Jasmine Trustees Ltd v L; M; N; O; P; Q; R; S; Kairos Trustees (NZ) Ltd and Jasmine Trustees Ltd; Lutea Trustees Ltd v L; M; N; O; P; Q; R; S; Kairos Trustees (NZ) Ltd; T; U

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Jurats Liston, Blampied
Judgment Date:	23 September 2015
Neutral Citation:	[2015] JRC 196
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Court:	Royal Court
Date:	23 September 2015

Text

[2015] JRC 196

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, and** Jurats Liston **and** Blampied

IN THE MATTER OF JASMINE TRUSTEES LIMITED

AND IN THE MATTER OF THE PIEDMONT TRUST

Between

Jasmine Trustees Limited
Representor
and
(1) L
(2) M
(3) N
(4) O
(5) P
(6) Q
(7) R
(8) S
(9) Kairos Trustees (NZ) Limited
Respondents

IN THE MATTER OF JASMINE TRUSTEES LIMITED

AND IN THE MATTER OF THE RIVIERA TRUST

Between
(1) Jasmine Trustees Limited
(2) Lutea Trustees Limited
Representors
and
(1) L
(2) M
(3) N
(4) O
(5) P
(6) Q
(7) R
(8) S
(9) Kairos Trustees (NZ) Limited
(10) T
(11) U
Respondents

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

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

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

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

Authorities

Re Skeats' Settlement (1889) 42 Ch.D 522.

In Re Bird Charitable Trust [2008] JLR 1.

Lewin on Trusts 19th edition.

Crociani v Crociani [2015] 17 IT ELR 624.

S v L [2005] JRC 109.

Re The Circle Trust [2006] CILR 323.

Re HHH Trust [2012] JRC 127B.

Re The V R Family Trust [2009] JLR 202.

Papadimitriou v Michailidis and Others CP2001/47.

Trust — consideration of validity of appointment of two new trustees and validity of appointments of new protectors.

THE COMMISSIONER:

1 This case requires the Court to consider first whether the appointments of a new trustee of two trusts were valid and secondly, whether the appointments of new protectors of the trusts were valid, alternatively whether the new protectors should be removed by the Court.

2 We propose to consider first the appointment of the new trustee before turning to the appointment of the new protectors. However first, we shall describe the trusts and the events which have given rise to these representations.

3 The two trusts are the Piedmont Trust ("the P Trust") and the Riviera Trust ("the R Trust"). Where it is not necessary to distinguish between them, we shall refer to them simply as "the Trusts".

The Trusts

(i) The P Trust

4 The P Trust was established on 4 th April, 2000, by a deed of settlement between Z as settlor and Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill Lynch Cayman") as original trustee. The Trust was governed by the law of the Cayman Islands. Jasmine Trustees Limited ("Jasmine") was appointed as trustee in place of Merrill Lynch Cayman on 20 th October, 2008, and the proper law of the Trust was changed to Jersey law

by deed dated 11 th February, 2011. Jasmine is a trust company carrying on business in Jersey.

5 Z is the godson and cousin of the first respondent ("the father"). The settled funds appear to have been money of the father's family. The father was named as the original protector. The Trust was a conventional discretionary trust and the class of beneficiaries was defined 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, which enabled the trustees to add any person as a beneficiary during the father's lifetime with his consent as original protector.

6 The assets of the P Trust (other than the loan to the second respondent referred to later) are held in a wholly owned company incorporated in the Cayman Islands. Pursuant to the power conferred by Schedule VIII of the trust deed, the father has been appointed as the Investment Adviser to the company.

7 By Schedule X of the trust deed, the protector is given the power to remove and appoint trustees in the following terms:–

> *"The Protector shall have the power from time to time and at any time by deed delivered to the Trustees to appoint additional Trustee or Trustees up to the maximum permitted by law and to remove any Trustee hereof and if such deed or written instrument so provides to appoint a successor Trustee in its place provided that any such additional or successor Trustee or Trustees in each case shall be a corporate Trustee or Trustees."*

8 The trust deed also deals with the position of protector. Clause 1(g) provides as follows:–

> *"'Protector' means*
>
> > *(i) [the father]… who shall be the first Protector ("the Original Protector") and after his death or during his Disability*
> >
> > *(ii) his son [the third respondent] and his daughter, [the second respondent] jointly or*
> >
> > *(iii) such other person for the time being holding the office of Protector in accordance with Schedule IX."*

9 The relevant provisions of Schedule IX are as follows:–

> *"2. A Protector may at any time resign by written notice to the Trustees and such resignation shall only take effect upon actual receipt of such written notice by the Trustees.*

3. A Protector (except the Original Protector, but including any Protector who has been appointed, but who has not yet taken office) may in writing appoint his successor. Such appointment may be to take effect immediately, (if the person making the appointment is in office and so directs), or prospectively, but shall only take effect upon actual receipt by the Trustees of the appointed successor Protector's written acceptance of office.

…

5. If at any time there shall be no Protector (or if the Protector shall be unable, unwilling or unfit to act), then a majority of the Beneficiaries sui juris shall have the power by written instrument to appoint a Protector.

…

10. No person (except the Original Protector's children) may be appointed or act as Protector if he or she is:–

(a) a descendant of the Settlor;

(b) a descendant of the Original Protector;

(c) the spouse, widow or widower (whether or not such widow or widower has remarried) of any such descendant described in sub-clauses (a) and (b) above; or

(d) the sibling, parent or descendent of any of those described in sub-clauses (a) to (c) above.

…

12. The Protector shall act in a fiduciary capacity."

10 The powers conferred upon the protector in Schedule X of the trust deed are wide ranging. They are helpfully set out at paragraph 42 of Advocate Kistler's skeleton but in essence (non-exhaustively) they include power to give or withhold consent to any distribution to beneficiaries, the addition or removal of beneficiaries, the remuneration payable to trustees, the amendment of the trust deed and the appointment of an Investment Adviser as well as the power to appoint and remove trustees already referred to. As well as the father, the class of beneficiaries includes the following. The father has three children, namely the third respondent ("the elder son") who is aged 55, the sixth respondent ("the younger son" together "the sons") who is aged 52 and the second respondent ("the daughter") who is aged 50. The elder son in turn has three children, namely the fourth and the fifth respondents and a further son who is a minor. The younger son also has three children, namely the seventh and eighth respondents and a further son who is a minor. At the time of the commencement of these proceedings the daughter had no children but she has now has a daughter who was born in late December 2014.

11 The settlor signed a letter of wishes at the time of the creation of the P Trust and a further letter in February 2006. Although there are differences, the essential nature of the settlor's wishes does not seem to have altered substantially during this period. He stated that the intention of the Trust is to provide for the great-grandchildren of the father's parents i.e. for the father's grandchildren. During the father's lifetime, the settlor asks the trustees to consider sympathetically any requests made by the father for distributions to him or other beneficiaries of such amount as the father may request from time to time. After the father's death, it is requested that the trust fund be divided into three equal parts, one for the elder son's family, one for the younger son's family and one for the daughter's, with the elder son, the younger son and the daughter being appointed as protector of their respective funds. In relation to the elder son's and the younger son's fund, the wish is expressed that the capital should be distributed to their three respective children in tranches as and when they attain certain ages. In relation to the daughter, the same principle should apply if she were to have children, but if she were not to have children, her fund should be distributed to her in tranches if she should so request at certain ages, with the full amount being distributable when she attains 55. The letter makes a specific reference to the settlor's wish to assist the beneficiaries with the purchase of properties for their occupation by way of a loan of up to 20% of the value of the beneficiary's designated share.

12 The settlor provided a further letter of wishes on 7 th July, 2010, by which time, as we shall see, relations between the father and the daughter had deteriorated dramatically. This letter expresses the wish that, after the father's death, the trust fund should be divided into two equal funds, one for the children of the elder son and one for the children of the younger son. The daughter and any family of hers are no longer mentioned. As to the question of protector, the letter of wishes states (incorrectly) that the trust deed provides that the elder son is the successor protector to the father with power to appoint his own successor and the letter asks that the elder son appoint the younger son as his successor. As already mentioned, the trust deed originally provided that the elder son and the daughter were to be the successor protectors. On 27 th February, 2006, Merrill Lynch Cayman as trustee, with the consent of the father as protector, had executed a revocable amendment of the trust deed to provide that the elder son should be the successor protector to the father rather than the elder son and the daughter jointly; but this amendment was revoked by deed of revocation dated 25 th March, 2009, so the position reverted to that contained in the original trust deed.

13 The assets in the P Trust are reasonably substantial. Apart from the loan to the daughter, the assets consist of shares in the wholly owned company referred to earlier which in turn has a portfolio of quoted securities. As to distributions, various distributions over the years have been made to the father (totalling some $1.8m) and in January 2011, $133,000 was appointed to each of the grandchildren then living (i.e. the children of the elder son and the younger son). There have been no other distributions but, as described later, £850,000 has been loaned to the daughter.

The R Trust

14 The R Trust was established on 18 th June, 2010, by deed between the tenth respondent as settlor and Jasmine and Lutea Trustees Limited ("Lutea") as trustees. It is a discretionary trust governed by the law of Jersey. Lutea is also a Jersey company carrying on trust business in the Island. The beneficial class is the same as in the P Trust with the addition of the settlor and the eleventh respondent. The settled funds appear to have originated substantially from another trust. The value of assets comprised in the R Trust was approximately one fifth of the value of the assets in the P Trust. Again, the assets consist of shares in a wholly owned company which in turn holds a portfolio of quoted securities.

15 The appointment and removal of trustees is dealt with at clause 12 of the trust deed, the relevant parts of which provide as follows:–

> *"12.3 The Protector shall have power (to be exercised in writing) to remove any or all of the Trustees with or without cause.* Notice of such removal shall forthwith be given to the trustee concerned and the removal shall become effective immediately, except where all the Trustees or the sole trustee have or has been removed in which case the removal shall be effective only on the appointment of a new trustee or trustees.
>
> *12.4 The power of appointing new or additional trustees shall be vested in the Protector or, if the Protector shall be incapacitated or otherwise unable or unwilling to act, or if there shall be no Protector, in the Trustees."*

16 As to the position of protector, the father was appointed as first protector pursuant to clause 13.1 of the trust deed and the other relevant provisions are as follows:–

> *"13.3 A protector may at any time resign as protector by written instrument, notice of which shall be given to the Trustees.* Such resignation shall be effective upon receipt of the notice or the expiration of the period of one month from the date of the resignation, whichever shall be the earlier.
>
> *13.4 The Protector may, by written instrument, appoint any other person to be a protector of this Trust (either in addition to or to succeed the existing protector).* Any appointment of a new or additional protector under the provisions of this clause shall take effect immediately unless it is expressly stated to take effect on the death, dissolution, resignation or incapacity of a protector in which case the appointment shall become effective on such death, dissolution, resignation or incapacity. Any such conditional appointment may be revoked at any time before it takes effect by the Protector.
>
> *13.5 Any appointment under this clause shall be in writing signed by the person making the appointment and by the new or additional protector so appointed.* Any such appointment shall only take effect when written notice of such appointment has been received by the Trustees.
>
> *13.6 If, notwithstanding the provisions of sub-clause 13.4, there shall at any time*

be no protector of this Trust, the Trustees shall, by deed, irrevocably appoint any person, not being one of the Trustees, to be the protector."

17 The protector is given a number of powers which are set out in paragraph 48 of Advocate Kistler's skeleton argument. As in the case of the P Trust, they are wide ranging and cover the giving and withholding of consent to appointments to beneficiaries, the addition or exclusion of beneficiaries, and a number of administrative matters as well as the power to appoint and remove trustees referred to at paragraph 15 above.

18 Although there is nothing in the trust deed concerning who should be the successor protector to the father, a letter of wishes dated 7 th July, 2010, requests that the elder son should be appointed as successor protector and that the younger son should be the elder son's successor. There is also a request that the father be appointed as Investment Adviser to the wholly owned company which holds the portfolio of trust assets.

Events leading up to these proceedings

19 On 31 st January, 2014, the father, as protector of the P Trust, executed a deed of removal and appointment of trustees whereby he exercised his power under Schedule X of the trust deed to remove Jasmine as trustee and appoint the ninth respondent Kairos Trustees (NZ) Limited ("Kairos") as trustee in its place. On the same date, the father signed a letter to Jasmine informing it of its removal and asking it to liaise with a Mr Hanley of Kairos to arrange the necessary transfer. The deed and the letter were forwarded to Jasmine by Kairos under cover of an e-mail dated 5 th February, 2014.

20 On the same day, Lutea and Jasmine received an e-mail from Kairos enclosing documents in connection with the R Trust. This included a deed of removal and appointment of trustee dated 31 st January, 2014, whereby the father, as protector of the R Trust, exercised his power under Clause 12.3 of the R Trust to remove Jasmine and Lutea as trustees and to appoint Kairos as trustee in their place. The deed was accompanied by letters from the father dated 31 st January, 2014, to each of Lutea and Jasmine asking them to contact Mr Hanley of Kairos to arrange the necessary transfer.

21 Although there had been disagreement between Jasmine and the father back in 2010 in respect of a loan by the P Trust to the daughter (as we shall see below), this removal and appointment of a new trustee came out of the blue so far as Jasmine and Lutea were concerned. They replied immediately by e-mail to Kairos indicating that it was necessary for the outgoing trustees to carry out a certain amount of due diligence on Kairos. They asked for copies of various corporate documents together with details of the directors and their experience in the trust industry and of the shareholder of Kairos. Mr Jenner, a director of both Jasmine and Lutea, acknowledged the letters from the father and informed the elder son, the younger son and the daughter of what had occurred. Mr Jenner sent a chaser to

Kairos on 17 th February. On 19 th February the father e-mailed Mr Hanley of Kairos asking him to contact Mr Jenner.

22 There was still no reply from Kairos by 6 th March and accordingly Mr Jenner sent a further chasing e-mail to Kairos on that date explaining that the outgoing trustees needed satisfactory responses and further advising that, unless they received a substantive and comprehensive response by 12 th March, they would have no alternative but to seek the directions of the Royal Court. That e-mail was copied to the father who replied immediately asking Mr Jenner to hold off until after 15 th March as he was in touch with Kairos and one of their legal representatives was going to be at his New York office on that date.

23 Finally on 10 th March Kairos responded. They apologised for the delay and explained this had been caused by the fact that two of their directors were travelling. Jasmine and Lutea considered that the package of information provided by Kairos raised more questions than it answered. After reviewing the material and carrying out Google searches, they ascertained that there were a number of gaps in respect of the information which had been sought (e.g. the CVs of the directors had not been provided). Furthermore there were a number of features which gave rise for concern. In particular it appeared that Kairos was incorporated in New Zealand in 2011, was wholly owned by another company which was in turn wholly owned by another company which was 100% owned by Mr Hanley personally. It appeared that were three directors of Kairos namely Mr Hanley, an 80 year old resident of the Isle of Man and an Italian law professor resident and practising law in Milan. Mr Jenner replied to Kairos on 20 th March posing eleven specific questions on which he sought further clarification and information. At the same time he e-mailed the father enclosing a copy of his e-mail to Kairos and asking the father to explain his rationale in choosing Kairos as successor trustee. The father replied that he was referring the matter to his lawyer.

24 Kairos replied on 27 th March stating simply in a somewhat aggressive tone that the former trustees had been removed and that their approval of their replacement was not required. They should therefore get on and transfer the assets. The letter did deal with the eleventh query in Mr Jenner's e-mail of 20 th March but not with any of the other ten queries.

25 On 4 th April, Mr Jenner e-mailed the father explaining the trustees' concerns and referring to the lack of response from Kairos. He pointed out that, unless all the adult beneficiaries agreed to the appointment, the trustees would have to take the matter to the Royal Court in order to seek directions. He asked again for an explanation as to why the father considered the appointment of Kairos as trustee to be appropriate but no reply to that e-mail was ever received.

26 Consultation with the adult beneficiaries established that the daughter did not agree with the appointment of Kairos whereas the elder son and the younger son had yet to form a view regarding the appointment.

27 It was in these circumstances that on 6 th May, 2014, Jasmine and Lutea presented two representations (one in respect of each Trust) seeking directions as to what if any action they should take in respect of their purported removal and the purported appointment of Kairos. The Court ordered that the various respondents to these two representations as listed above be convened. The Court agreed that in the particular circumstances of this case, the interests of any minor grandchildren could be adequately represented by their parent.

28 The next significant event was that on 16 th June, 2014, the father, the elder son and the younger son executed a deed in relation to the R Trust whereby the father retired as protector and, pursuant to clause 13.4 of the trust deed, appointed the elder son and the younger son as protector in his place. This was sent to Kairos as well as Jasmine and Lutea (given that there was uncertainty as to who were the trustees) on 18 th June.

29 On 7 th July, the father executed a letter retiring as protector of the P Trust pursuant to Clause 1 of Schedule IX of the trust deed. This was sent to both Jasmine and Kairos on 8 th July and accordingly took effect on that date. In accordance with paragraph 3 of Schedule IX, the father as original protector has no power to appoint his successor in relation to the P Trust. In the absence of a protector, the power of appointing a new protector falls to a majority of the beneficiaries of full age under Clause 5 of Schedule IX. On 8 th July, all the adult beneficiaries except the daughter (i.e. the father, the elder son, the younger son and the four adult children of the elder son and the younger son) executed a deed appointing the elder son and the younger son as protector of the P Trust. This was sent to Kairos as well as Jasmine and Lutea.

30 On 11 th July, the daughter issued a summons in the present proceedings seeking a declaration that the appointments of the elder son and the younger son as protectors of both the P Trust and the R Trust were invalid, alternatively that they should be removed.

31 Finally, on 4 th December, 2014, the elder son and the younger son executed two written instruments in their capacity as protectors of the P Trust and the R Trust respectively. As protector of the P Trust, they exercised the power under Schedule X of the trust deed and removed Kairos as trustee of the P Trust. They did not purport to appoint any trustee in place of Kairos. In the second instrument of the same date, they exercised their power under Clause 12.3 of the trust deed of the R Trust to remove Kairos as trustee. Again, they did not purport to appoint any trustee in its place.

32 All the beneficiaries before the Court are now agreed that they do not wish Kairos to be trustee of either Trust. As we have just described, the daughter was never in favour of its appointment and the elder son and the younger son have now purported to remove Kairos from both Trusts. The father has stated in his affidavit that he has no objection to the

appointment of Kairos being *'withdrawn'*. However, we still need to resolve the question of the validity of the appointment of Kairos. That is because the appointment of the sons as protector of both Trusts is being challenged. If that challenge is successful, they will not have had the standing to remove Kairos. In that event, if the original appointments of Kairos were valid, Kairos will remain as trustee of both Trusts. Conversely, if the appointments were invalid, Jasmine (for the P Trust) and Jasmine and Lutea (for the R Trust) will remain as trustees. The position needs to be ascertained so that everyone can know where they stand going forward.

Validity of the appointments of Kairos as new trustee of the Trusts

(i) The law

33 All the parties are agreed that a power to appoint new trustees is a fiduciary power even where that power is vested in a person other than the outgoing trustees (such as a protector). In this the parties are undoubtedly correct. See In *Re Skeats' Settlement* (1889) 42 Ch.D 522 and in Jersey law *In Re Bird Charitable Trust* [2008] JLR 1 at paras 80–81.

34 The question then is what are the duties of a person exercising a fiduciary power in this case to appoint new trustees. As Lewin on Trusts (19th edition) at 29–151 states, the decisions of the courts contain numerous formulations of the duties of trustees when exercising fiduciary powers conferred upon them, with considerable variations of language.

35 *Lewin* draws a distinction between a decision as to whether the requisite state of facts for the exercise of the power exists and the exercise of the power itself. In relation to the former, it states at 29–135 that the duties are:–

> ***"(i) to act honestly and in good faith;***
>
> ***(ii) to ask themselves the correct questions;***
>
> ***(iii) to reach a decision open to a reasonable body of trustees; and***
>
> ***(iv) to take into account relevant matters and only those matters."***

36 In relation to the exercise of the power itself, *Lewin* (para 29–151) considers that the duties may fairly be summarised as comprising:–

> ***"(i) a duty to act responsibly and in good faith;***
>
> ***(ii) a duty to take any relevant matters into account;***
>
> ***(iii) a duty to act impartially; and***

(iv) a duty not to act for an ulterior purpose."

37 We can understand that in some cases a decision as to whether the requisite facts exist is properly to be considered separately from the exercise of the power itself. For example, if a power to pay maintenance is exercisable in favour of a person in full time education, the question of whether a particular beneficiary is in full time education has to be determined separately before deciding as a matter of discretion whether to exercise the power in favour of that beneficiary. However, we do not think that this rigid division (with apparently a separate formulation of the duties) is necessarily helpful in all cases. In relation to a power to appoint new trustees, we think it is preferable to consider the matter under a single heading.

38 These formulations are articulated in relation to the exercise of fiduciary powers by trustees. At 29–184, *Lewin* comments that the question of how far these duties apply to the donee of a fiduciary power who is not a trustee is not fully explored in the authorities. However it goes on to state that the mere fact that the power is fiduciary must itself imply that those duties do apply and we agree. Accordingly, we think that the fact that the power to appoint new trustees in both Trusts is exercisable by the protector rather than the outgoing trustees makes no difference to the nature of the duties imposed on the holder of the power.

39 Counsel's submissions as to the relevant requirements were formulated in relation to the power to appoint a new protector but, as we say later in this judgment, we think the duties are the same whether the power is to appoint new trustees or to appoint a new protector. We shall therefore summarise them under the present heading.

40 Advocate Robertson, on behalf of the daughter, summarised the duties in his skeleton as being to act in good faith and not be motivated by any ulterior purpose, to act rationally and reasonably, and to take into account all the considerations relevant to the selection of an appropriate person.

41 Advocate Kistler and Advocate Speck both relied on the passages from *Lewin* which we have just cited, although in his oral submissions Advocate Speck reformulated the duties so that they were threefold, namely to act in good faith, to act rationally (in the sense of not being Wednesbury unreasonable) and for a proper purpose.

42 Ultimately, although different formulations were used, we detected no significant difference between the parties as to the duties of the donee of the power (and therefore the circumstances in which the Court will find the decision to be invalid) other than perhaps in relation to the issue of rationality. We note that, although *Lewin* refers specifically to this aspect at item (iii) of the duties when considering whether the requisite state of facts exists, it does not repeat this in relation to the duty when exercising the power itself. *Lewin* discusses this at paragraphs 29–154 and 29–155 and concludes by stating "it may be that

the decision is vitiated if it was impossible for reasonable trustees to have reached it, a very stringent test derived from public law and there called “Wednesbury unreasonableness”, but even that is uncertain”.

43 In our judgment, the holder of a fiduciary power must not exercise the power irrationally, i.e. he must not reach a decision which no reasonable holder of the power could arrive at. The Court will declare an appointment to be invalid if the decision is irrational (in this sense). We would summarise our reasons for so concluding as follows:–

(i) The Court exercises its supervisory jurisdiction in relation to trusts in order to protect the beneficiaries — see for example Lord Neuberger in *Crociani v Crociani* [2015] 17 IT ELR 624 at [36]. Where he said:–

> ***“This is not to suggest that a court has some free-wheeling unfettered discretion to do whatever seems fair when it comes to trusts.*** However, what is clear is that the court does have a power to supervise the administration of trusts, primarily to protect the interests of beneficiaries…”

It would seem to us to be an abandonment of that role to decline to interfere and to insist that the beneficiaries have to live with the consequences of a decision which no reasonable power holder could have arrived at. An ability to sue for breach of trust is unlikely in many cases to provide a satisfactory remedy.

(ii) There is authority in this jurisdiction to support this approach. In *S v L* [2005] JRC 109 the Court approved para 29–100(4) of the 17 th edition of *Lewin* where it was stated:–

> ***“(4) Trustees must not act perversely, i.e. they must not take a decision to exercise their powers which no reasonable body of trustees could arrive at.*** But the discretion to exercise a power is that of the trustees, not that of the court, unless they have surrendered their discretion to the court; thus a decision not perverse in that sense cannot be challenged merely because the court would have reached a different decision.”

The Court went on at paragraph 23 to state:–

> ***“The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision.*** It may only intervene where the decision is one which no reasonable trustee could arrive at.”

(iii) Similarly in *Re The Circle Trust* [2006] CILR 323, the Grand Court of the Cayman Islands, having found that the power to appoint a new protector was a fiduciary power, accepted that this meant that the decision would be invalid if tainted by (i) irrationality, (ii) absence of good faith, or (iii) improper purpose.

(iv) Such an approach would be consistent with that taken by the Court in blessing 'momentous' decisions where it will not do so (and therefore not confer protection against a claim for breach of trust) where the decision is not one at which a reasonable trustee properly instructed could have arrived.

44 We repeat the cautionary note given in *S v L* at paragraphs 22 and 23. A settlor does not choose the Court as the donee of the relevant power; he chooses the person appointed in or by virtue of the provisions in the trust deed. It is the donee upon whom the power has been conferred. The Court's role is merely a supervisory one. The Court may not therefore overturn the decision of a power holder merely because the Court would have reached a different decision. However, it may do so where the decision falls outside the band of decisions within which reasonable disagreement is possible and becomes a decision which, in the Court's opinion, is a decision which no reasonable holder of that power could arrive at.

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

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

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

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

(iv) not to act for an ulterior purpose.

(ii) Application to the facts

46 As already mentioned, none of the parties wishes Kairos to be the trustee of the Trusts. The daughter submits that the appointment was invalid. The elder son and the younger son are neutral on that aspect but have purported to remove Kairos in their capacity as protector. The father does not concede that the appointment was invalid but agrees to it being *'withdrawn"*.

47 It is accepted by all parties that the appointments are both formally valid; in other words each was exercised by the right appointor and in accordance with the formal requirements of the relevant trust deed. The issue is whether the appointments are essentially valid.

48 In our judgment, the appointment of Kairos, in the particular circumstances of this case in relation to these Trusts, was invalid. We would summarise our reasons for so concluding as follows:–

(i) There was considerable delay in supplying the standard due diligence information requested of Kairos. Mr Jenner stated in evidence that this was a routine request to a professional trustee and he would have expected there to have been a package of documents and information available for immediate provision on a regular basis.

(ii) No information was provided at any stage about the financial position of Kairos or of its parent companies. Nothing was provided to show that it had expertise and experience in the field of trust administration.

(iii) It appeared ultimately to be 100% owned by an individual director.

(iv) No information was provided as to its insurance cover, its capital base and other matters which might be thought relevant to whether it was suitable to act as a trustee of these two substantial Trusts.

(v) Although in due course the names of the three directors were provided, no information about their careers, experience in trust administration etc was ever provided. The three directors resided in New Zealand, Italy and the Isle of Man respectively and the Isle of Man director was aged 80.

(vi) Kairos appeared to have no presence on the internet nor did it have an internet domain name and related email accounts. Mr Hanley was shown on the website for a company called Pearse Trustees (which appeared from its website to be an international trust company) as the manager of that company which operated from the same address as Kairos; but Kairos was not mentioned at all on the website of Pearse Trustees.

(vii) The beneficiaries of the two Trusts are resident in the United States and the United Kingdom. Whilst the fact that a trustee is incorporated or carries on business in a jurisdiction where none of the beneficiaries live (as is the case for both the Cayman Islands and Jersey in relation to these Trusts), is not a reason to question the appointment of a trustee, the fact that New Zealand is on the other side of the globe and in a wholly different time-zone which would make communication between trustee and beneficiaries more difficult, is at least a factor to be considered by an appointor.

(viii) Highly significantly, the father does not appear to have considered any of these matters prior to making the appointment. Thus he was unable to assist when information was requested by Jasmine/Lutea and he said merely that he expected to be in touch with one of Kairos' legal representatives in New York on 15 th March. But this was of course after he had appointed Kairos.

(ix) The father has explained in his affidavits why he wished to replace Jasmine and Lutea. However the sole reason that he has given for choosing Kairos as the replacement trustee is that he was advised in mid-2013 that it might be preferable to relocate the trust to a ‘white listed' jurisdiction as considered from the perspective of ‘relevant authorities' (Jersey, he said, not being such a white listed jurisdiction). He

was further advised that New Zealand was such a jurisdiction and that Kairos was a New Zealand trust company which had been identified and was happy to accept the role as trustee. On enquiry by the Court, which understood that Jersey was indeed a white listed jurisdiction for OECD purposes, the Court was informed that the 'relevant authority' which the father had in mind was Italy. As none of the beneficiaries resides in Italy, it was not made clear why that would be a material consideration.

49 In summary, we conclude that the father failed to take into account material matters, namely the expertise, experience, financial standing etc. of the proposed trustee of two substantial trusts, took irrelevant matters into account (namely New Zealand's position *vis à vis* Italy) and in the circumstances reached a decision which no reasonable appointor could have arrived at. We therefore declare the appointment of Kairos to be invalid in relation to both Trusts.

50 We should emphasise that, although Kairos has been convened to these proceedings, it has elected (quite reasonably) not to play a part given that none of the parties wishes Kairos to be the trustee. We have not therefore received any evidence from Kairos. In fairness to that company, we wish to emphasise that, as stated above, the reason for quashing the decision is because of the lack of information. This Court can only go on the evidence produced to it. Kairos did not produce any material to show that it was a reasonable choice as trustee, nor has the father produced any such evidence. We are not to be taken as holding that Kairos is *per se* unsuitable to act as a trustee. Our decision is based on the fact that there was no material before the father or this Court to show that it was suitable. In the absence of such evidence, it was therefore a decision which no reasonable appointor would take.

51 The appointment of Kairos was contained in the same deed (in relation to each Trust) as the removal of the current trustee(s). All counsel agreed in the course of the hearing that the removal of the current trustees was so closely linked with the appointment of Kairos that the removal and the appointment stand and fall together. If the appointment of Kairos is invalid, the removal also falls away. We agree and accordingly the outcome is that Jasmine remains as trustee of the P Trust and Jasmine and Lutea remain as trustees of the R Trust.

Validity of appointment of the elder son and the younger son as protector of the Trusts

52 We now turn to consider the issue which took up most of the hearing, namely whether the appointments of the elder son and the younger son as protectors of the P Trust and the R Trust respectively are valid; alternatively, if valid, should the sons be removed by the Court? Again, it is accepted by all parties that the appointments are formally valid i.e. they were made by the right appointor(s) and complied with the requirements as to formality set out in the trust deeds. The issue is whether they are essentially valid. The arguments presented require us to review the history of the Trusts and the events leading up to the appointments in question. In that respect, as well as affidavits from the trustees, we have

received three affidavits from the daughter, two from each of the father and the younger son and one from the elder son. Counsel agreed that it was not necessary for there to be cross-examination and accordingly we heard no live evidence. We were however taken in some detail through the affidavits and the exhibits.

(i) General background

53 The father is 93. He was born in Italy and moved to the United States in 1951. His principal occupation prior to his retirement was running a business that imported and distributed machines for making coffee in the US.

54 The elder son is 55 and lives in Chicago. He holds a business degree and a degree in government from Harvard University. In 1996 he co-founded a firm which advises on investment in commercial real estate. The firm invests in commercial real estate and also advises institutional funds that it sponsors and manages. He serves on the board of two public companies and states that he is well aware of the nature of a trustee's fiduciary obligations.

55 The younger son is 52. He holds a law degree from the University of California and a degree in economics and history from Harvard. He has practised as an attorney in California for more than 25 years. He is a partner in a law firm. He states that during this time he has frequently advised clients who are fiduciaries with regard to their fiduciary responsibilities. In addition he is a member of the board of trustees of a mutual fund company which operates eleven mutual funds and has substantial funds under management. He asserts therefore that he is fully aware of the nature of fiduciary obligations.

56 The daughter is 50. She has followed a career in finance working in New York and Italy before moving to London. She has recently married and gave birth to a daughter at the end of December 2014.

57 Sadly the father and his wife separated when the daughter was about eight and there then followed bitter divorce proceedings which lasted for nearly a decade. The daughter lived with her mother who was granted custody of all three children. It seems clear that this has affected the relationship between the daughter and her father.

58 As described earlier, the P Trust was established in April 2000 and the letter of wishes indicated that it was intended to provide for the father's grandchildren, although the children were also beneficiaries. The daughter was involved in the establishment of the P Trust as she worked for Merrill Lynch at the time and it was through her recommendation that Merrill Lynch Cayman was appointed as the original trustee.

59 In 2008, Merrill Lynch Cayman apparently took the decision to stop acting as trustee for trusts associated with US persons and, on the daughter's recommendation, Jasmine was appointed as the replacement trustee.

60 Although each gives a different explanation of the reasons, the father and the daughter agree that the relationship between them has been difficult. Nevertheless, when the daughter moved from Rome to London in 1997, the father assisted her with the purchase in June 1998 of a leasehold flat in London, the lease of which had 25 years left to run. He paid the purchase price of £310,000 and she took out a mortgage of £70,000 to pay for necessary renovation. According to the daughter, the father also promised to fund various works to the roof which would be necessary and to assist in due course with the purchase of an extension to the lease. Over the years that followed, there were periodic discussions between them as to the funding of the lease extension. According to the daughter, the father was inconsistent. At times he would say that he would do so and at other times he would not. The father, on the other hand, feels that he never committed to provide the necessary funds. There was a period of two years from 2002 — 2004 when they did not speak but the elder son brokered a meeting between them in 2004 and there was a rapprochement, albeit somewhat uneasy. According to the daughter, there were further discussions in 2004 at which time the father said that he would refuse any request for distribution from the P Trust for the lease extension. She says that in 2007, he told her that he had taken steps to ensure she would no longer inherit anything from him; but by 2008 he had changed his mind and said he would honour his previous assurances about assisting her with the lease extension. According to the daughter, it was agreed in August 2008 at a meeting with the father and Merrill Lynch Cayman that a distribution of £1.2m would be made from the P Trust so that she might fund the lease extension.

61 In July 2009, at a meeting in London, the daughter states that the father asked her to sign a letter stating she would not fight with her brothers over money and would not dispute his will or wishes more generally. He wished her to write out a letter to that effect there and then and showed her letters (which we have seen) written by the elder son and the younger son to the same effect. The daughter said she would need time to think about what to write but the father became angry that she was not willing to do so immediately and said that she was being unreasonable and ungrateful. She did in due course write such a letter in October 2009 confirming she had no desire to challenge his will or ownership of any companies or trusts he had created but she stated in the letter that she assumed he would honour his consistent promise to her over the years that he would provide equally for her and her brothers.

(ii) The General Release

62 It appears that during the course of April — June 2010 the daughter was negotiating the terms of the extension of the lease and keeping the trustee and others informed. She had also enquired whether the father, as investment adviser to the P Trust, had identified which assets in the portfolio he was going to liquidate in order to fund the distribution.

63 On 5 th August, 2010, the father sent the daughter an e-mail as follows:–

> *"Very recently I told you that it is detrimental to my reputation that you call my accounts, lawyers, secretary, friends and associates in order to obtain information about my businesses and my various corporations that I set up.* In spite of my request, you continue to do the same, causing me great damage.
>
> *I have been informed today, both by Mr James Trafford, and by Jasmine Trusts Ltd about your contacting them in order to solicit their help for interceding with me for the payment of your extension of lease.*
>
> *I want you to discontinue contacting all of them; if you don't, you will pay a substantial penalty.*
>
> *In the meantime, I instructed them to disregard any inquiry that you may submit to them.*
>
> *Together with [the elder son] and our lawyer, we are preparing a 'general release' that I ask you to sign as a condition for me to pay for your extension of the lease.*
>
> *As soon as this document is ready, I'll send it to you."*

64 In a further e-mail of 10 th August the father repeated that he would be willing to authorise the payment out of the P Trust provided that she signed a ' *General Release the elder son is preparing*'. The next day the daughter forwarded this email to the elder son and said:–

> *"Clearly Dad is relying on you to 'prepare' and bless this 'General Release' which I am now being forced to sign in order to get money out of the trust which was earmarked for me anyway.*
>
> *Therefore I am relying on you immensely to make this 'General Release' as loose and/or as favourable and fair to me as you can possibly manage given Dad's emotional limitations and present state of mind.* Please can you let me view a copy of the draft as soon as possible, even the one you sent back to Dad in early July after your lawyers reviewed and revised his first draft would be a good starting point.
>
> *Thanks for your help."*

65 The proposed General Release was sent to the daughter by e-mail dated 10 th September, 2010. We have read the document. It is too long to reproduce in full but the recitals give a flavour of its effect and they are as follows:–

> *"WHEREAS, as of the date hereof, [THE FATHER] has, from time to time, directly or indirectly arranged for the transfer of funds to [THE DAUGHTER] in an amount now in excess of … US$800,000 and by signing this agreement*

[THE DAUGHTER] will receive directly or indirectly from [THE FATHER] an amount equal to at least … £800,000 for her use in connection with the purchase of real property in London, England (collectively referred to herein as the 'funds') and

WHEREAS [THE FATHER] desires that [THE DAUGHTER] will not commence any legal action against [THE FATHER's] other children, descendants, relatives or heirs; and

WHEREAS in consideration of the funds to be transferred and the funds already transferred to her, and acknowledging the receipt of these funds, [THE DAUGHTER] desires to release her existing legal rights and the existing legal rights of her heirs, legatees, devisees, executors, administrators, successors and assigns in and to any and all real and personal property now owned, previously owned, or hereafter acquired by [THE FATHER], by any means and in any manner whatsoever, and in and to any right, title or interest in the property of [THE FATHER's] estate or any trust or other entity created by or for the benefit of [THE FATHER], or any part thereof, either under the present or future laws of the United States of America or of any other state, country or jurisdiction; and

WHEREAS, in further consideration of funds to be transferred and already transferred to her as set forth above, [THE DAUGHTER] desires to release her existing legal rights and the existing legal rights of her heirs, legatees, devisees, executors, administrators, successors and assigns in and to certain real and personal property that [THE FATHER] has, from time to time, directly or indirectly, arranged for the transfer to [THE ELDER SON] and [THE YOUNGER SON] their descendants, and [THE ELEVENTH RESPONDENT] …."

66 We would summarise the key provisions of the proposed General Release as follows:–

(i) At clause 3, the daughter waived and relinquished any right or claim which she might have to any property (whether currently or formerly) owned by the father or thereafter to be acquired by the father or his estate including in particular "any and all trusts or entities established or created by, on behalf of or for the benefit of [THE FATHER] or in which [THE FATHER] has any interest" and any right which she might have to challenge the father's last will or any trust in which the father may have an interest.

(ii) Under clause 4, the father's estate and any trust in which he might have an interest are to be administered and distributed as if the daughter had pre-deceased the father unless the father voluntarily and expressly provides otherwise in the will or trust or by written instrument. It was stated that notwithstanding this, the fact that the father might voluntarily give or bequeath property to the daughter was not to be construed as a waiver of the agreement.

(iii) Under clause 5, if the daughter were to challenge the Release itself or the father's will or any trust in which the father had an interest, the daughter would be deemed to

have died unmarried, intestate, and without living descendants before the father.

(iv) Under clause 7, the daughter waived and relinquished any interest she might have in the following companies (including the real property owned by such companies), which we shall call:–

a) Alpha Corporation, said to be owned by the elder son;

b) Beta Corporation, said to be owned by the elder son and the younger son;

c) Gamma Corporation, said to be owned by the elder son and the younger son;

d) Delta Corporation, said to be owned by the elder son and the younger son; and

e) certain real properties located in Italy, said to be owned by the elder son.

(v) Under clause 9, the daughter agreed not to challenge or dispute any transfer or gift of property made by or on the direction of the father to the elder son, the younger son or any of their descendants whether during his life or after his death.

(vi) Under clause 10, the daughter agreed not to make any further enquiries of any kind regarding the extent, value etc of any property that might be owned by the father, the elder son, the younger son or their descendants, including in particular the companies referred to at clause 7.

67 After reading the General Release, the daughter emailed the elder son on 13 th September and said amongst other things “am in total shock now from everything ….. having a hard time digesting all …..” The elder son replied later that day confirming that he had reviewed the draft document which had been sent to the daughter and that the younger son had also reviewed it. The elder son also said “please don't stress out about Dad or this. If it makes sense for you we'll figure out a way to get it done”. The daughter states in her affidavit that she was very concerned at this as she did not know what the elder son meant by this and was somewhat confused because it seemed to indicate that the document had no consequence or significance whereas it appeared to her that the elder son and the younger son stood directly to gain from her signing the document. In a subsequent email the elder son said there was no further review of the document to be done on the father's part and it was now final subject to the daughter and her attorney's review. He said that his understanding was that she needed a New York Attorney to represent her.

68 The father had made it clear that as protector he would not consent to any trust funds being used to pay for the lease extension unless the daughter signed the General Release. She wrote to Jasmine on 22 nd September, making a formal request for funds in order to purchase the lease extension. Jasmine as trustee was aware of the protector's view. Nevertheless it considered it was more advantageous for tax purposes to proceed by way of a loan to the daughter's in order to enable her to purchase the lease extension and that it was appropriate to do so. Accordingly, on 1 st November, 2010, Jasmine as trustee of the P

Trust, loaned the sum of £850,000 to the daughter. There was a written loan agreement whereby the loan was repayable 12 months after service of written demand for payment, which could not be served before 1 st November, 2014, or 28 days after the sale of the daughter's property, whichever first occurred. No interest was payable on the loan until service of notice after a demand for repayment, from which point interest would be charged. Security for the loan was given by way of legal charge over the daughter's property in January 2011.

69 The daughter did not ever sign the General Release. It is clear that this has led to a complete breakdown in relations. There has been no contact between the daughter and her two brothers since then. The daughter asserts that she feels she was being blackmailed into giving up all her rights in the companies referred to and to inherit anything from her father or to receive anything under any of the Trusts in exchange for the monies required for the lease extension. The father, on the other hand, states that he feels that he has been more generous to the daughter than to the elder son or the younger son and that she went behind his back to obtain a loan after he had made it clear that the monies could not be released unless she signed the General Release.

(iii) The US Proceedings

70 As stated above, the General Release referred to four US companies. Alpha Corporation ("Alpha"), Beta Corporation ("Beta") and Gamma Corporation ("Gamma") are incorporated in New York and Delta Corporation ("Delta") is incorporated in Vermont. The aggregate value of their assets was said in the draft General Release to be approximately $19m. The General Release asserts that Alpha is wholly owned by the elder son and the other three companies are owned by the elder son and the younger son. It is clear that this came as a considerable shock to the daughter when she received the draft General Release. She asserts in her affidavit that she had always understood that she was a one third shareholder in all these companies and indeed had suggested to her father back in 1997 that perhaps she could sell her shareholding in the New York companies in order to fund the purchase of her apartment in London. Furthermore, she exhibited documents to her affidavit which showed that in respect of Gamma, she had declared one third of the income of that company on her tax return from 1996 to 2009. It was asserted on her behalf that she had done the same in relation to all the other companies (although we were not shown documents in respect of those companies). Following production of the draft General Release, she sought to obtain information about the companies but had been unsuccessful. She has therefore instituted legal proceedings in New York and Vermont claiming her rights as a shareholder.

(a) The New York proceedings

71 These were commenced in December 2010 against the father, the elder son and the younger son (amongst others) in their capacity as directors and officers of the New York companies. The proceedings were subsequently discontinued against the younger son.

According to Advocate Robertson this was on ‘jurisdictional grounds' although according to Advocate Speck it was because the younger son had ceased to be a director back in 2003. The proceedings continue against the father and the elder son.

72 The complaint asserts that the daughter, the elder son and the younger son were each originally one third owners of all three companies. The complaint refers to 15 documents which are said to support this assertion, including share certificates, corporate resolutions and documents filed with the New York authorities. The complaint also refers to an email dated 24 th September, 2010, from the father to the daughter which apparently confirms her interest as a one third shareholder in Gamma.

73 The complaint then refers to a substantial number of resolutions at both shareholder and board level, many of which appear to be inconsistent with each other. In particular there are resolutions whereby the shares issued to the daughter are purportedly cancelled and new shares issued. Certain documents appear on their face to be signed by the daughter but according to the complaint, a forensic expert has concluded that the daughter's signature on these documents has been forged and is not genuine. Certain documents appear to have been signed by the elder son as a director. The complaint also alleges mis-application of corporate monies.

74 It further alleges that the directors have approved the actions of the father or alternatively have simply signed corporate documents without informing themselves of the relevant facts before agreeing to the father's actions. The complaint alleges breaches of fiduciary duty, negligence and conspiracy. Not only does it seek a declaration that the daughter is a one third shareholder of the companies but it also seeks compensatory and punitive damages against, amongst others, the father and the elder son.

75 The father, on the other hand, has made clear in his deposition in the New York proceedings that he considers the three New York companies to be his to dispose of as he wishes. He cancelled the daughter's shares because he considered her behaviour to be so erratic that he did not trust her anymore (page 272 of his deposition). He considered he had the right to modify the shareholdings according to the behaviour of his children (page 246).

76 We were informed that the New York proceedings were likely to be heard in the first or second quarter of 2016.

(b) The Vermont proceedings

77 These were commenced by the daughter in January 2012 against the father, the elder son, the younger son and others. The essential allegation is that the defendants all conspired to deprive the daughter of property that is rightly hers. She seeks a declaration that she is a one third owner of Delta and she seeks compensatory and, if justified, punitive damages.

78 Much of the background to these proceedings does not appear to be in dispute. As part of the divorce settlement between the father and his wife, it was agreed that certain real properties in Vermont should be placed in a trust to benefit the three children, namely the elder son, the younger son and the daughter. A trust agreement was executed in May 1981 whereby the father and his wife were the settlors and the trustees were the father's attorney in the divorce proceedings, his wife's attorney in those proceedings and the elder son. The trust is apparently recorded in the local Land Records. On 21 st May, 1981, four parcels of real property in Vermont were conveyed to the trustees. The terms of the trust provided that the entire trust property would be distributed outright in equal shares to the three children when the daughter attained the age of 25. That event occurred on the 3 rd September, 1989.

79 The daughter alleges in the complaint in the Vermont proceedings that neither the father nor the elder son (as trustee) informed her of her interest in the trust property. In April 1994 (nearly 5 years after it should have happened), the trustees conveyed the four parcels of real property into the names of the three beneficiaries and this is recorded in the land records. The document appears to have been executed by a lawyer as attorney of all the parties. The daughter asserts that she was not informed of the transfer of the real properties from the trust into her and her brothers' names. In May 1994 the elder son, the younger son and the daughter signed a document (the “Warranty Deed”) transferring the real estate to Delta in which they were each a one third shareholder. It is alleged that this was done at the request of the father. The daughter was residing in Italy at the time. She asserts that she asked the elder son and the younger son what the purpose of the document was and was told not to worry about it, but the father needed them to sign it and that they would be signing the document too.

80 In 2010 the daughter requested access to the books and records of Delta having discovered from the draft General Release that she was apparently not a shareholder as she had thought. She subsequently requested evidence as to whether she had ever had an interest and was then supplied with two “Stock or Bond Powers” dated 15 th January, 2002, which showed a transfer by the daughter of 49 shares in Delta to the younger son and 51 shares in Delta to the elder son. Both documents appear to be signed by her. She asserts that she did not sign them and that her signatures are forged. She was not aware of the existence of these two documents until they were produced to her in December 2011.

81 The sons filed a motion to dismiss the daughter's claim. Their application was brought on two grounds; first, the Vermont court did not have personal jurisdiction over them as they resided outside Vermont and had never taken any actions within the State; and secondly, that the claim was prescribed as being brought outside the statutory limitation period. Both of these applications failed, but the court ordered that the daughter should provide a more definite statement of her claim against them. The judge gave his decision on the motion to dismiss on 5 th July, 2012, and the amended complaint (with a more definite statement of the case against the elder son and the younger son) was filed on 30 th October, 2012. This alleges amongst other things that the Stock or Bond Powers had been forged or caused to be forged by the father and that sometime after their execution, the elder son and the

younger son had become aware of the purported transfer of shares to them but had never told the daughter what had happened. She said that in December 2010, the elder son had told her " *you don't own anything in Vermont [the daughter]*". The Vermont proceedings are due to come on for trial in 2016.

(iv) The law as to the duties of the appointor(s)

82 Although in his skeleton argument, Advocate Speck submitted that the power of the majority of the adult beneficiaries in the P Trust to appoint a successor protector was a personal power, during the course of the hearing all counsel accepted that the power to appoint a new protector was a fiduciary power in both Trusts. In our judgment, they were right to do so for the following reasons:–

(i) The role of protector is a fiduciary one in both Trusts. In relation to the P Trust, clause 12 of schedule IX provides expressly that " *the protector shall act in a fiduciary capacity".* Although the R Trust does not contain a similar provision, an analysis of the nature and extent of the protector's powers, the fact that they are given to an office holder with provision for succession, the provisions such as the ability of the protector to release a power notwithstanding the fiduciary nature of any such power and the provision permitting the protector to charge all point to the protector's role being a fiduciary one.

(ii) There is authority to support the proposition that a power to appoint a successor protector who is a fiduciary is itself a fiduciary power, see *re Bird Charitable Trust* [2008] JLR 1 at para 91; *Re HHH Trust* [2012] JRC 127B at para 18; and *Re Circle Trust* [supra at para 43].

(iii) It makes no difference that the power is exercisable by a majority of the adult beneficiaries rather than by the retiring protector; see *Re Circle Trust* where it was held that the power of a majority of beneficiaries to appoint a new protector was a fiduciary power.

(iv) We accept that the fiduciary obligations as protector are qualified to an extent in that, as the father was the original protector and was also a beneficiary, it is clear that a protector could exercise certain of his powers in a way which could benefit himself. Nevertheless this does not alter the essential nature of the protector's powers and therefore the fiduciary nature of a power to appoint a successor protector.

83 In our judgment there is no reason to differentiate between the duties of an appointor when appointing a new protector of these two Trusts and the duties when appointing new trustees; accordingly we apply the formulation set out in paragraph 45 above.

(v) Contentions of the Parties

84 We propose to summarise the parties' contentions in outline before turning to our decision. Detailed skeleton arguments were lodged and the hearing was spread over three days; counsel quite rightly developed their cases in considerable detail. We have carefully considered all the points which they have made but we hope will be forgiven for referring only to what seem to us to be the most significant submissions in this summary.

(a) The daughter

85 Advocate Robertson, on behalf of the daughter, submitted that the appointment of the elder son and the younger son as protector is invalid in relation to both Trusts as being an appointment which could not have been arrived at by a reasonable appointor. He submitted that the elder son and the younger son cannot reasonably be considered to be in a position to discharge the fiduciary duties of protector fairly and properly on the grounds that:–

(a) they have an actual or potential conflict of interest arising out of the litigation in the United States;

(b) they are not sufficiently independent from the father and have not exercised their fiduciary duties in the US companies in an appropriate manner; and

(c) there is a complete and irretrievable breakdown in relations between them on the one hand and the daughter on the other.

86 We summarise his submissions on each of these in turn.

(i) Conflict of interest

87 He submits that the existence of acrimonious and hostile litigation between the daughter on the one hand and the father, the elder son and the younger son (the latter only in the Vermont proceedings) on the other means the elder son and the younger son cannot possibly be or be perceived as being fair minded and appropriate individuals to act as protectors of trusts of which the daughter and her daughter are beneficiaries.

88 Taking first the New York proceedings, the daughter's complaint alleges that the elder son as a director either colluded with the father in his improper conduct in relation to the three companies (or acquiesced in that misconduct) by signing the corporate documents purporting to strip the daughter of her shareholder status in the companies (for at least one of the New York companies) and/or otherwise turning a blind eye to the father's misappropriation of assets from the New York companies despite his fiduciary position as a director. He referred in particular, in relation to Beta, firstly to a written consent of shareholders (signed by the elder son, the younger son and the daughter) in May 2001 which stated that the three of them held all the shares in Beta. He next pointed to a document dated 19 th August, 2003, apparently signed by the elder son as the ‘equitable

owner' of all the outstanding shares of Beta whereby consent is given to a resolution to cancel the shares issued to the three children and issue the same number of shares equally to the elder son and the younger son only.

89 Advocate Robertson disputed the suggestion made by the elder son and the younger son in their affidavits that their involvement in the litigation was very limited; they were neutral as to its outcome and it was really a dispute between the father and the daughter. He pointed out that vindication of the daughter's rights as shareholder in any of the companies would have an adverse impact on the elder son and/or the younger son who were currently said to be the shareholders and that she was also seeking damages (including punitive damages) for fraudulent conversion, breach of fiduciary duty and other matters against the elder son. The outcome of the US proceedings could therefore have a material financial impact on the elder son and the younger son.

90 He submitted that the litigation had created an untenable conflict of interest. What if the daughter asked for a distribution to help her fund the litigation? There would be an impossible position. What if the elder son and the younger son needed a distribution from the Trusts in order to help fund their side of the litigation? Furthermore, the trustees would inevitably need on occasion to seek personal or private information from the daughter and this would normally have to be given to the protector so that the protector could decide whether to approve of the trustees' decision. It would be impossible for private information about the daughter to be given to parties with whom she was engaged in hostile litigation. The reality would be that, if they remained as protector, each and every decision which they made would be likely to be challenged because it would be impossible for the daughter or her side of the family to believe that any decision was not influenced by their adverse interest towards the daughter. The Court would become permanently involved in having to resolve matters.

(ii) Lack of independence and breach of fiduciary duty

91 Advocate Robertson referred to the conduct of the sons in relation to the US companies and the evidence which they had given on this topic in their depositions in the New York and Vermont proceedings. He submitted that it was clear from this that they had both completely abandoned any fiduciary duties as directors of the companies and had simply signed whatever their father placed in front of them.

92 He referred to paragraph 28 of the elder son's affidavit which states:–

> *"28…. although I am a named director of the NY Corporations they have always been managed by my father. I never had any formal management or operational role. I never attended any meetings nor did my father ever seek my advice. The properties owned by the NY Corporations were managed entirely by father as part of his business and my titular titles and power of attorney authorities were simply put in place to facilitate an eventual transition at the point of my father's*

passing or incapacitation. In [the daughter's] First Affidavit, paragraph 61.3 she references a document I signed "relating to [Beta]". [The daughter] further claims that she does "not believe that [the elder son] [me] could have read these documents without realising their purported significance". How [the daughter] can draw this conclusion is beyond me, since all of us children over the last 25 years frequently signed numerous documents prepared by my father with little or no explanation from him. For the record I have no recollection of signing the documents to which she refers. In both my New York and Vermont depositions I testified that I frequently signed documents at my father's request, all in the spirit of eventually transitioning a family business and that I did not know one way or the other whether [the daughter] was a shareholder of the NY Corporations….." ***[emphasis added]***

93 Similarly, he referred to paragraph 34 of the younger son's first affidavit which states:–

"34….The Vermont Corporation has always been managed by our father, without my involvement. From time to time my father listed me as an officer or director of the Vermont Corporation but I have never had any actual role in the management, operation or direction of the Vermont Corporation…."

94 Advocate Robertson submits that these statements are borne out by the depositions. For example, the elder son's deposition in the New York proceedings on 9 th January, 2014, (at page 92 — 93 of the exhibit to the daughter's third affidavit) was in the following terms. (We should add that in all the extracts from depositions quoted in this judgment we have omitted the numerous objections to questions by attorneys; furthermore all emphasis has been added by us):–

"Q: …. And you write at the bottom of your response, "[the elder son] believes that the shareholders understood that [the father] made all the decisions for the corporations, and [the elder son] understood that he nominally had been listed as a director of the corporations to ease any transitions." What does the word 'nominally' refer to?

A:…. This, this is my father's business. It's a little family business. He runs it, he operates it, always has. He listed me as a director. We never talked about it. You know, again, to our verbal discussion; and I, you know, he handed me stuff, sign it, fine. All because he was interested in a transition, in the event he passed away, that there would be a mechanism for someone to take over. Period, end of discussion. That's what that means.

Q: How did your being listed as a director aid in any potential transition as you set forth in this response?

A: I have no idea…..

Q: My question is: you, in the interrogatory response, refer to easing transitions, okay. I'm just trying to understand why you chose to include that in your

response, an ease of transitions? What does that mean, in terms of your response?

A: It means if he dies.

Q: Okay. In your understanding, why would you being named as a director, ease a transition, in the event of your father's death?

A: I have no idea.

Q: When you use the term "nominally" there what do you mean by the term "nominally"?

A: Nominally means it's on a piece of paper. There is no role or responsibility associated with that. It was understood.

Q: "Was understood", how was it understood?

A: This is my father's business. This is what he did every day. He took care of it.

Q. Was it understood because of conversations you had with your father?

A: Yeah. He made it very clear to all his children.

Q: What did he make clear to all his children?

A: This is — this is my thing. I'm just trying, I'm now, at the time, let's call it aged 70 ok. I need to start thinking about the hereafter and I want to make sure that I have a transition plan in place and he is going to do whatever he does, and this was his way of doing this. Here, sign this, sign that, here, blah, blah, blah, I'm running it, don't worry. Someday it will be yours.

Q. You use the term, the phrase "it was understood," in connection with your testimony that there was no role or responsibility associated with being named as a director. I am just trying to understand, how did you come to the understanding that being named as a director did not, in turn, give rise to any responsibility or obligations on your part?

A. My father made it very clear.

Q. What did he say in that regard?

A. I'm his son. You have a father, right, all lawyers have fathers? So your son — your father tells you to do something, and this is how it's going to be, and that's great. Okay that's the deal. He said that I'm going to run it. Great.

Q. In that conversation, did he specifically tell you that you would have no role or obligation as a director?

A. He made it very clear by his actions, by our interactions over a very long

period of time."

95 To similar effect, submitted Advocate Robertson, was the younger son's deposition in the Vermont proceedings (page 209 of the exhibit to his first affidavit) where the following is to be found:–

> *"Q. Do you know who made the decision that you would be listed as vice president or treasurer of [Delta]?*
>
> *A: I believe — well, I can only give you my best understanding, Mr Pearl, and my best understanding is that my father from time to time listed me as either a vice president or treasurer of [Delta] to facilitate any future transition when my father reached the point where he would step down as the manager of the corporation.* That's my best understanding.
>
> *Q: So, during all of those periods of time, who was making the decisions with regard to the operation of the corporation?*
>
> *A: My father.*
>
> *Q: And did you ever participate in any decisions regarding the management of [Delta]?*
>
> *A: No.*
>
> *Q: Does that include up to the present day?*
>
> *A: Yes."*

96 He further submitted that it was clear that the brothers shared their father's attitude to the decision of the trustees to grant the daughter a loan in November 2010. The father was critical of the decision in his affidavit and similarly the younger son in his affidavit summarises why the family were not happy with the decision. Advocate Robertson said that the elder son's attitude emerges from his deposition in the Vermont proceedings on 28 th February, 2014, where the following passage appears at page 140 of the deposition (page 95 — 96 of the exhibit to the elder son's first affidavit):–

> *"A: She convinced an offshore trust to lend her roughly 900,000 pounds, which is if you do the maths that's well into the million plus.*
>
> *Q: Um-hum.*
>
> *A: Million three, four.*
>
> *Q: Um-hum.*
>
> *A: Depending on exchange rates.*

Q: Did you have any involvement in that?

A: No

Q: In the loan?

A: No. In terms of making it, or approving it or whatever, no. It basically came at our expense.

Q. What do you mean by that?

A. Well, it was a trust of which I'm a beneficiary and my brother is a beneficiary of the trust.

Q. So by making the loan to her you're saying that ……

A. Yeah.

Q. ….. took away funds that might have been available to you?

A. Yeah, or to my kids, or to whatever.

Q. What was your reaction when you, when you heard about that loan?

A. Par for the course.

Q. Were you angry at your sister?

A. I'm angry that my sister is suing me.

Q. Were you angry that she was able to obtain the loan from the trustees?

A. No, I have no view on that.

Q. Did you ever talk to your father, [the father], about his reaction to the loan from the trustees?

A. You'll have to ask him, but yes. I didn't talk to him, I listened while he vented.

Q. Would it be fair to say that he was angry about that?

A. No, he was not happy.

Q. Do you recall what he told you? Or any part of it?

A. No. She went around him and she convinced them to make her a loan.

Q. And he was not happy about that?

A. Correct."

97 In summary, Advocate Robertson submits that the elder son and the younger son will do exactly what their father asks even when they are acting in a fiduciary capacity. The father is cross that she has obtained a loan from the P Trust and his sons share that view.

(iii) Breakdown in relations

98 Advocate Robertson submitted that it was clear that since 2010 there had been a complete and irretrievable breakdown in relations between the elder son and the younger son on the one hand and the daughter on the other. This would make it impossible for them to act or be seen to act fairly as protectors of trusts in which the daughter and her child were beneficiaries.

99 The trigger for the breakdown was the events surrounding the General Release. The daughter was let down by her brothers, particularly the elder son, in this regard. She was presented with a document which would have stripped her of every entitlement to the US companies, under the father's estate or under any of the Trusts despite the substantial value of all the assets; all this in exchange for a payment of £850,000 to extend her lease. The elder son had been her trusted adviser but he had participated in the preparation of the document and, when she turned to him, he let her down and simply told her that she must take her own advice.

100 He said that in their affidavits, the sons sought to play down their involvement in the preparation of the General Release and to portray their actions as being entirely passive. Thus at paragraphs 41 and 42 of his first affidavit, the younger son said:–

> *"41. [The daughter's] First Affidavit also discusses a 'General Release' that my father asked [the daughter] to sign in 2010. I never spoke with or otherwise communicated with [the daughter] regarding the General Release. [The daughter] did not ask my advice on whether she should sign it, and I did not offer any. I neither encouraged nor discouraged [the daughter] from signing it. I understood that [the daughter] would be consulting attorneys in New York on whether to sign the General Release, which was appropriate under the circumstances.*
>
> *42. [The daughter's] first affidavit states that both her brothers 'approved' the draft General Release she received …. I never communicated with [the daughter] regarding the General Release, so I am unsure why she believes I approved it. In fact, neither [the daughter] nor anyone else provided me with a copy of the proposed General Release that [the daughter] received until several months after [the daughter] received it. No one ever asked me to approve or disapprove of the General Release. Instead, my father informed me he was asking [the daughter] to sign a General Release, and his attorneys provided me with an early draft of such a document. The General Release was subsequently revised, expanded and provided to [the daughter]."*

101 The elder son deals with the matter at paragraphs 34 — 38 of his affidavit. He explained how the daughter had telephoned him in tears and begged for his help in trying to convince the father to give her the necessary funds to extend the lease. He said that on speaking with his father, the father made it very clear that the only way that the money could be advanced was if she signed the full release of all the US real estate and associated company assets. He says that the P Trust was never mentioned and it did not occur to him that she would not continue to be a beneficiary of the P Trust. The father asked him to find a Chicago law firm to prepare the General Release because New York firms were too expensive. The elder son introduced the father to a firm with which he (the elder son) was familiar and they prepared the release on the father's instructions. His statement as to his involvement is at paragraph 37 which reads:–

> *"37. Paragraph 62 of [the daughter's] First Affidavit states that both her brothers 'approved' the draft 'General Release' she received. No one ever asked me to approve or disapprove of the 'General Release' — my father was the client and he directed and paid the law firm. I was asked to look at a draft of the release and I provided a little input, primarily of a factual nature to make sure my father included all his assets, because, (again according to my father's attorneys) under New York law in order for a release to be valid all assets had to be disclosed."*

102 Advocate Robertson submitted that the e-mails at the time and the depositions in the New York and Vermont proceedings showed a rather different position. As to the e-mails, matters started on 5 th August, 2010, when the father e-mailed the daughter to give her the first indication that she would have to sign a General Release if she wished to obtain the money for the lease extension. The e-mail included the phrase ' *together with [the elder son] and our lawyer, we are preparing a 'general release' that I ask you to sign as a condition for me to pay for your extension of the lease …'*. On 11 th August, as mentioned earlier at paragraph 63, the daughter e-mailed the elder son saying that she was relying upon him to make it as loose as possible. In an e-mail of 10 th August, the father repeated that the elder son was preparing the General Release.

103 On 30 th August, the daughter e-mailed her father (with copies to the elder son and the younger son) enquiring as to the position of the General Release as she was eager to move things forward on the lease extension. She included the passage ' *on the phone just now, you advised me that 'the boys' needed to be protected so that it was now their responsibility to prepare this 'General Release' document but that I am still the only one that needs to sign it.* [The elder son] has advised me last week that he gave you the latest copy to approve. ….'

104 The elder son replied on 31 st August ' *am tied up on the West Coast.* Back in Chicago Wed afternoon … Let's talk then or Thurs anytime. Based on input from last week, attorneys are re-drafting release.' On 2 nd September, the father sent an e-mail to the daughter wishing her happy birthday but repeating that he would not authorise any payment until the

General Release is signed and stating '[the elder son] *tells me he is working on the 'General Release'.*

105 On 9 th September, the elder son e-mailed the daughter to say '… *am on my way to NYC this morning and will see Dad.* Want to go over agreement with him and then have it to you by Monday. If you have not lined up NY counsel please do so asap. Let me know if you need help finding one. I will be back in Chicago over the weekend, so we can catch up then. Enjoy Italy!'

106 As stated already, the draft General Release was sent to the daughter by the Chicago lawyers by e-mail dated 10 th September and the daughter contacted the elder son on 13 th September expressing her shock. The elder son replied on 13 th September:–

> *"Erica Lord is one of Dad's attorney's here in Chicago … yes, the document you have is the one I reviewed with Dad and has his OK.* [The younger son] also reviewed it. I am available at your convenience to discuss."

107 Advocate Robertson also referred to the depositions in the Vermont and New York proceedings. The younger son gave evidence to like effect in both depositions. For convenience we simply quote the New York deposition which he gave on 28 th June, 2014, (page 33 of the exhibit to the daughter's third affidavit) as follows:–

> *"Q Did you provide input on the draft agreement that you had received?*
>
> *A I recall that I …..* provided some comments.
>
> *Q What comments were those that you provided?*
>
> *A I recall commenting that the draft release should include a release as to me and my family, including my children.*
>
> *Q Why did you include those comments?*
>
> *A Because, as I understood it, the release was intended to avoid any future lawsuits and, frankly, avoid any lawsuits at all (past, present or future), involving my father and his family.* And so I wanted to, in keeping with that purpose, make sure that the release covered lawsuits against not just my father personally, but against other family members, including myself and my children."

108 The elder son confirmed in his New York deposition that he had focussed on the advice of the lawyers that, in order to be valid under New York law, the General Release would have to accurately disclose all of the father's assets and their values and the daughter would have to be independently represented by a New York attorney. These were the matters he had concentrated on when reviewing the draft General Release.

109 In short, Advocate Robertson submitted that this showed that the brothers were more involved in the drafting of the General Release than their affidavits suggested. This was a document which was extreme in its effect. It required the daughter to waive any right she might have to any assets whether of the father's or of the New York or Vermont companies or of any trusts and to waive any claim to a share in the father's estate in exchange for the payment of £850,000 for the lease extension. Whilst it was correct that the brothers had not advised her to sign it, they had participated in its production in circumstances where they and their families were the ones who stood to benefit from it. The daughter had relied in particular on the elder son as her older brother for advice and guidance over the years and she felt betrayed by him. They had in effect both sided with the father against her.

110 He submitted that there were other examples of the breakdown in the relationship. For example, neither the elder son nor the younger son had spoken to the daughter for four and half years before the hearing, and neither of them had attended her wedding. Although the younger son had had a valid excuse for not attending, the elder son had never given any explanation for his non-attendance. Nor had either of them contacted her when she suffered from breast cancer in 2012 or over her expectation of a child. She accepted that they were engaged in litigation but this had not prevented the father from attending her wedding or from communicating with her from time to time.

111 He argued that the elder son's real attitude towards the daughter was shown by a number of passages from his depositions. Thus:–

(i) In his deposition in the Vermont proceedings quoted at paragraph 96 above, he regarded it as *"par for the course"* that the daughter was seeking a loan and he was angry that she was suing him.

(ii) At page 127 of his Vermont deposition (page 92 of the exhibit to his affidavit) the elder son said as follows (in the context of approaching his father to help the daughter with the payment for the lease):–

> *"A: And she claims that my father promised that he would give her the money, and this, that and the other, but the long and the short of it is my sister called me, let's call it the spring of 2010 in a panic saying "I've been working on this lease renewal", dad's "not going to," you know "come up with the money.* You need to help me. Help me" which was typical of the conversations I had with my sister, it was always she needed money, and you know, like a halfway decent brother that I am, I always, you know, tried to help her."

(iii) At page 138 (page 95 of the exhibit to the elder son's affidavit), in the context of his being questioned about an email from the daughter dated 11 th February 2008 (which has not been drawn to our attention) the elder son said this:–

> *"Q: Sure. What was your reaction when you received this e-mail from [the daughter]?*

A: You know, I mean I don't remember. It was just, you know, it was just par for the course. I mean, it's, you know, it's [the daughter] trying to work an angle, and manipulate, and get money for what she wants.

Q: Okay.

A: It's consistent over a lifetime. So it didn't, you know, jar me one way or the other."

112 In those circumstances, submitted Advocate Robertson, how could the brothers act fairly and impartially as protectors. At present they could only communicate through lawyers; so how would they be able to act sensibly as protector, a role which required communication where appropriate between beneficiary and protector. Furthermore, a beneficiary would often be asked to provide private information in relation to decisions concerning a trust. How could this be effected when the elder son and the younger son were in hostile litigation with the daughter.

113 In summary, a combination of the existence of the litigation between the daughter on the one hand and the elder son and the younger son on the other, the approach which they had shown in relation to the administration of the New York and Vermont companies and their willingness to do exactly as the father wished, and the complete breakdown in relations between the daughter and them meant that it was an irrational decision to appoint the elder son and the younger son as protector of the Trusts of which the daughter and her child were beneficiaries.

(b) The father

114 In his affidavit the father explains the background to the P Trust and the R Trust which we have described earlier. He makes it clear that the P Trust was established principally for his grandchildren rather than his children and that the R Trust was set up at a time when his relationship with the daughter was not very good and he did not ever intend that she would be a beneficiary of or benefit from the R Trust. That was why the letter of wishes for the R Trust stated that it should be divided after his death as to one half for the elder son's children and one half for the younger son's children. He explains the difficulties in his relationship with the daughter and that he considers that she has in fact received more so far than the elder son or the younger son. He says that he began to have concerns that all the daughter wanted from their relationship was money. He says that the purpose of drawing up a General Release was that he did not want the daughter to view him as a cash machine and wanted to avoid the risk of litigation. He did not intend by the document to cut her off altogether because, although the document required her to release all claims, it specifically referred to the possibility of his making further gifts to the daughter in the future. He wanted her to know that he was open to giving her money in the future in appropriate circumstances. Unfortunately his relationship with the daughter had broken down after he refused to sanction the distribution for the lease extension and the daughter and Jasmine

had betrayed him by going behind his back to provide the money by way of loan when he did not think that such payment was in the best interests of the beneficiaries as a whole. He further thinks it relevant that the daughter has now married a wealthy man, so that she is unlikely to have any further need for funds from the Trusts. At the age of 90 he travelled to attend her wedding in 2012 but was hurt by the way he was treated at the wedding.

115 As to the appointment of the new protectors, he points out that he is nearly 93 (he has since attained that age). He feels strongly that the elder son and the younger son are the right people to replace him. In the first place they are both well qualified through their respective careers and experience. In the second place their appointment has the support of most of the other beneficiaries. Thirdly and most importantly, they are both members of the family and as such will be able to act as a link between the family and the trustees that hold such a large part of the family's wealth. He believes they are better placed than him to act as protector. Neither the elder son nor the younger son's relationship with the daughter has deteriorated in the way that his relationship with her has done and he does not believe that they hold any personal animosity towards the daughter. He believes that they will look to work collaboratively with the daughter for the good of the family as a whole and that their appointment is in the best interests of the beneficiaries as a whole and in keeping with his fiduciary responsibilities as protector of the Trusts. He denies that he will seek to exert influence over his sons. He accepts he enjoys a good relationship with them but it is not true that this gives him control over their decision making abilities.

116 In his New York deposition, the father made it clear that he regarded the New York companies as his to do with as he wished. Thus he said the following (page 119 of the exhibit to his first affidavit):–

> *"(A) But, if I may, I would like to make a statement, and go on record that this litigation between my daughter and myself is something of a family business or litigation, is not a commercial litigation.* So I think that all — all this time and expense of time for everybody is useless, because, after all, I am, I think that I have the right to dispose of my life saving in the way that I think that my children deserve.
>
> *(Q) Do you think the assets held by [Gamma] are part of your life savings?*
>
> *(A) Of course. All — all the corporation that I have set up is part of my life saving. When I came to this country, I was penniless.*
>
> *(Q) Do you think the assets held by [Beta] are part of your life savings?*
>
> *(A) Of course.*
>
> *(Q) Do you think the assets held by [Alpha] are part of your life savings?*
>
> *(A) Definitely, yes.* All of them.
>
> *(Q) Do you see any distinction at all between the assets of the corporations and*

your personal assets?

(A) No, I don't, because it's all the result of my — of my life saving."

117 Similarly at 172 there is the following passage:–

"(Q) Why did you make the decision at that time to cancel [the daughter's] shares in [Beta]?

Because it's my privilege.

(Q) It's your privilege.

(A) Yes.

(Q) Why did you decide to exercise, according to you, what is your privilege?

(A) Because her behaviour was so, so erratic that I didn't trust her anymore.

(Q) In attempting to cancel her shares, did you compensate [the daughter] for her shares?

(A) I beg your pardon?

(Q) Did you compensate her for the shares that you were cancelling?

(A) Of course not."

118 Advocate Kistler submitted that both trust deeds envisaged the protector having a certain degree of conflict of interest because the father, as original protector, was also a beneficiary. Furthermore the P Trust specifically envisaged the elder son and the daughter (also beneficiaries) as successor protectors and the letter of wishes in relation to the R Trust envisaged the elder son and the younger son as successor protectors despite being beneficiaries. Accordingly, although the protector held a fiduciary position in relation to both trusts, this was an example of the situation envisaged by *Lewin* at 29–018 where it is stated:–

> ***"It is possible, however, for the trust instrument to authorise the donee, whether a trustee or a third party, to exercise (or refrain from exercising) a fiduciary power in a way which benefits himself.*** Such a power remains fiduciary but subject to the qualification that the donee is not debarred from exercising it in a way which confers some benefit on himself; the precise constraints on the donee depend on the particular trust instrument."

119 It could not therefore be an objection to the appointment that the elder son and the younger son were beneficiaries or the parents of beneficiaries. This was specifically envisaged by the terms of the Trusts.

120 Advocate Kistler accepted that there was now a new source of potential conflict of interest which had not existed previously, namely the New York and Vermont litigation. However that did not of itself mean that the elder son and the younger son were not suitable to act as protectors. He referred to the following extract from the decision of the Royal Court in *Re The V R Family Trust* [2009] JLR 202 at paragraph 31 — 32 as follows:–

> ***"31. ….In our view, the first step when the conflict first comes to light is for the protector to disclose the same to the trustee and the beneficiaries, in the case of a fixed trust, or the principal beneficiaries, in the case of a discretionary trust (if the latter is practicable).***
>
> ***32. How that conflict is managed by the protector will depend upon the protector's powers and the nature of the conflict and how pervasive its effect. The protector may be able to remain in office if it is in the interests of the beneficiaries for him to do so and if he honestly and reasonably believes that he can discharge his duties in the interests of the beneficiaries. If so, he must, like trustees in a position of conflict, run the risk of having to justify the exercise of his powers in hostile litigation and to satisfy a court that any decision taken was not influenced by the conflict. If not, his duty is to resign and if he fails to do so it is the duty of the trustee to apply to the court for his removal."***

121 In that case the protector was actively pursuing claims against assets of the trust and the Court not surprisingly had said that such a person could not possibly reasonably contemplate remaining in office.

122 Advocate Kistler submitted that the position was very different here. The US litigation was essentially between the daughter and the father; it did not involve the assets of the Trusts. The father considered the corporations to be his, so that he was free to dispose of them as he wished; the daughter on the other hand asserted that she was the owner of one third of the shares of the relevant companies. That was a matter for resolution in the New York and Vermont courts. The elder son and the younger son have not taken an active position and indeed their depositions have made clear that they do not know whether the daughter was a one third shareholder. The father was of the opinion that their limited involvement in the litigation would not prevent them from fulfilling their fiduciary duties as protector. They were both experienced businessmen who were fully aware of the nature of fiduciary obligations.

123 Advocate Kistler placed some reliance on the judgment of Deemster Cain in the Isle of Man case of *Papadimitriou v Michailidis and Others CP2001/47*, judgment being delivered on 18 th September 2002. In that case, the settlor had established a discretionary trust which appointed his sister, Mrs Papadimitriou ("Mrs P") as protector. Apart from the settlor, the beneficiaries included Mrs P and her descendants and a Mr Symes and his descendants. Mr Symes was a close friend of the settlor. The principal asset of the trust was a valuable property in London which was owned through two companies. During the life of the settlor, the trustee had caused those companies to grant security over the property

in order to support a substantial loan to a company owned as to 99% by Mr Symes. In broad terms the amount secured by the charge exceeded the value of the property with the result that, if the bank were to call in its security, the trust would be left with no assets of significance.

124 The settlor died in 1999 and in 2001, Mrs P exercised her power as protector to appoint two new independent trustees to act jointly with the original trustee.

125 It appears that Mrs P had subsequently instructed lawyers and had instituted proceedings against Mr Symes in a number of jurisdictions. The proceedings in the Isle of the Man began with a petition by Mrs P seeking confirmation that the appointment of the additional trustees was valid and an order for the removal of the existing trustee. Mr Symes lodged cross petitions on various matters. In the end what was at issue was a contention by Mr Symes first, that the appointment of the additional trustees was invalid and secondly, that Mrs P should be removed as protector.

126 It is clear that, having reviewed the evidence, the Isle of Man court took an adverse view of Mr Symes. In paragraph [45] it described his wish to get rid of Mrs P as protector in 2000 as *'ungrateful and cynical and wholly unjustified'*. The court found that Mrs P had acted wholly properly in appointing two additional independent trustees. As to the application to remove Mrs P as protector, the court questioned whether it had the power to do so. However it went on to say at paragraph [75]:–

> ***"I am not prepared to say that the Court does not have, in any circumstances, an inherent power to remove a protector, if that were necessary to protect the assets of a trust or prevent the trust failing, or if the continuance of a protector would prevent the trusts being properly executed.*** However I consider that the court would only so act in exceptional circumstances. The question therefore arises, do the circumstances of this case, namely the present dispute between Mrs P and Mr Symes, make it necessary for the court to remove Mrs P as protector, particularly bearing in mind that…… the settlor deliberately chose his sister, Mrs P as protector?"

127 The court said that Mrs P had only performed two acts as protector. The court had found that the appointment of the additional trustees was proper and no criticism had been made of the other action. It felt that in the circumstances, the assets of the settlement were not at risk from her continuing as protector, nor were the interests of the beneficiaries. If on some future occasion, the trustees considered that the protector was preventing the trust being properly executed by improperly withholding consent, they could apply to the court for relief.

128 We have found that case to be of limited assistance. In the first place, the law as to the removal of protectors has been clarified since then and the test of 'exceptional circumstances' is not one which has been articulated; secondly, the court did not specifically address the issue of the litigation in explaining why Mrs P should remain as

protector; and thirdly, it is clear that the court formed a very favourable view of Mrs P and a very unfavourable view of Mr Symes.

129 In summary, Advocate Kistler submitted that the father (and the majority of the adult beneficiaries in relation to the P Trust) was acting entirely reasonably in being of the view that the elder son and the younger son were suitable to act as successor protectors. They had the necessary experience and expertise, the trust deeds and letters of wishes envisaged that one or more of the father's children should act as successor protector and the US litigation and other matters described in the daughter's affidavits were not such as to make it inappropriate to appoint them as protectors. It was a matter of judgment which fell within the wide discretion conferred upon the person(s) having the power to appoint a successor protector.

(c) The elder son and the younger son

130 In his first affidavit the younger son addresses some of the concerns expressed by the daughter as to his ability to act as protector. He says that he believes that as a protector he can faithfully discharge his fiduciary duties to his sister while at the same time exercising his fiduciary duties to his father, brother, children, nieces, nephews and other beneficiaries. In relation to the power to consent to distributions, he says that, if the trustee considered (as must necessarily be the case) that its decision to make a distribution was a proper one, he would question the trustee's intended course of action only if it appeared that the trustee had failed to take into account relevant facts or had taken into account irrelevant facts with respect to the family. In such circumstances, he would present these facts to the trustee and ask it to reconsider. In relation to the power to remove and appoint trustees, he said that the family had lost trust and confidence in Jasmine and Lutea. This was because:–

> (i) They had commenced legal proceedings in Jersey concerning the appointment of Kairos.
>
> (ii) Jasmine had loaned £850,000 to the daughter from the P Trust. He understood that this was controversial and had reduced the family's trust and confidence in Jasmine because it was made without notice to or discussion with the father, it ignored the letter of wishes from the settlor signed on 7 th July, 2010, only some four months before the loan, the amount was substantial and no interest had been charged, and finally no effort had been made by Jasmine to obtain repayment of the loan even though the daughter was no longer living at the property. He said that a perception therefore existed that Jasmine was favouring the interests of the daughter over the interests of the other nine beneficiaries of the P Trust. He proposed therefore that Cititrust Jersey Limited (“Cititrust Jersey”) should be appointed as successor trustee in order to provide a clean break from past controversies.

131 He agreed that the daughter had had a difficult and strained relationship with the father and this could be traced back to the divorce. However he had always tried to be neutral

between them. In relation to the New York proceedings, these had been discontinued against him as he had not been a director or officer of any of the New York companies since 2003. He was neutral as to whether or not the daughter was a shareholder of any of the companies; he simply did not know. He was not taking a position on this in the New York proceedings. In relation to the Vermont proceedings, Delta had always been managed by the father without his involvement even though he had been listed as an officer or director from time to time. He had never had any actual role in the management, operation or direction of Delta. He did not know whether the daughter was a shareholder of Delta and had said so in his deposition. He did not believe that his testimony had favoured either the daughter or the father. He had only learned of the purported stock or bond powers dated 2002 (which transferred one third of the shares from the daughter to him and the elder son) in 2010. When he and the elder son learned of her claim that the document was forged, they both offered to return her shares to her. This offer had been declined by the daughter. So far as he was concerned, there was no bitterness on his side in relation to the Vermont litigation and he was happy to return the shares in Delta to the daughter.

132 We have already dealt with his evidence in relation to the General Release and will not deal with this aspect further here. The younger son stated that he would not be under the father's influence. As to relations between him and the daughter, he disputed the statement in the daughter's affidavit that he had not communicated or sent a gift or a personal note of good wishes in respect of her wedding. The fact is that he was unable to attend because his youngest son was being confirmed on the same day. He and his wife had sent a personal note to the daughter with good wishes explaining the reason that they could not attend and subsequently sending a tray as a wedding gift.

133 The elder son's affidavit was essentially to like effect. Like the younger son he had never received any distribution from any of the Trusts. The only distribution was in the sum of $133,000 to each of the grandchildren in 2011. His father had always made it clear that the family should take a “European” view of family assets and preserve wealth for future generations. The analogy which has struck him is to *“imagine a river and if you are thirsty dip your cup and take a drink, but always allow the river to flow on”*. He felt that he was well qualified to act as protector and endorsed the younger son's statement of the approach which he would adopt. He had always tried to help the daughter as far as possible. He had always encouraged his father to continue to support the daughter financially and felt that the relationship between them had been good until 2010.

134 In relation to the New York proceedings, as set out earlier, he accepted he was a director of the corporations but said they had always been managed by the father.

135 As to the Vermont proceedings, he had been informed by his mother that he was being named as a trustee of some real property in Vermont as part of his parent's divorce settlement but nothing was ever explained to him beyond that. He was about 21 at the time. During the ensuing two decades, he was never contacted or provided with any information about the trust. He agreed that in 1994 he, the younger son and the daughter had all signed the ‘Warranty Deed' transferring the real property to Delta. This was done at the request of

the father and was something he gave no consideration to at the time. He had not offered any advice to the daughter. In his view the litigation in both jurisdictions was essentially between the daughter and her father and about what she felt she was entitled to inherit from him. He did not feel that the litigation would prevent him from acting properly as protector.

136 We have already dealt with his evidence about the General Release and he too confirmed that he did not feel the father would influence his actions as protector. As to the future, he shared the younger son's views about Jasmine and Lutea and that Cititrust Jersey should be appointed in their place. He recalled in particular in February 2011 telephoning Mr Jenner and questioning him about unilaterally making a significant loan to the daughter without consulting the protector or any of the other beneficiaries. He said that to his great astonishment Mr Jenner hung up on him.

137 Advocate Speck emphasised the qualifications of each of the elder son and the younger son to act as protector. Furthermore, their appointment was entirely consistent with the trust deed and/or letters of wishes in relation to the two Trusts. The daughter submitted that the US litigation was a reason for their appointment to be considered irrational but it was necessary to analyse closely the exact nature of that litigation in order to assess whether this was correct.

138 In relation to the New York litigation, this was a dispute between the father (who said that he was the beneficial owner of all three companies no matter in whose name the shares were from time to time registered) and the daughter (who said that she was entitled to one third along with her brothers who were also each entitled to one third). It was clear that these had always been private companies run by the father. The elder son lived in Chicago, the younger son in California, and the daughter in Europe. All had been named as directors at different times but there had been no call for them to interfere. The family had been content to leave the running of the companies to the father. It was against that background that the actions of the elder son (in particular) had to be judged when assessing his attitude towards fiduciary obligations. It was not surprising that in a family situation such as that, a son would sign what he was requested to by his father unless something appeared to be illegal or improper about it. Everything had changed in 2010 once the litigation began; and the situation was now fundamentally different. It was wrong to transpose the conduct of the elder son and the younger son in relation to private companies in New York which were thought to belong to the father to issues of how they might act as protector when they knew that they were subject to fiduciary obligations, that there were a substantial number of beneficiaries, and that the Court would have supervisory jurisdiction. The elder son and the younger son had made it clear that they were neutral in relation to the outcome of the US litigation and did not know whether the companies belonged to the father or were owned as to one third by each of the children. They were not taking an opposing stance to the daughter and in any event the younger son was no longer party to the New York litigation.

139 As to the Vermont litigation, there was no dispute that the land in question was originally

placed in trust and then became owned by the three children in equal shares. There was furthermore no dispute that by means of the 1994 Warranty Deed, the property had been transferred to Delta, which was owned by the three children in equal shares. The key complaint in relation to the Vermont litigation related to the stock or bond powers purportedly executed in 2002 whereby it appeared that the daughter had transferred her one third interest in Delta to the elder son and the younger son. She said that these were forgeries. They said that they had not become aware of that until the proceedings in 2010 and that, as soon as they were aware of this, they had offered to re-transfer the one-third interest to the daughter. This offer had not been taken up because the daughter's lawyers said that there needed to be investigation as to what had happened to the assets of Delta, but this showed the neutral approach which the brothers were adopting towards the litigation.

140 In those circumstances, submitted Advocate Speck, the existence of the litigation was not a reason for concluding that the elder son and the younger son could not reasonably be appointed as protectors. They were content to await the outcome of the US litigation without taking an active stance and they had no feelings of acrimony or hostility towards the daughter.

141 As to the alleged breakdown in relations, he submitted that the evidence showed that, in relation to the General Release, neither the elder son nor the younger son had sought to persuade the daughter to sign. The younger son had not spoken to her about it at all and the elder son had emphasised that he was not telling her one way or the other what to do and advised her to consult a New York attorney. It had not been their idea to put forward the General Release and they did not ‘approve' it as alleged by the daughter. They had commented on the draft document but this was limited to particular points. It was outside their control that the father was insisting on the signature of this General Release and their conduct in relation to it did not in any way disqualify them from acting as protectors. As to the more general matters relied upon in relation to the breakdown of the relationship, it was true that the parties had not spoken for some four and a half years but this came as much from the daughter as the brothers. She had admitted in her New York deposition that she was under instruction from her solicitors not to have communication with the elder son and the younger son once the litigation began. She had also been factually wrong in her assertion that the younger son had given no explanation for not attending her wedding and had not communicated or sent her a present. Indeed she had behaved in an unfortunate manner as her response to the gift had been addressed only to the younger son's wife, not to him. Advocate Speck submitted that a more likely reason for the lack of any contact from the younger son in recent years was the fact that the daughter had responded in this manner.

142 Ultimately, said Advocate Speck, the question of who to appoint as successor protector was a matter for the appointor, namely the majority of the adult beneficiaries in the case of the P Trust and the father in the case of the R Trust. The appointments were wholly consistent with what was envisaged in the trust deed or the letter of wishes, as the case may be. Furthermore, the letter of wishes in both Trusts made it clear that the Trusts were

intended primarily for the benefit of the father's grandchildren rather than his children. In the case of the *R Trust*, the letter of wishes did not envisage the daughter or any children of hers obtaining any share. In those circumstances, it could not be said to be irrational for the elder son and the younger son, as representatives of the family, to be appointed as protector. The daughter's objections were based entirely on speculation as to what they might do in the future. That was not an appropriate basis for concluding that the appointors had acted in breach of fiduciary duty in making the appointments. The only actions which the elder son and the younger son had taken so far as protectors was to remove Kairos as trustee and to indicate that, if appointed, they would appoint Cititrust Jersey as trustee in place of Jasmine and Lutea. These were two entirely reasonable actions.

Response of the daughter

143 The daughter's response consisted largely of elaboration of points made earlier. However, we would mention the following specific points raised.

144 Advocate Robertson said, in relation to the litigation, that Advocate Speck had submitted that, on close analysis, the litigation was a claim against the father; the role of the elder son and the younger son was a neutral and passive one and there was no acrimony on their part.

145 This was not accepted by the daughter. In the first place, the elder son and the younger son had sought to dismiss the Vermont proceedings before trial on the grounds that the relevant limitation period had expired and that they were not subject to the personal jurisdiction of the Vermont court. That was not adopting a passive and neutral role.

146 Secondly, Advocate Speck had said that once they learned of the forgery allegation in relation to the stock or bond powers, the sons had offered to return the shares in Delta. But, said Advocate Robertson, it was not like that. The sons first became aware of the forgery allegation at the time of the original complaint lodged in the Vermont proceedings, which was on 13 th January, 2012. The offer to return the shares was not made until the last week of July 2012. In the meantime the sons had lodged their application to dismiss the proceedings without trial and the judge's decision rejecting that application was issued on 5 th July, 2012. Accordingly they had not offered to return the shares to the daughter as soon as they learned of the forgery allegation; on the contrary, they had brought an application to dismiss her claim on technical grounds. It was only after they had lost the dismissal application some months later that they offered to return the shares. Furthermore, the offer to return the shares had not been rejected by the daughter. Her lawyers had simply said that they could not agree to it at that stage because they needed information about what had happened to the assets of the company etc. There had been no further attempt by the sons to progress that aspect.

147 Thirdly, the portrayal by Advocate Speck of the litigation as being between the daughter

and the father ignored the relief which was actually sought against both brothers. In the Vermont proceedings, at paragraph 60 of the amended complaint, it was alleged that both the elder son and the younger son had engaged with the father in a course of conduct to deprive the daughter of her interest in Delta and at paragraph 61, that such was done with intent to defraud or gain unfair advantage; paragraphs 63 — 67 alleged fraudulent conversion against them; paragraphs 69 — 75 sought damages for breach of fiduciary duty against them; paragraphs 76 — 81 alleged that they had engaged in conduct which was fraudulent, dishonest, illegal and oppressive and sought their removal as directors of Delta; and finally in the prayer the daughter sought amongst other things compensatory damages and, if justified by the evidence at trial, punitive damages. In the New York proceedings she was seeking damages (compensatory and punitive) against the elder son.

148 Fourthly, he submitted that, whilst the practice of signing whatever the father requested was conceivably understandable (although still wrong) in relation to the New York companies (on the basis that the sons thought these were his to dispose of as he saw fit), the same could not be true in relation to Delta. It must have been understood by the elder son and the younger son that the three children were shareholders in Delta because they had transferred property (which belonged to them absolutely) to Delta by means of the 1994 Warranty Deed. They could not therefore have thought that the father was beneficially entitled to Delta; yet they still let him do what he wished in relation to that company despite being officers of it.

149 In relation to the General Release, the daughter had specifically made it clear to the elder son in her e-mail of 11 th August, 2010, that she was relying upon him (as she had on many occasions previously) to look after her interests. Instead of looking after her, he had, to put it at its lowest, stood by while she came under immense pressure from the father to sign a document which the elder son well knew to be detrimental to the daughter and advantageous to the elder son. Furthermore, he had made comments in relation to the draft documentation in order to make sure it was legally watertight by emphasising the need to list the father's assets and their values. She had looked to him to be her ‘protector' but he had failed her. She could hardly now be expected to regard him as suitable to be a protector of trusts of which she and her child were beneficiaries. The younger son's involvement similarly had been to try and improve the terms of the General Release so as to increase the protection to him and his family.

150 In summary, there was hostile litigation between the daughter on the one hand and the father, the elder son and the younger son (in Vermont) on the other. This was hard fought litigation where there were potentially serious adverse financial consequences for the younger son and the elder son should the daughter be successful. The circumstances surrounding the General Release and the litigation and other matters had led to a complete breakdown in the relationship. In those circumstances it was a breach of duty and irrational for the relevant appointor to appoint the sons as protectors of trusts of which the daughter (and now her child) were beneficiaries.

Decision

151 We begin by reminding ourselves of the limited circumstances (as discussed at paragraph 44) in which the Court may hold the exercise of a power (such as to appoint new protectors) to be invalid. It is not sufficient that the Court considers the decision to be mistaken, in the sense that it is not the decision which the Court itself would have reached. The power has been conferred upon the appointor, not upon the Court. It is only if the Court concludes that the decision is outside the band within which reasonable disagreement is possible and is accordingly a decision to which no reasonable appointor could come (i.e. irrational), that the Court may intervene and hold the decision to be invalid.

152 We also remind ourselves that the fact that the elder son and the younger son may be thought to have adverse interests to the daughter and her family because they and their children are also beneficiaries is no ground for questioning their appointment. As discussed earlier, the father was the original protector despite being a beneficiary and the Trusts therefore clearly envisaged the existence of a protector who could consent to appointments which would benefit him or his family and could therefore be considered to have an adverse interest to other beneficiaries. Furthermore the trust deed of the P Trust specifically envisages one or more of the father's children succeeding him as protector and the letters of wishes in relation to both Trusts are to like effect. On the face of it, the elder son and the younger son have the necessary skills and experience to fulfil the duties of protector. We agree therefore that, were it not for the supervening matters referred to below, there could have been no objection to the elder son and the younger son being appointed as protectors of the Trusts.

153 However, despite that background, we have come to the clear conclusion that, in the light of what has occurred in recent years, the decision to appoint the elder son and the younger son was irrational in the case of both Trusts and we declare it to be invalid. We would summarise our reasons (which are essentially those put forward by Advocate Robertson) as follows:–

> (i) We agree entirely with the observation in *V R Family Trust* (cited at para 120 above) that not every conflict of interest renders a protector's position untenable. One has to have regard to how pervasive its effect. Nevertheless, in our judgment, the US litigation does make it impossible for the elder son and the younger son to be considered as being in a position to act fairly as protector. There is a very significant conflict of interest between them and the daughter as a result.
>
> (ii) We accept that the younger son is not a party to the New York proceedings and is not therefore exposed to a risk of compensatory or punitive damages in those proceedings. Nevertheless the younger son's interests may be affected because at present he and the elder son are said to be the owners of Gamma and Beta whereas they will only own one third if the daughter is successful. The elder son is exposed to an award of compensatory and punitive damages as well as the loss of his 100% ownership of Alpha.

(iii) In relation to the Vermont proceedings the elder son and the younger son are equally exposed to the financial consequences of an adverse finding. They are said to own Delta equally whereas, if the daughter is successful, they will only own one third. In addition they are exposed to the possibility of an award of compensatory and punitive damages.

(iv) It is contended on their behalf that they are playing a neutral and passive role in the litigation and that this is really a dispute between the daughter and the father. It is said that this approach is supported by the fact that they offered to return the shares in Delta once they discovered that it was alleged that the stock and bond powers transferring the daughter's shares in Delta to them were forged. We do not accept this. As Advocate Robertson pointed out, far from immediately offering to return the shares once they were made aware of the allegation of forgery, their immediate reaction was to apply to dismiss the Vermont proceedings (without there even being a trial) on the basis of a lack of jurisdiction and expiry of the limitation period. This is hardly the action of a neutral or passive party to the litigation. It was only when that application failed that they offered to return the shares. We therefore agree with Advocate Robertson's portrayal of this as being hostile litigation between a beneficiary of the Trusts and the two people who it is said should act as protector of those Trusts. One must also have regard to the nature of the allegations made against them in the litigation. Thus in the New York proceedings the complaint alleges breaches of fiduciary duty, negligence and conspiracy; in the Vermont proceedings the allegations are summarised in paragraph 147 above and include allegations of conduct which is fraudulent, dishonest, illegal and oppressive.

(v) We also accept the submission that the sons have not shown themselves to be independent of the father and appear to have paid little attention to their fiduciary duties in connection with the New York and/or Vermont companies. The elder son's evidence in his affidavit and in his depositions, summarised at paragraphs 92 and 94 above, is particularly telling. He refers in his affidavit to *'titular titles'* in the context of his offices in the New York companies and confirms that he has frequently signed documents prepared by his father with little or no explanation from him. This is borne out by his deposition (summarised at para 94) where he says that he had *'nominally'* been listed as a director of the New York companies; and the various emphasised passages set out para 94 make it clear that he simply signed whatever his father put before him with little or no consideration as to what it involved. Similarly, in relation to Delta, both the elder son and the younger son made it clear that they have left the management entirely to the father despite the offices which they held.

(vi) We have some sympathy with the elder son in relation to his position in New York in that his belief was that the companies were owned by his father and were his to do with as he wished. In those circumstances, we can understand his starting with an approach which seeks to accommodate his father's wishes, but that did not relieve him of the need to ensure that he was signing proper documents. He clearly did not, in that he appears to have signed a document which stripped the daughter of her shares without giving any consideration to it.

(vii) Regardless of the position in relation to the New York companies, it is particularly hard to understand how the sons can have shown the attitude which they have in relation to Delta. They must be taken to have understood that real property which belonged absolutely to them and the daughter had been transferred into Delta. The Warranty Deed is crystal clear in this respect and in 1994, the elder son would have been approximately aged 34 and the younger son 32. The younger son was already a lawyer practising in California. The elder son was about to start his own business. They cannot have failed to understand the document they were signing. Real property of which they and the daughter were the absolute owners was transferred to Delta and Delta was owned by all three of them. In those circumstances, it is hard to understand their willingness to play so little part in the management of Delta despite their position as directors or officers of that company; they left everything to the father and did as he asked.

(viii) We accept that they are otherwise well qualified to fulfil a fiduciary role and that their position as protector would not be the same as that of director. Nevertheless, given their track record of being willing to do exactly as their father wishes and to have paid so little attention to their fiduciary responsibilities, we accept that the daughter has legitimate fears over how they would perform their function as protector.

(ix) The likelihood of their reflecting the father's wishes is supported by the fact that they have supported him in relation to the loan to the daughter. It is clear that the father was furious that the trustees had gone behind his back and granted the loan to the daughter for the lease extension after he had made it clear that he would not consent to a distribution. This is given as a reason by both the elder son and the younger son for wishing to remove Jasmine and Lutea as trustees despite the fact that they were not directly involved with the matter at the time.

(x) We also agree that there has been a breakdown in relations between the daughter on the one hand and the elder son and the younger son on the other, which makes it impossible for them reasonably to be seen to be in a position to act fairly as protector. We agree that both sought to play down their involvement in the preparation of the General Release when, as discussed above, the e-mails show that both gave their input into the draft document before it was sent to the daughter in a way that strengthened it. The younger son asked for a provision to be inserted which protected him and his family as well as the father and his estate; and the elder son ensured that the father's assets were fully stated and that the daughter was separately represented, because these two matters were necessary if the General Release was to be legally valid. It was a document which clearly benefitted them and their families at the expense of the daughter and it is not surprising that the daughter felt and feels that they sided with the father against her in this respect.

(xi) Both the elder son and the younger son assert in their affidavits that they have no feelings of acrimony towards the daughter which would prevent them acting fairly as protector. However, we do not think that that assertion — at any rate on the elder son's part — is consistent with the evidence which he gave in his deposition. This is summarised at paragraph 111 above and we would refer in particular to his remarks “ *it was always that she needed money*”; “ *it was just par for the course … it's [the*

daughter] trying to work an angle and manipulating to get money for what she wants … it's consistent over a lifetime …"; "I'm angry that my sister is suing me".

(xii) Further evidence of the breakdown is that there has been no communication between the daughter on the one hand and the elder son and the younger son on the other for some four and a half years, and that the elder son refused to attend her wedding. He did not communicate with her and has given no explanation.

(xiii) In our judgment, the appointment of the elder son and the younger son as protectors would undoubtedly have a seriously detrimental effect on the administration of the Trusts. Given the matters we have described, it seems inevitable that the daughter would challenge any decision by the protectors which she considered was contrary to her interests, because she would say that their decision was vitiated by conflict of interest, hostility etc. As Advocate Robertson submitted, it would be likely that the Court would become regularly involved in resolving matters. Conversely, there is also a risk that, because of their worry that any adverse decision towards the daughter or her immediate family would be challenged, the protectors might lean over backwards the other way and agree to requests on the daughter's part which they would not normally have agreed to, thereby prejudicing the other beneficiaries. In essence, they would be in an impossible position because of the litigation, the breakdown of the relationship and the other matters referred to.

154 For all these reasons, despite reminding ourselves that the question of appointment of a protector is essentially for the appointor, we are satisfied that these two appointments fall outside the band within which reasonable disagreement is possible and are irrational. We therefore declare them to be invalid.

155 In the circumstances, we do not need to go on to consider the question of removal. If, on the other hand, we are wrong and the appointments of the elder son and the younger son do not pass the high threshold of being irrational, we would not think it right to remove them. Neither of the two actions which they have taken since appointment (the removal of Kairos and the indication that they wish to appoint Cititrust Jersey) are such as to cast doubt on their fitness. It follows that if the original appointments were not irrational, the elder son and the younger son have done nothing since then to justify their removal.

The way forward

156 The result of our decision is that there is no protector of either Trust. The power of appointment in relation to the P Trust rests with the adult beneficiaries and the power of appointment in the R Trust rests with the trustees i.e. Jasmine and Lutea. We do not think it would be right for the Court to exercise its overriding power to appoint a protector at this stage. The trust deeds provide for the mechanism for appointment of a new protector and the relevant appointor(s) should be allowed to exercise that power in the light of the Court's ruling. As to the practicalities, we would urge the parties to try and construct a sensible *modus operandi* to achieve new appointments by means of consultation and exchange of

views as to possible candidates for appointment. We would be willing to hear the parties on this aspect when this judgment is formally handed down.

157 Once a new protector is appointed, it will be for that person to decide whether to keep Jasmine and Lutea as trustees or whether a fresh start should be made with new trustees. In that connection, the elder son and the younger son have suggested that Cititrust Jersey should be appointed as trustee of each of the Trusts. The daughter raised some objections on the basis that the father, the elder son and the younger son (and possibly some of the companies) had a relationship with Citigroup in the United States. We do not think that this disqualifies Cititrust Jersey from being appointed as a trustee as we are confident they can be relied upon to act professionally. Nevertheless, if the intention of any appointment of new trustees is to have a completely fresh start with both sides having confidence in the new trustee, it might be preferable to select an entity which does not have connections with any of the beneficiaries, however remote.