail in the first affidavit of Mr Jenner and the minutes of the meeting on 8 th February 2021. We would summarise in very truncated and summary form the key considerations which they articulated as follows:

(i) (i) The letters of wishes were significant and should be taken into account as material considerations. However, the Trustees were not bound to follow them.

(ii) The primary intention to be inferred from the letters of wishes was to benefit the father's grandchildren rather than his children.

(iii) Although the letters of wishes envisaged capital being retained and only distributed to the grandchildren on attaining various ages (which for the most part had not yet been attained), the US tax position was such that terminating the Trusts and distributing the assets amongst the beneficiaries was the correct course to take.

(iv) It was relevant that one of the assets of the P Trust was the loan to the daughter. It was reasonable to appoint to her a sum which was at least equivalent to her

outstanding loan and interest but, given her financial circumstances as described by her, it was appropriate to benefit her by a sum above the amount of the loan so as to provide her with some liquidity.

(v) Any payment to the daughter should be matched by payments to the sons so as to treat all the children of the father equally as envisaged in the letter of wishes. If the sons wished the payments to them to be made instead to their children, that was a matter for them and the distributions could be altered accordingly.

(vi) Although the letters of wishes envisaged a per stirpes distribution into three equal portions, LOW 1 and the S Trust LOW were written some 20 years ago and LOW 2 some 15 years ago. The position of the family had changed since then. All of the Adult Grandchildren were now adults and, unlike 15 to 20 years ago, it was now known exactly how many grandchildren there were. The division of the assets should be considered by looking at the family as it was currently constituted. There was no reason to think that the position of the daughter's child justified her receiving three times the benefit which her cousins would receive and it would be unfair to distribute the funds in such a way as to have this result.

(vii) However, given her young age and therefore the longer period going forward during which she would potentially need support for education etc, and the fact that she had received less benefit to date than the Adult Grandchildren, the daughter's child should receive a larger share than her cousins.

99 It is the case that sadly this is a family riven by disagreement, distrust and hostility and none of the beneficiaries are happy with the Trustees' decision. There are, in effect, two sides, namely the sons and the Adult Grandchildren on one side and the daughter and the daughter's child on the other. Each side considers that the decision of the Trustees is too generous to the other side.

100 Thus, at the time of the original hearing in May, the sons submitted that the Trustees should have remained with the 2019 Proposal so far as payments to the sons and the daughter were concerned and, subject to the payment to the Fifth Respondent, should have distributed the remainder of the funds equally between the seven grandchildren, i.e. the daughter's child should have received the same amount as each of the Adult Grandchildren. The sons further submitted that the clear intention of the relevant letters of wishes was to benefit the grandchildren of the father and they should benefit rather than the children of the father. The submissions of the Adult Grandchildren were to broadly similar effect in asserting that the Trustees should have remained with the November 2019 Proposal. However, both the sons and the Adult Grandchildren accepted that the decision to make the Proposed Distributions could not be said to be outside the band of decisions open to a reasonable trustee.

101 The daughter was very unhappy with the Proposed Distributions. Her key submission was that the Trustees had departed from LOW 1 and the S Trust LOW without any objective justification. She further submitted that the Trustees had simply given in to pressure from

the sons and the Adult Grandchildren.

102 She placed particular reliance on LOW 1 and the S Trust LOW. Although LOW 1 stated that the intention of the Trust was to provide for the great-grandchildren of the father's parents, the section dealing with the daughter's one third share stated that, if she did not have a child before 3 September 2004 (as turned out to be the case) her fund should be distributed to her at various ages. The S Trust LOW stated that it was the intention of the Trust to provide for both the grandchildren and the great-grandchildren of the father's parents. Following the death of the father, the trust fund should be divided into three equal parts, one for each child. The letter went on to say that each child's share should be held primarily for such child's benefit during his or her lifetime and that all or part of it should be distributed to the relevant child should he or she so request. Thus, in effect, submitted the daughter, her share was intended primarily for her benefit. It followed, submitted Advocate Robertson on her behalf, that it was wrong to say that the trust funds – and her share in particular – were intended to benefit only the grandchildren of the father.

103 However, her key submission was that it was wrong to depart from the per stirpes distribution envisaged in all the letters of wishes. No proper reason had been given by the Trustees for their decision not to make a per stirpes division. If a trustee was to depart from a settlor's wishes, there must be objectively justifiable grounds for such departure and none had been provided in the present case. She submitted that the real reason for the departure was that the Trustees had given in to pressure from the sons and the Adult Grandchildren. She pointed, for example, to the November 2019 Proposal (which treated her even more harshly in that the capital distribution to her would only be sufficient to cover her loan and interest) and the fact that the sons and the Adult Grandchildren still wished the Trustees to adhere to that proposal. The result of the Trustees' decision to make the Proposed Distributions was that the daughter's branch would be considerably worse off than was envisaged in any of the letters of wishes. The decision also ignored the Italian roots of the family. She submitted that it was the normal Italian approach to inheritance to favour a per stirpes approach.

104 The submission of Advocate James, on behalf of the daughter's child, was to broadly similar effect. He pointed out that under the Proposed Distributions, the daughter and the daughter's child would between them receive some 22.25% of the total trust funds, rather than the 33% envisaged in the letters of wishes under a per stirpes distribution.

105 On behalf of the unborn and remoter issue, Advocate Franckel accepted that the letters of wishes envisaged the Trusts being distributed in their entirety amongst the father's grandchildren (at the latest) and did not envisage any future generations benefitting. Given the tax imperatives of terminating the Trusts, he very properly did not feel able to submit that the Trustees' decision was outside the band of reasonable decisions open to them insofar as concerned the unborn and remoter issue.

106 Following the adjournment and the receipt of UK tax advice, the Trustees decided at the

June meeting to maintain the Proposed Distributions and not to gross up the distributions to the daughter and the daughter's child in order to compensate them for the UK tax payable. As explanation for their decision, we were referred to the fourth affidavit of Mr Jenner and the minutes and board papers of the June meeting. Mr Jenner summarised the principal reasons for the Trustees' decision as follows:

> (i) As a matter of principle there was no requirement on the Trustees to equalise benefit to be received by different beneficiaries by reference to the tax regime in any one beneficiary's home jurisdiction, being the place where that beneficiary had chosen to live.
>
> (ii) Grossing up the payments to the daughter and the daughter's child as suggested by Frank Hirth would have the effect that the burden of UK tax would be shifted (if paid) on to the other beneficiaries who did not live in the UK.
>
> (iii) There was no certainty that the UK tax would be payable in the sums envisaged by Frank Hirth. Payment to a trust for the benefit of a UK beneficiary would result in deferral of such tax and thereafter, whether the tax would in fact be payable on distributions would be affected by where the beneficiary was living at the time the distribution was made.
>
> (iv) Overall, the rates were not onerous (at 13.11% and 22% respectively).
>
> (v) There would be US tax payable in any event on distributions from the R Trust to the extent that such distributions came from the non-grantor portion which originated with the S Trust, and there remained a risk of the grantor status of the other portion of the R Trust, and of the P Trust as a whole, being lost should the P Settlor or the R Settlor (as the case may be) pass away before the distributions were made, which would result in very significant US tax being payable.

107 The sons and the Adult Grandchildren, whilst maintaining their views about the Proposed Distributions as set out above, supported the decision of the Trustees not to gross up the payments to the daughter and the daughter's child to compensate them for the UK tax payable. They submitted that a beneficiary takes the benefits and disadvantages of the place where they choose to live and there was no reason that US resident beneficiaries should pay for UK tax liabilities incurred by UK resident beneficiaries. Furthermore, state taxes would be payable by US resident beneficiaries on the distributions from the part of the R Trust which derived from the S Trust and, if grossing up and equalisation was to be given to UK resident beneficiaries, it should also be given to US resident beneficiaries. It was also unknown at this stage whether there would be more substantial federal and state US tax liabilities in the event of the P Settlor or the R Settlor dying or becoming incapacitated before the distributions were made.

108 On the other hand, the daughter and Advocate James, on behalf of the daughter's child, submitted forcefully that there should be equalisation by way of grossing up the payments to the daughter and the daughter's child as suggested by Frank Hirth. The original proposal

of the Trustees had assumed that certain sums would come into the hands of the daughter and, in particular, the daughter's child, but this assumption was now incorrect. As a result of the UK tax payable, both the daughter and the daughter's child would ultimately receive much less. The combined effect of the original decision (with its failure to follow the per stirpes distribution envisaged in the letters of wishes) and the refusal to vary that decision in the light of the information about the UK tax which would be payable, rendered the Trustees' decision unreasonable such that it should not be blessed by the Court. Indeed, the position might well be even worse than contemplated in that, because the father's estate was insolvent, the loan to the father from the P Trust could only be realised by selling the house which he owned. There was a real risk that this process would not be completed by 5 April 2022 and, in such event, additional UK tax would become payable (as described at para 41(iv) and (v) above) because the Trusts would not be terminated in the same UK tax year as the distributions to the UK resident beneficiaries.

Conclusion

109 We have carefully considered all the submissions from the parties. Although some trustees might have reached a different decision, we have come to the clear conclusion that the decision of the Trustees to make the Proposed Distributions should be approved, on the basis that it is a decision which reasonable trustees, properly instructed, could have reached. We would summarise our reasons for so concluding as follows:

(i) We begin by addressing the letter of wishes in respect of the R Trust. As described at paras 64 and 65 above, the Trustees have placed no weight upon the only letter of wishes from the R settlor, which was signed on 7 th July 2010. That approach is clearly correct and none of the beneficiaries has suggested otherwise. However, it means that there is no expression of wishes by the R settlor in respect of the R Trust.

(ii) The Trustees have, however, had regard to the S Trust LOW on the basis that approximately half of the assets of the R Trust came by way of appointment out of the S Trust in 2010. In normal circumstances, when assets are appointed from trust A to trust B, the wishes of the settlor of trust A will no longer be a material consideration when considering distributions out of trust B. Such an appointment of assets means that the assets are no longer part of trust A (which may indeed have been terminated if all the assets had been so appointed). They become part of trust B and, accordingly, the relevant wishes are those of the settlor of trust B. Indeed, unless the trustees of trust A and trust B are the same, the trustees of trust B may well not be aware of any indication of the wishes of the settlor of trust A.

(iii) However, in the unusual circumstance of this case where, as set out at (i) above, there are no relevant wishes of the R settlor, we do not consider it unreasonable for the Trustees to have had regard to the S Trust LOW given that approximately half the assets of the R Trust came from the S Trust. Nevertheless, as a matter of strict analysis, given the lack of weight to be placed on the letter of wishes from the R settlor, there is no expression of wishes by any settlor in relation to the half which was

originally contributed by the R settlor.

(iv) In relation to the P Trust, Advocate Robertson, on behalf of the daughter, concentrated on LOW 1. However, we consider that the relevant letter of wishes is LOW 2. This was written in 2006 and expressly cancelled LOW 1. Advocate Robertson submitted that there was some hostility between the father and the daughter by 2006 and that LOW 2 should therefore be disregarded in the same way as LOW 3. However, there is little evidence of this and the terms of LOW 2 do not disclose any animus against the daughter. On the contrary, she and her children (if any) are treated in exactly the same way as the sons and the children of the sons.

(v) On behalf of the daughter and the daughter's child, the key submission was that the Trustees had paid insufficient regard to the letters of wishes in relation to the P Trust and the S Trust in that they had not followed the per stirpes division into three equal branches suggested by those letters. The Trustees have explained their reasons for departing from a per stirpes division. LOW 2 is specific in stating that the intention of the Trust is to provide for the great grandchildren of the father's parents (i.e. the father's grandchildren) and the S Trust LOW states that the intention is to provide for the grandchildren and great-grandchildren of the father's parents. In our judgment, it cannot be said to have been unreasonable for the Trustees to have concluded that the majority of the P Trust (two-thirds) and all of the R Trust (save for the provision for the Fifth Respondent) should be distributed to the Adult Grandchildren and the daughter's child, being the great-grandchildren of the father's parents.

(vi) Insofar as the intention is to benefit the father's grandchildren, it is in our judgment reasonable for the Trustees to have taken note of the fact that the letters of wishes were written some 15 to 20 years ago and that the position is now rather different. At that time, it would not have been known exactly how many great-grandchildren of the father's parents there would have been, but now it is known that there are the six Adult Grandchildren together with the daughter's child. It cannot be said to be unreasonable for the Trustees to have concluded that it would be unfair for the daughter's child to receive three times as much as any of the Adult Grandchildren when there is no logical reason for such a difference, other than the reference to a per stirpes division in the letters of wishes.

(vii) However, contrary to the submission of the sons and the Adult Grandchildren, we see nothing unreasonable in the decision of the Trustees to increase the share of the daughter's child to a limited extent in order to take account of her young age and the corresponding need for future education expenses etc, and to have some regard to the suggestion of a per stirpes division in the letters of wishes.

(viii) As to the submission of the sons and the Adult Grandchildren that a lesser sum should have been paid to the daughter and the sons out of the P Trust, we consider it perfectly reasonable for the Trustees to have concluded that they should distribute to the daughter at least an amount which would enable her to repay her loan and interest, but we think it also reasonable for them to have concluded that, in the light of expenses she has incurred in the US litigation, she should be provided with a greater

sum so as to provide her with some liquidity and that a matching sum should be paid to each of the sons in order to maintain equality between the father's children. Ultimately, approximately one third of the P Trust has been allocated to the daughter and the sons, whereas two thirds have been allocated to the Adult Grandchildren and the daughter's child. Given the family circumstances, we cannot possibly categorise such a division as unreasonable. The Trustees have made it clear that, if the sons would prefer their shares to be distributed to their respective children, that could be accommodated; and we agree that it would be entirely reasonable for the Trustees to act in accordance with a son's wishes in that regard.

(ix) The question then is whether what was a reasonable decision has become unreasonable in the light of the UK tax consequence for the UK resident beneficiaries, namely the daughter and the daughter's child. In our judgment, it has not for the following reasons:

(a) Whilst, as Advocate Robertson submitted, the reference in para 13.4(a) of the minutes of the June meeting to there being *'…no principle or requirement within the Trusts for equalisation in circumstances where beneficiaries through their own life choices live in different jurisdictions with different tax systems'*, is poorly phrased (in that the question is not whether there is some requirement for equalisation, which clearly there is not), we think that a fair reading of the minutes, the board papers and the fourth affidavit of Mr Jenner as a whole suggests that the Trustees were ultimately considering the correct question, namely whether in their discretion they should choose to increase the payments to the UK resident beneficiaries so as to compensate such beneficiaries for the UK tax payable.

(b) In our judgment, they were perfectly entitled to conclude that they should not. Whilst in some cases trustees may decide to do so, in many other cases trustees are likely to reach the view that it is a matter for individual beneficiaries where they live and they must accept the consequences (advantageous and disadvantageous) of such a decision, including the tax consequences. We cannot possibly categorise the decision of the Trustees to follow the latter approach on the facts of this particular case as being unreasonable, notwithstanding that this will result in the UK resident beneficiaries receiving less than would have been the case if they were living in the US.

(c) Grossing up the payments to the daughter and the daughter's child so as to equalise the position as recommended by Frank Hirth would have the effect of causing the US resident beneficiaries indirectly to contribute to the UK tax payable by the UK resident beneficiaries. Furthermore, this would be in circumstances where the UK tax may be deferred for some time if the payments are made to a trust rather than directly to the relevant beneficiary. Although the daughter has rejected the idea of a trust for her distribution, it is envisaged that the daughter's child's distribution will be paid to such a trust. In those circumstances, there would be scope for mitigation of the UK tax payable if the daughter's child were to become non-resident at a future date, so that distributions thereafter would not attract UK tax. There is also some uncertainty

as to the UK tax which may become payable in respect of the daughter's child given that there is said to be a question over her father's domicile as at the date of her birth and therefore her domicile. If she is domiciled outside the UK, the UK tax payable will be substantially mitigated. It follows that if there were to be a grossing up as suggested by Frank Hirth, this could, depending on future events, turn out to have been an over-provision because the calculations are made on the basis of an immediate and quantifiable liability to UK tax.

(d) US state tax will be payable by the Adult Grandchildren in respect of the distributions from that portion of the R Trust which derived from the S Trust. The Trustees were entitled to conclude that, if there was to be any equalisation in respect of the UK resident beneficiaries, there would have to be matching equalisation in respect of US state taxes in order to maintain fairness. Furthermore, if either the P settlor or R settlor were to die, or become incapacitated, before the distributions are in fact made, there would be further state taxes payable by all of the US resident beneficiaries on their distributions.

110 Putting all these matters together and taking an overall view of the Proposed Distributions including the UK tax consequences, we reach the view that the decision of the Trustees cannot be regarded as being outside the range of decisions open to a reasonable trustee. As there is no suggestion that the decision was not taken in good faith and as we have held that the decision is not vitiated by any actual or potential conflict, it follows that the three requirements set out in the case of Kan are satisfied and accordingly we grant our approval to the decision of the Trustees to make the Proposed Distributions.

111 We would add this. As mentioned earlier, it was suggested before us that there is a risk that it will not be possible to realise the loan by the P Trust to the father (because of delays in realising his estate) in time for the P Trust to be terminated before 5 th April 2022, i.e. in the same UK tax year as the distributions. We wish simply to record that it is incumbent upon the Trustees to strain every sinew to achieve recovery of the loan to the father as soon as possible and in any event before the expiry of the requisite period. If, despite their best efforts, they cannot do so, they must explore any alternatives such as, for example, assigning the benefit of the loan in specie amongst the beneficiaries if that is a viable option. The urgency in terminating the P Trust (and the R Trust) lies, of course, not only in respect of the UK tax position but also in order to minimise the risk of US tax consequences by reason of the death or incapacity of the P settlor or the R settlor.

Postscript

112 At the time of the hearing before us, counsel were not aware of any authority on the nature of a protector's role when deciding whether or not to consent to a decision by a trustee. A draft of this judgment was circulated to the parties on 28 th September for comment in the usual way. In response, Advocate Christie alerted the Court to the existence of a judgment of Kawaley J in the Supreme Court of Bermuda dated 7 th September 2021 in the case of

Re The X Trusts [2021] SC (Bva) 72 Civ. The issue before Kawaley J appears to have been the same as was raised in these proceedings. The question therefore was whether, in exercising their powers to consent to the exercise of powers vested in the trustees, the protectors were to exercise an independent discretion as to whether or not to give consent, taking into account relevant considerations and disregarding irrelevant considerations so that the protectors might withhold their consent to a proposed exercise of power by the trustees even if the proposed exercise of power was one which a reasonable body of properly informed trustees was entitled to decide upon ("the Wider View"), or whether the correct approach for the protectors was simply to satisfy themselves that the proposed exercise of power by the trustees was an exercise which a reasonable body of properly informed trustees was entitled to undertake and, if so satisfied, to consent ("the Narrower View"). In summary, did the consent provisions in the trust deed confer an independent decision-making discretion on the protectors (the Wider View) or merely a discretion to ensure that the trustees' substantive decision was a valid and rational one (the Narrower View)?

113 At the conclusion of a thorough and detailed review of the position, Kawaley J came to the conclusion that the Narrower View was to be preferred. It is not possible to do justice to his full reasoning and, in any event, it is not necessary for the purposes of this postscript. Suffice to say that he helpfully summarised his reasons at [113] – [117] which we in turn would summarise as follows:

(i) The Narrower View reflected the true construction of the consent powers conferred on the protectors because it was clear that the dominant purpose of those terms was to ensure the due exercise of the powers vested in the trustees. Unless there is something to contrary effect in the trust deed, the usual role of a protector is not to exercise a power jointly with the trustee; the protector's role is to be a 'watchdog' to ensure due execution by the trustee of the powers vested in the trustee.

(ii) The drafting of the trust deed clearly distinguished between powers expressly vested in the trustees, powers expressly vested in the protectors and powers expressly vested in the trustees subject to protector consent. Whilst on a literal reading of the wording of the consent powers, a power of veto was imposed, the provisions had to be construed in the wider context of the trust deeds.

(iii) A contextual reading of the consent provisions suggested that the consent powers were not intended to be exercised jointly with, or entirely independently from, the powers conferred on the trustees subject to protector consent. There was no explicit wording used to signify an absolute discretion but, more importantly, the powers were vested in the trustees, albeit subject to protector consent. As Evans JA had said in *Re Information About a Trust* [2014] Bda LR 5, the normal function of the protector consent clause was that it was to be regarded as an ancillary power rather than a power exercised jointly with the trustee.

(iv) Although the only case in which the issue had been specifically considered, namely *PTNZ v AS* [2020] WTLR 1423, had preferred the Wider View, this was a

decision of a Master and Kawaley J was not persuaded by it, not least because the point had not been fully argued before the Master and the authorities on protector powers placed before Bermudan court had not been considered by the Master.

(v) Kawaley J did not accept that the Narrower View resulted in the protector's role being a fundamentally limited one. Ensuring that trustees properly and rationally exercise their powers was an important and substantial role.

114 Kawaley J also placed some weight at [77] upon the fact that there was no provision in the trust deeds for the X Trusts for an indemnity in favour of the protectors. He felt that this was a further pointer to the conclusion that their powers of consent were merely ancillary to, rather than of equal status to, the trustees' relevant powers. In the case of the P Trust and the R Trust, there is in each case a provision granting an indemnity to the Protector, but apart from this, there is no material distinction that we can see between the protector consent provisions in the Y Trusts and those in the Trusts. Accordingly, we do not think we can properly say that the decision in Re Y Trusts can be distinguished because of a difference in the wording of the trust deeds.

115 None of the parties in this case sought to argue that the matter should be restored for further argument in the light of the Bermuda decision. Nevertheless, we have considered whether we should amend our view at paras 87–95 above in the light of the decision in Re The X Trusts, which is clearly inconsistent with that view.

116 We acknowledge that Kawaley J had the advantage of much more detailed argument on the point than occurred before us, but we nevertheless respectfully differ from Kawaley J and remain of the views expressed in the above paragraphs. Such views are, we believe, essentially consistent with the Wider View as formulated before Kawaley J. Our reasons remain those summarised earlier in this judgment, but we would take this opportunity of commenting briefly on the matters relied upon by Kawaley J as summarised at para 113 above:

(i) As to (i)-(iii), we accept that the role of a protector is not to exercise a power ‘jointly’ with the Trustee. On the contrary, as we endeavoured to clarify at paragraph 92 above, the discretionary power to make a distribution lies with the trustee. The protector's only function is to decide whether or not to consent to that decision by a trustee. It is a separate decision on the part of the protector, not a joint exercise of a power with the trustee. We do not see that a conclusion that a protector does not exercise a power jointly with the trustee points towards the Narrower View rather than the Wider View.

(ii) Nor are we convinced by the reasoning at (ii) and (iii). We do not think that the observation of Evans JA in *Re Information About A Trust* can bear the weight which Kawaley J placed upon it. We found more convincing the submission of Mr Taube QC in the *X Trust* case as to the correct interpretation of a protector consent clause (in the terms in which it appeared in that case and in the present case), which submissions

were recorded at [42] of the judgment of Kawaley J in the following terms:

> ***"93. The Powers of Veto in the X Trusts state the Trustees' specified powers may not be exercised 'without obtaining the prior written consent of the Protectorate'*** .
>
> ***94. In this context the natural and ordinary meaning of the word 'consent' is agreement or permission: see the Oxford English Dictionary*** .
>
> ***95. The reference in the Powers of Veto to the Protector's 'consent' – to its agreement or permission – indicates the Protector has a choice whether to consent to the Trustees' proposed exercise of the specified powers*** .
>
> ***96. It follows, as a matter of ordinary language, that the Protector has a discretion in the matter whether to choose to consent*** .
>
> ***97. By contrast, the reference to the Protector's 'consent' is not appropriate to describe the [Narrower View]. The [Narrower View] involves not a discretion but an adjudication whether circumstances exist*** .
>
> ***98. The [Narrower View] is described in para 1(b) of the Protector Summons, where the court is asked whether the role of the Protectors is 'to satisfy themselves that the proposed exercise of a power by the Trustees of the X Trusts (or any of them) is an exercise which a reasonable body of properly informed trustees is entitled to take and, if so satisfied, to consent to the same'*** .
>
> ***99. This description of the [Narrower View] echoes the test applied by the court in a*** *Public Trustee v Cooper Category 2* ***case. In such a case the court determines whether the proposed exercise of the trustee's power is rational: is the trustee's decision one which a reasonable body of properly informed trustees is entitled to take? The court adjudicates the point. It is not a matter of the court's discretion*** .
>
> ***100. As a matter of ordinary language, these factors show the requirement for the 'consent' of the Protectors in the Powers of Veto is not intended to allocate to the Protectors the [Narrower View]."***

(iii) As to (iv), we have not seen the judgment in *PTNZ* and are certainly willing to accept that the Master did not have the advantage of the detailed arguments put before Kawaley J. We accept that no great weight can be placed upon the decision, but it remains of interest that the only known decision (prior to the *X Trust* and the present case) dealing with this issue has adopted the Wider View.

(iv) As to (v), differing from Kawaley J, we would categorise the role of a protector, if the Narrower View is adopted, as being a fundamentally limited one. The protector

will simply be fulfilling the same role as the Court. Accordingly, provided the trustee's decision is a rational one and has not relied on irrelevant considerations or ignored relevant considerations, the protector is helpless, regardless of how wrong he thinks the trustee's decision to be in terms of the interests of the beneficiaries.

117 The last point has particular force in the context of offshore trusts where the use of a protector is most common. As mentioned in *Re X Trust*, it is frequently the case that a settlor is recommended to a particular trustee company by his advisers but has no personal knowledge of the trustee company or its officers. Not unnaturally therefore, he will often wish to impose some check on the exercise of the trustee's powers and to do this by appointing himself or a trusted friend or adviser as protector. To take a common example, he may well have views about how much money should be given to comparatively young children or grandchildren and does not wish to give them too much too early. A decision by trustees to appoint a comparatively large sum (perhaps at the request of a beneficiary) is unlikely to be categorised as irrational but this is just the sort of situation where a settlor would no doubt intend that a protector should be able to see that the trust is administered in accordance with his (the settlor's) wishes by refusing consent. One can think of many other examples. It seems inherently unlikely that settlors would go to the trouble of appointing themselves or trusted friends or advisors as protectors if they intended the role of protector to be limited to that of assessing rationality. If that were the case, the key requirement for a protector would be a legal qualification rather than knowledge of the settlor's wishes and sound judgment as to what is in the best interests of particular beneficiaries.

118 We acknowledge that the approach we favour carries with it a greater risk of deadlock between trustee and protector if a protector refuses consent. Clearly, if a trustee considers that a protector's refusal to consent is irrational or otherwise legally flawed, he may have recourse to the Court to overturn the protector's veto. However, there is the potential for deadlock where the trustee and the protector both reach rational but opposing decisions. In our judgment, this is a natural consequence of the settlor's decision to introduce the office of protector into the trust deed. A settlor must be taken to have intended (by imposing a requirement for consent) that a trustee should not be able to make certain decisions unless the protector consents. If consent is refused, the trustee's decision cannot be put into effect. In most cases this is likely to lead to further discussion between trustee and protector in the hope of finding a sensible outcome. In the event of complete deadlock where such deadlock is causing real damage to the interests of the beneficiaries, we leave open the possibility of recourse to the Court. The Court has power to break a deadlock where this is caused by lack of agreement among trustees where they have to act unanimously (see *Garnham v PC* [2012] (1) JLR 204, approved by the Supreme Court in *Children's Investment Fund Foundation (UK) v Attorney General* [2020] 3 WLR 461 at [219]. It may be arguable that the Court has a similar jurisdiction in the event of damaging deadlock between a trustee and a protector. However, we say no more about that. We have not heard any argument on the point and it does not arise in this case.

119 For these reasons, we think there is no reason to cut down the ordinary and natural meaning of a protector consent provision in the form in which it appears in this case and in

the *X Trust* so as to read the word ‘consent’ as being limited to an assessment of rationality.

120 In summary, for the reasons set out earlier in this judgment and these supplemental reasons, we would respectfully differ from the decision in the *X Trusts* in so far as the role of a protector is concerned.