

Centre Trustees (CI) Ltd and Another v Van Rooyen and Others

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Tibbo, Clapham
Judgment Date:	02 June 2009
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Text

[2009] JRC 109

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Tibbo **and** Clapham.

In the Matter of The Representation of Centre Trustees (C.I.) Limited And Langtry Trust
Company (Channel Islands) Limited

And in the Matter of The V R Family Trust

And in the Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984, As Amended.

And in the Matter of The Inherent Jurisdiction of the Royal Court.

Between
Centre Trustees (CI) Limited and Langtry Trust Company (Channel Islands) Limited
Representors
and
Jacques Van Rooyen and Nikki Van Rooyen
First Respondents

and
Wilfred Pabst
Second Respondent

Advocate J. Harvey-Hills for Centre Trustees (CI) Limited.

Advocate N. G. A. Pearmain for the First Respondent.

Advocate F. B. Robertson for the Second Respondents.

Authorities

Pell Frischmann Engineering Limited v Bow Valley Iran Limited and Others
[\[2007\] JRC 143](#).

Lewin on Trusts, 18th edition.

Re Skeats' Settlement [\(1889\) 42 CHD 522](#) at 526.

In Re Bird Charitable Trust [\[2008\] JRC 013](#).

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

THE COMMISSIONER:

- 1 On 27th April, 2009, the Court, in the exercise of its inherent jurisdiction, removed the First Respondent, Wilfried Pabst ("Mr Pabst") as the Protector and Appointor of the VR Family Trust and appointed Frederick Stiglingh Human, an attorney in South Africa, in his place. Those orders were not opposed but there were issues as to the costs of the application in respect of which the Court reserved judgment which it now gives. For reasons which will become clear the Jurats remained in Court to hear the applications in relation to costs. The judgment deals with the duties of a protector when placed in a position of conflict.

Background to the VR Family Trust

- 2 Some time prior to 1997, Mr Pabst and Mr Herman van Rooyen ("Mr van Rooyen") agreed to participate in the development of mining operations in South Africa. They established Terret Holdings Limited ("Terret"), a Jersey incorporated company, as the vehicle through

which the venture would be conducted. Terret came to be owned as to 50% by a discretionary settlement settled by Mr Van Rooyen on 14th September, 1997, ("the VR Family Trust") and as to 50% by a discretionary settlement settled by Mr Pabst known as "the Africa Trust I" ("the Africa Trust"). Mr Pabst also established a second discretionary settlement known as "the Global Trust II" ("the Global Trust") which in turn owned a company known as Grenache Holdings Limited ("Grenache") which features in the story. Centre Trustees Limited ("Centre") was the trustee of all three settlements and administered Terret and Grenache. Mr Pabst was appointed the Protector and Appointor of the VR Family Trust and we understand that Mr Van Rooyen was appointed Protector of the Africa Trust. Centre retired as trustee of the Africa Trust and the Global Trust and ceased to administer Terret and Grenache in 2007 handing over to Trustcorp Services Limited ("Trustcorp").

- 3 The VR Family Trust is a standard discretionary trust, the beneficial class comprising Mr van Rooyen, his wife Colette van Rooyen and their two children, Nikki van Rooyen and Jacques van Rooyen (the latter being the second respondents, who will be referred to as "the children"). Under the terms of the trust, certain powers of the trustee could only be exercised with the prior or simultaneous consent in writing of the Protector as follows:-

- (i) The power to accept onerous property as an addition to the Trust Fund.
- (ii) The power to distribute capital on the expiration of the Trust Period.
- (iii) The power of appointment.
- (iv) The power to apply capital.
- (v) The power to transfer funds to another trust.
- (vi) The power to settle capital on beneficiaries.
- (vii) The power to form companies.
- (viii) The power to exclude beneficiaries.
- (ix) The power to add beneficiaries.
- (x) The power to add primary beneficiaries
- (xi) The power to determine the trust period.
- (xii) The power to permit occupation of property.
- (xiii) The power to make loans to beneficiaries.
- (xiv) The power to guarantee debts of beneficiaries.
- (xv) The power to release or restrict powers.

(xvi) The power to change the proper law.

The Protector also has the power to consent to the trustee entering into transactions in which it has an interest.

- 4 The trust also provided for an Appointor, who was given the power to appoint new or additional trustees and new protectors. As we have said Mr Pabst was named as both the Protector and the Appointor.
- 5 In November 2000, Mr van Rooyen and his wife were killed in a helicopter accident in South Africa leaving the children then aged 13 and 16 respectively as orphans. They are now of course of age.
- 6 In 2002, certain mining interests underlying a South African company known as Hernic (Pty) Limited ("Hernic") were sold. Terret owned 70% of Hernic and received a total of US\$46,133,652.92 from the proceeds. On the face of it the VR Family Trust stood to share equally with the Africa Trust in this sum.

Conflicts of interest

- 7 The history of how the proceeds received by Terret were dealt with are complex but for the purposes of this judgment, it is sufficient to give an overview of the concerns as expressed by Centre in order to illustrate the nature of the conflict that arose between Mr Pabst's personal interests and those of the VR Family Trust.
- 8 The directors of Terret in 2002 were Mr Pabst and Mr Michael Kearns ("Mr Kearns") who had been an employee of Centre until, we are told, May 2002. In the latter part of 2002, the directors of Terret, having made certain direct payments to third parties, authorised the payment of US\$5,479,727 to the VR Family Trust and US\$23,933,895.37 to Grenache. Mr Kearns was the sole director of Grenache which was itself an asset of the Global Trust of which Mr Pabst was the primary beneficiary. Because the Africa Trust had no bank account of its own, it would appear that Grenache acted as its nominee. Following further payments made out of Grenache to third parties, Centre calculate that the Africa Trust received US\$11,572,319.37 by way of distribution from Terret, namely some US\$6,092,592.27 more than that received by the VR Family Trust. Centre has concerns about the other substantial payments out of the Hernic proceeds made by Terret and Grenache and the extent to which they may have been to the ultimate benefit of Mr Pabst. These matters have yet to be investigated but it would certainly seem that the VR Family Trust received a very small share of the Hernic sale proceeds.
- 9 On or about 21st December, 2004, Centre received an offer from Mr Pabst on behalf of the Africa Trust to purchase its shareholding in Terret for a nominal amount of US\$1, including taking over certain liabilities the VR Family Trust may have had to Terret and indemnifying Centre as trustee of the VR Family Trust against any claims that Terret may have against it.

At that stage, Terret owned 100% (less 1 share) of a South African company known as African Mineral Trading & Exploration (Pty) Limited ("AM & TE") which owned other South African mining interests. After extensive enquiries, Centre received advice from Ernst & Young valuing Terret at Rand 34.65M, which is approximately £3.1 million. As a consequence Centre making these enquiries, Mr Pabst irrevocably withdrew the offer.

10 Mr Pabst was involved in the sending of three letters as follows:-

These demands were unsupported by documentation. Mr Pabst describes the claims against the VR Family Trust in his affidavit as "the Pabst claims" and we shall do the same.

(i) A letter dated 24th April, 2006, from Terret to Centre as trustee of the VR Family Trust, demanding repayment of its share of the sale proceeds of Hernic, together with interest (some US\$6.1million) within seven days. Until receipt of that letter, Centre had always understood that the payments made to the VR Family Trust had been a final distribution and/or dividend.

(ii) On the same day, Grenache sent a letter to Terret demanding payment within seven days of US\$10,131,925 purportedly loaned by Grenache to Terret pursuant to a loan agreement dated 16th October, 2004. At that time Centre had not seen any purported loan agreements.

(iii) On the same day, Mr Pabst wrote to Centre as trustee of the VR Family Trust and the Africa Trust and to the directors of Terret in his capacity as a beneficiary of the Africa Trust, urgently requesting that arrangements be made by the trustee of the VR Family Trust to repay the funds previously advanced to it with interest within the seven days stipulated in order to enable Terret to meet its obligations as demanded to Grenache.

11 On 25th January, 2007, Mr Pabst used his powers as Appointor to appoint Langtry Trust Company (Channel Islands) Limited ("Langtry") as an additional trustee of the VR Family Trust and this without prior notice to Centre. We will deal with that appointment in more detail below. It is accepted that one of Mr Pabst's motives for the appointment was to advance the Pabst claims by having them independently reviewed by a new trustee appointed by him.

12 On 25th June, 2007, Arthur James, the South African solicitor to Mr Pabst, provided to the now co-trustees of the VR Family Trust a statement of the Pabst claims. In summary the claim alleged that the directors of Terret, namely Mr Pabst and Mr Kearns, always and only intended that the transfer of the funds to the VR Family Trust in 2002 following the sale of the shares in Hernic was to be a holding device and that there existed no final distribution or dividend. Monies transferred were always and only ever loans to the VR Family Trust. Centre and Langtry separately investigated, considered and rejected the Pabst claims.

13 Following the transfer of the administration of Terret to Trustcorp in 2007, the directors then

comprised Mr Pabst and Trustcorp officers. Within two months of that transfer, the directors purportedly sold Terret's shareholding in AMT&E, (the main asset of Terret) to a company wholly owned by the Africa Trust for the nominal sum of US\$1, pursuant to an agreement dated 28th March, 2007. The sale was made without any notice to the co-trustees of the VR Family Trust, which still owned 50% of Terret. Leaving aside the issue of the conflict that must have faced the directors of Terret in resolving to enter into such a transaction, Centre understands that they took no investment advice, no independent legal advice, and obtained no independent valuation of AMT&E.

- 14 Centre considers that Mr Pabst has deliberately sought to prevent proper and effective communications between the co-trustees of the VR Family Trust and the children. A meeting arranged with the children on 30th January, 2007, was cancelled at short notice at or about the time that Mr Pabst appointed Langtry as an additional trustee. Mr James advised on 26th January, 2007, that the children were the subject of psychological counselling and that the psychologist had reservations in relation to the co-trustees' intention to consult with the children. This was confirmed by an unsigned letter from a psychologist resident in South Africa, Dr R Berard. On 26th May, 2008, the co-trustees received affidavits from the children stating that they did not wish to be involved in the VR Family Trust or to be contacted by any person other than Dr Berard, their guardian and one of the trustees of their South African trust. Mr Pabst denies deliberately seeking to disenfranchise the beneficiaries of the VR Family Trust and it has to be said that there is no evidence of his involvement in obtaining the report from Dr Berard or the children's affidavits. In December 2008, the Court appointed Mr Robertson to represent the children. He has now met with them and their South African adviser, Mr Human, (the new Protector and Appointor). He informed us that they are lucid and intelligent and did not consider that at any time they were in a condition which prevented them from being contacted by the co-trustees. He had not taken specific instructions on why it was that they signed the affidavits but he had no evidence to suggest that Mr Pabst was deliberately seeking to disenfranchise them. In the circumstances we have disregarded this allegation for the purposes of the applications we are considering.
- 15 Thus, in summary, Mr Pabst who is Protector and Appointor of the VR Family Trust has been involved firstly in the apparently inequitable distribution of the proceeds of the Hernic sale to the prejudice of the VR Family Trust; secondly, in an offer by the Africa Trust to purchase the VR Family Trust's interest in Terret at a substantial undervalue; thirdly, in Terret demanding back from the VR Family Trust its share of the proceeds of the sale of Hernic (for onward payment to Grenache); fourthly in appointing an additional trustee at least in part to advance the Pabst claims and fifthly in the sale of Terret's remaining asset AMT&E for US\$1 to a company owned by the Africa Trust. All of this was to advance his interests at the expense of the VR Family Trust. The Pabst claims are still being maintained. It was not inaccurate to describe him as the Court did as a hostile party to the VR Family Trust. It is surprising therefore to say the least that he elected to remain in office as Protector and Appointor right up until the hearing on 27th April, 2008.

- 16 As long ago as November 2006, his lawyer Mr James acknowledged the conflict in an e-

mail in the following terms:-

“ There is a clear conflict between Mr Pabst's duty as a director of Terret Holdings and his obligations as Protector of the VR Family Trust.”

Mr James went on, in our view unsatisfactorily, to state:-

“ Willy Pabst has quite correctly agreed that he will refrain from intervening in this dispute in his capacity as the Protector of the VR Family Trust. Other than that, Mr Pabst's interests lie squarely with the interests of the trust.”

17 On 23rd May, 2007, Mourants, acting for Centre, wrote to Mr Pearmain, acting for Mr Pabst, in the following terms:-

“ Your client is the Protector and Appointor of the VR Family Trust. Your client is also the primary beneficiary of the Africa Trust I which in turn owns 50% of the issued share capital of Terret Holdings Limited and the primary beneficiary of the Global Trust II which in turn owns the entire issued share capital of Grenache Holdings Limited. As your client has already accepted, this places him in a direct position of conflict.

The Trustee has been concerned at the manner in which your client is performing his function as Protector of the VR Family Trust and, in particular, the efforts that are being made by him or on his behalf to ensure that the sum of approximately US\$6.1 million together with accrued interest, presently owned by the VR Family Trust are to be transferred to structures under your client's control and/or in which he has a beneficial interest, to the detriment of the beneficiaries of the VR Family Trust.

The Trustee continues to investigate the claims made by your client. Pending a resolution of its investigations, the Trustee considers that the powers of the Protector ought properly to be suspended.”

Mr Pearmain responded on 24th May, 2007, in the following terms:-

“ Picking up on a point made in the first paragraph of your letter, our client does not accept that a conflict of interest arises such as to prevent him from discharging his role in a proper fashion. Indeed, I find your comment most surprising given that [Centre] can hardly be commended for managing the conflict of interest that they have had between 2000 and 2006 when they administered all of the relevant trusts to this dispute.

Our client does not see the point in your client attempting to have the powers of the protector suspended. Our client is not minded to exercise any powers in the near future in any event albeit that he does expect [Centre] to give effect to the appointment of Langtry that he has made.”

Thus Mr Pabst remained in office.

- 18 Centre and Langtry as co-trustees of the VR Family Trust applied to the Court by representation dated 12th June, 2008, for the removal of Mr Pabst as Protector and Appointor. It was supported by a detailed affidavit sworn by David Bester, a director of Centre, sworn on 13th June, 2008. That did not elicit the resignation of Mr Pabst. He filed a detailed affidavit in response sworn on 6th November, 2008. He expressed the belief that any potential issues as to conflict of interest had been dealt with by his agreeing not to exercise any of the Protector's powers with regard to the Pabst claims. He expressed himself as being willing to step down as Protector although he did not do so.
- 19 In his skeleton argument filed on behalf of Mr Pabst, Mr Pearmain submitted that Mr Pabst was not in a position where there was any conflict between his functions as Protector and Appointor and his personal interests. The claims against the trust fund of the VR Family Trust that he was promoting concerned the administrative commercial issues of that trust only, in respect of which he had no functions under the trust.
- 20 At the hearing on 27th April, 2009, Mr Pabst did not oppose his removal as Protector and Appointor and the appointment of Mr Human in his place. However Centre sought the costs of and incidental to the representation against Mr Pabst personally. It argued that his conduct constituted a special or unusual feature justifying costs being awarded on an indemnity basis. In *Pell Frischmann Engineering Limited v Bow Valley Iran Limited and Others* [2007] JRC 143, Page, Commissioner summarised the circumstances in which the award of indemnity costs may as a matter of discretion be ordered as follows:-

“At the risk of oversimplifying matters, the result of these English authorities may be said to be this: that the circumstances in which an award of indemnity costs may, as a matter of discretion, be ordered are less restrictive than they used to be; there must, ex hypothesi, still be something to take the case out of the ordinary, but the range of potentially relevant considerations, as described by Millet J. (later Lord Millett) in *Macmillan v Bishopsgate* is considerable and need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end it is a question of what would be fair and reasonable in all the circumstances.”

- 21 In order to consider the conduct of Mr Pabst in relation to these proceedings, it is necessary to have regard to his duties both as Appointor and as Protector.

Duties of Appointor and Protector

- 22 As Appointor, Mr Pabst had the power to appoint new or additional trustees and to appoint new protectors. In relation to the power to appoint new trustees, counsel agreed that this was a fiduciary power which cannot be exercised for his own benefit. (See Lewin on Trusts,

18th edition, para 14–31 and the classic statement to that effect by Kay J in *Re Skeats' Settlement* (1889) 42 CHD 522 at 526). It is probable that on the same basis the power to appoint new protectors is also fiduciary although the matter was not canvassed at the hearing (see *In Re Bird Charitable Trust* [2008] JRC 013 and the extract from *Lewin* below). There are no provisions within the VR Family Trust for the resignation and appointment of Appointors. It follows therefore that the same can only be affected through the Court.

- 23 *Lewin* makes the following observations at para 29–41 in relation to the powers of protectors:-

“ The power in question may be one of a number conferred on a protector or other similar third party. The term “protector” may occasionally be used simply as a convenient name for a given person but more commonly it refers to an office created by the trust instrument, with provisions for a succession of persons to fill it. If a power is conferred on a protector of that latter kind, it will ordinarily be impossible to construe the power as beneficial: the protector will be there for the protection of the beneficiaries and his powers will be fiduciary. On the ground that a protector of that kind is a fiduciary, it has been asserted that the court has jurisdiction to remove a protector for good cause, at any rate where that step is necessary to prevent the trusts from failing or where a protector's continuance in office would prevent the proper execution of the trusts. On the same ground, where the settlement provided for a protector, presumably not intended to be a beneficiary, to be named in a schedule, and required the protector's consent for the exercise of powers of appointment, the addition of beneficiaries, distributions of capital and income, and the exercise of other trustee powers, but by oversight no protector was named in the schedule, it was held that the court could appoint a protector, by analogy with the principle that a trust would not fail for want of a trustee. Again on the same ground, the power to appoint a new protector has itself been held to be fiduciary.”

- 24 The VR Family trust creates an office of protector for the duration of the trust. Having nominated the first protector, it goes on to provide in clause 16(C):-

“ A new Protector shall be appointed whenever a sole Protector dies or is desirous of being discharged ... ”

It goes on to vest the power to appoint a Protector in the Appointor, or failing the Appointor, in the trustees, who are required to make an appointment if no Protector has been in office for a period of six months.

- 25 Ordinarily, therefore, there would be no doubt in our view that the powers of the Protector are fiduciary. However, clause 17(B) provides as follows:-

“ For the avoidance of doubt, it is hereby declared that no power is vested in the Protector in a fiduciary capacity.”

26 As against this, clause 2 of part VI, dealing with the exercise and release of powers provides as follows:-

“ The Trustees and the Protector shall exercise the powers and discretions vested in them as they shall deem most expedient for the benefit of all or any of the persons actually or prospectively interested under this settlement”

27 Lewin helpfully describes a three-fold division of dispositive and administrative powers into beneficial, limited and fiduciary powers (see para 29–14 *et seq*). In broad terms, those classifications can be described as follows. Beneficial powers can be exercised in any way for the benefit or purposes of the donee, as the donee wishes without restriction. Limited powers must be exercised in good faith for the purposes for which they are given. They differ from beneficial powers in that they are conferred for the benefit of one or more of the beneficiaries other than the donee. The constraints on the exercise of a limited power are expressed in the doctrine of a fraud on a power. An exercise of the power can be impeached for example if it was made for a corrupt purpose, such as for the benefit of the donee himself. Fiduciary powers are a class of limited powers. The significance of the distinction, which according to Lewin has been elaborated in a recent authority, is that the donee of a fiduciary power owes a duty to the objects of the power to consider from time to time whether and how to exercise it and they have various remedies open to them if the donee does not or cannot do so. He is not bound to exercise it merely by virtue of its being a fiduciary power, the duty being to consider its exercise, although in the case of what is called a trust power he is bound to exercise it. If he does exercise it, the donee is subject to the doctrine of a fraud on a power, in the same way as the donee of non-fiduciary limited power.

28 The Court was not called upon to consider the inconsistency within the trust as to the nature of the Protector's powers save that it is clear from clause 2 of Part VI that they are not beneficial powers. Mr Pearmain did not seek to argue otherwise. Using Lewin's classification, the Protector's powers in this case would appear at the least to be limited powers conferred for the benefit of one or more of the beneficiaries, other than the Protector himself. The significance of clause 17(b) declaring that the powers vested in the Protector are not held in a fiduciary capacity would simply mean that he is not under an obligation to consider from time to time whether or not to exercise them. If he does exercise them, then they have to be exercised for the benefit of one or more of the beneficiaries.

29 Counsel agreed that just as beneficiaries are entitled to require that decisions made by their trustees are made independently of any private interest or competing duty (see Hart J in *Public Trustee v Cooper* (2001) WTLR 901 as quoted in Lewin at paragraph 20–83) so the beneficiaries of the VR Family Trust are entitled to require the same of the Protector and Appointor.

30 Hart J dealt with the management of conflict by trustees as follows:-

“ Where a trustee has such a private interest or competing duty, there are,

as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.

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

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

- 31 This guidance is helpful albeit if not in all respects directly applicable when considering the position of a person other than a trustee (however called but say a protector) exercising limited or fiduciary powers within a trust, who has a private interest or competing duty. 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 to 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 satisfying 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 Court for his removal.
- 33 In the instant case, we have a Protector and Appointor actively pursuing claims against the trust assets. We cannot envisage a conflict more pervasive. Furthermore we cannot envisage any circumstances in which anyone in his position could reasonably contemplate remaining in office. We reject wholly the contention of Mr Pearmain that you can separate the claims Mr Pabst was involved in advancing against the trust fund from his role as

Protector and Appointor. One example suffices. How could he deal with an application for consent to a capital distribution out of funds against which he is advancing claims? In our view, it is intolerable that Mr Pabst should have sought to retain his two offices and thus remain within the domestic confines of this trust when he was in reality a hostile party to it. He was under a clear duty to resign from the moment it was contemplated that claims would be advanced against the trust in which he had an interest. In his skeleton argument, Mr Pearmain said this:-

“ It was not, and is not, improper for Mr Pabst to put forward the commercial claims of the Pabst interests against the VR Family Trust. Mr Pabst is plainly entitled to advance such claims, notwithstanding that he was also Protector with unconnected functions in respect of the VR Family Trust.”

- 34 We disagree. It was improper for Mr Pabst to promote the Pabst claims whilst he remained as Protector and Appointor of the trust.
- 35 The children fully supported Centre's application. They see the blame for the current situation lying entirely with Mr Pabst. Mr Robertson agreed that they were entitled to have a Protector and Appointor in office who was free from conflict and Mr Pabst was under a duty to resign once that conflict arose. He did not do so. Furthermore, following the filing of the representation, he continued in office right up until the current hearing. Instead of resigning and reserving his rights in relation to the Pabst claims, he filed an 85 page affidavit. In their view, he has acted unreasonably and incurred costs out of all proportion which should not be borne out of the trust fund.
- 36 Whilst Mr Pabst was able to resign and should have resigned as Protector, the power of appointing a new protector is vested in him as Appointor and his conflict would have militated against him purporting to exercise that power without the approval of the co-trustees and, in this case, the children who were the only beneficiaries, to the person nominated. It is also the case that there is no provision for the resignation of the Appointor. That being the case Mr Pabst should have formally acknowledged that his conflict required his resignation as Appointor and that he would co-operate with the co-trustees in the appointment of a successor and an application to the Court for his replacement.
- 37 There is a material difference in terms of costs in an application to the Court that is not contested and one that is. The conduct of Mr Pabst was such as to give the co-trustees no alternative but to bring an application for his removal as both Protector and Appointor and to regard the application as contested, necessarily incurring the costs that preparation for such an application entails. The extensive affidavit of Mr Bester was justified.
- 38 We find the conduct of Mr Pabst to be wholly unreasonable and in flagrant breach of his duty as Protector and Appointor to the beneficiaries. It would be unreasonable for the trust estate to bear the resulting costs. We accordingly order Mr Pabst to pay the costs of the co-trustees and the children of and incidental to the representation on an indemnity basis

subject to what we say below.

39 After the representation was brought and following the giving of directions by consent for it to be heard, there were two hearings before the Court at which Mr Pabst was not present. The first of these hearings on the 16th December, 2008, concerned the difficulties the co-trustees were having in establishing contact with the children and led to the appointment of Mr Robertson to represent them. As made clear in paragraph 14 there is no evidence before us that Mr Pabst was responsible for this. The second hearing on the 12th February, 2009, was a directions hearing concerned in part with the Pabst claims and from which he was excluded. It would not be just for the costs of and incidental to these two hearings to be paid by Mr Pabst.

Appointment of Langtry as co-trustee

40 A further issue arises in that Centre seeks to recover from Mr Pabst the costs incurred by the VR Family Trust as a result of the appointment of Langtry as co-trustee. Its application is supported by an affidavit by Michael Andrew Weston, a director of Langtry, sworn on 11th June, 2008, in which he reaches the following conclusion:-

“ With the benefit of hindsight, it would appear that Wilfried Pabst procured the appointment of Langtry as co-trustee for the primary objective of getting it to accede to his claims, and this, notwithstanding that Langtry made plain from the outset that it would only ever act in the best interests of the beneficiaries.”

41 Following its rejection of the Pabst claim, and the filing of Mr Weston's affidavit, Langtry could see no benefit to the beneficiaries in having two professional trustees continuing in office and accordingly with the sanction of the Court it voluntarily resigned following the hearing on the 12th February, 2009.

42 Langtry and its advisers have received some £217,000 in costs out of the trust fund incurred in the main in investigating the Pabst claims which it ultimately rejected. There will be further costs yet to be calculated incurred by Centre in dealing with its co-trustee.

43 Whilst the representation sets out the facts in relation to Langtry's appointment and seeks by way of relief the costs incurred as a result of it from Mr Pabst, Mr Pearmain pointed out some inconsistencies in Centre's position in that in its representation, having raised its concerns as to his motives for appointing Langtry, Centre state as follows:-

“ However, Centre has accepted that Langtry was validly appointed as co-trustee of the VR Family Trust.”

In his affidavit of 13th June, 2008, Mr Bester deposed as follows:-

“ In the intervening period between March 2007 and May 2007, the Co-Trustees together considered matters relevant to the administration of the VR Family

Trust. In particular, Centre was concerned at the manner in which Langtry had been appointed and whether such appointment was indeed valid given the Protector's clear conflict of interest. In the event, and after consultation with Langtry, Centre decided not to take issue with Langtry's appointment. Furthermore, it was necessary for Centre to deliver up to Langtry all relevant documentation and material in order to allow Langtry to fully understand the past administration of the VR Family Trust and the facts and matters pertaining to Wilfried Pabst's allegations and claims (that Centre considered may not have been advised to Langtry by Wilfried Pabst himself). Centre cherished the hope that cooperation with Wilfried Pabst's appointee would facilitate a resolution with Wilfried Pabst."

Furthermore Centre did not seek to have the appointment set aside but for it to be ratified by the Court.

- 44 Mr Pabst has dealt with the appointment of Langtry as co-trustee at length in his affidavit, although he makes no comment on the affidavit of Mr Weston. He accepts, as did Mr Pearmain, that at least one of the reasons for his appointing Langtry was to enable it to review the Pabst claims.
- 45 His power to appoint an additional trustee is a fiduciary power and having exercised that power when in a clear position of conflict Mr Pabst will now have to satisfy the Court that it was a reasonable decision to make and was not influenced by the conflict (see extract from *Public Trustee v Cooper* cited above).
- 46 In our view this claim does not constitute part of the costs of the proceedings but is a substantive claim that Mr Pabst has acted in breach of his fiduciary duties requiring a finding of fact; hence the retention of the Jurats. We were concerned that whilst this claim falls within the terms of the representation, Mr Pabst may not have appreciated that it was still a live issue, given Centre's decision not to challenge the appointment and Langtry's subsequent resignation. Fairness dictates therefore that Mr Pabst be given an opportunity to answer this claim more fully. We therefore adjourn this aspect of Centre's claim and will give separate directions for its determination.