The Representation of Appledore Trustees Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	30 August 2022
Neutral Citation:	[2022] JRC 179
Court:	Royal Court

Text

In the Matter of the Representation of Appledore Trustees Limited
As Trustee of the Blackberry Family Settlement

[2022] JRC 179

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Christensen and Austin-Vautier.

ROYAL COURT

(Samedi)

Trust.

Authorities

Power of Appointment of New or Additional Trustee.

Trusts (Jersey) Law 1984.

BB, A and C v E, F and G in the Matter of the D Retirement Benefit Trust [2011] JRC 148.

The Maria Trust [2022] JRC 164.

Re BB [2011] JLR 672.

The Z Trust [2016] (1) JLR 132.

Advocate H. F. Brown **for the Representor**

Advocate N. L. M. Langlois **for B**

Advocate D. P. Le Maistre **for the minor and unborn beneficiaries**

Bailiff

THE DEPUTY

Background

1 On the 4 th July 2022, having heard argument, we made various orders in this case. We now give reasons for making those orders.

2 The Blackberry Family Settlement ("the Trust") was established by settlement made on 28 th September 2016 between the settlor, A, and John McLuskie and Alexandra McLuskie ("the Trustees").

3 The Trust is and has always been governed by Jersey law.

4 The assets of the Trust are held in a number of underlying corporate vehicles. It is not clear what the total of the assets is but they are believed to be in the region of £50 million.

5 The key issue for the Court was the validity of the Deed of Retirement and Appointment dated 31 st January 2020 ("the DoRA").

6 Appledore Trustees Limited ("Appledore") argue that the DoRA is valid and that pursuant to its terms Appledore is now trustee of the Trust. One of the beneficiaries of the Trust, B, asserts that the DoRA is invalid.

7 The beneficial class consists of the settlor, A, his niece, C, his nephew, B and various other individuals and particular persons identified as issue by reference to their connection to

various families.

8 The settlor's Memorandum of Wishes executed on 28 th September 2016 expressed the wish that the Trustees hold the assets and income generated therefrom for the benefit of the beneficiaries in the following proportions – to the settlor 50%; to C 25% and to B 25%, and that in the event the settlor dies, his shares are to be apportioned to C and B equally, and in the event that they pre- decease the settlor, their issue will inherit their parents' shares equally per stirpes.

9 Further, the Memorandum of Wishes invited the Trustees to consider setting up a discretionary ' *help fund*' in the sum of $250,000 for the issue of the various families identified in the Trust as beneficiaries having consulted with the settlor, B, C and the protector.

10 For the purposes of this application, the key provisions of the Trust are as follows. First, the 'Power of Appointment of New or Additional Trustee' at clause 16 of the Trust provides:

> ***"16.1 If any Trustee whether original additional or substituted (being an Individual) shall refuse or become unfit to act (through insolvency incapacity or otherwise) die or wish to be discharged from the position of Trustee in accordance with the provisions of sub-clause 16.2 or (being a company) is put into liquidation (whether voluntary or compulsory) or is declared bankrupt or is subject to any similar process in any jurisdiction whether permanent or temporary or otherwise ceases to exist or passes a resolution to the effect that it desires to be discharged from the position of Trustee then the persons specified in Schedule 5 in order of priority may by deed appoint one or more other persons wheresoever resident but subject to any exclusions or provisions specified in Schedule 5 to be a Trustee in place of the aforementioned Trustee."***

11 Clause 16.8 provides:

> ***"There shall be no obligation to have more than one corporate Trustee or two individual Trustee (sic) of this settlement."***

12 Schedule 5, the provision setting out the order of priority of persons with a power to appoint a new trustee, says:

> ***"Schedule 5***
>
> ***(Appointment of New or Additional Trustee)***
>
> ***The following persons in the following order of priority shall have the power to appoint new or additional Trustees:-***

1. B and C unanimously

2. A

3. John McLuskie"

13 On any view, the terms of the DoRA did not comply with Schedule 5. We will return to the arguments as to the construction of Clause 16 and Schedule 5 below when we consider the arguments of the parties. The DoRA was made between the Trustees and Appledore, recited that the Trustees resided in Thailand and Appledore in Cyprus and that the Deed was supplemental to the Trust. Recital C provided that the *'Retiring Trustees wish to retire from the Trust'*. Recitals D and E provided as follows:

> ***"(D) By clause 16.1 the persons specified in Schedule 5 in order to [sic] priority may by irrevocable Deed appoint one or more other persons wheresoever resident but subject to any exclusions or provisions specified in Schedule 5 to be trustee of this Settlement in place of a person ceasing to be Trustee*** .
>
> ***(E) Further to Clause 16.2 the Outgoing Trustees have exercised notice in writing confirming their desire to withdraw and be discharged from the Trust."***

14 The Recital went on to express the intention that the assets of the Trust shall forthwith be transferred to Appledore in consideration of the *'following covenants and indemnities'*. The *'operative provisions'* purported to record that the *'Retiring Trustees hereby retire as trustees of the Trust'*. The DoRA is governed by Jersey law. The DoRA was executed by the original Trustees and Appledore only.

15 The DoRA did not recite that B and C had purported to appoint Appledore as new Trustees of the Trust and they were not parties to the instrument.

16 The reason for this is explained by Mr McLuskie in the affidavit he swore for the purpose of the hearing:

> *"A different order of priority was followed at the time of the DoRA because an earlier draft of the Trust was consulted.* This earlier draft contained a different order of priority, the highest priority being given to the Former Trustees. I did not know at the time that the wrong version of the Trust Instrument had been used to draft the DoRA. I do not know why this occurred."

17 He went on to say:

> *"at the time the DoRA was drafted and executed I was operating under the erroneous belief and understanding that it was my daughter Alexandra*

McLuskie and myself who had the priority under the Trust to consent to the appointment of new trustees."

18 He went on to explain that Appledore was the *'obvious choice'* as a replacement for himself and his daughter as the individuals behind it were familiar with the family and the Trust and had helped with aspects of their business for many years – indeed it was one Greg MacRae of Appledore who first introduced Mr McLuskie to B. He expressed the view that if either B, C or A had known that they had the power to appoint a new Trustee of the Trust then they would have done so at the time of the DoRA.

19 Notwithstanding the passage of time, there is still no explanation as to how it was that an incorrect version of the Trust was placed before the Trustees when they executed the DoRA or, indeed, why such a document existed.

20 In any event, the incorrect version of Schedule 5 that was before the Trustees who executed the DoRA was shown to us and is in the following terms:

"Schedule 5

(Appointment of New or Additional Trustee)

The following persons in the following order of priority shall have the power to appoint new or additional Trustees:

1. John Kerr McLuskie and Alexandra Charlotte McLuskie; unanimously

2. B and C; unanimously

3. A"

The contentions of the parties in relation to the validity of the DoRA

21 Jack French, in his affidavit sworn on behalf of Appledore, says that the three main beneficiaries were content with the appointment of Appledore in 2020 and did not query it at the time. He said *'in error'* the DoRA was made by reference to an incorrect version of the Trust instrument. He says that *'it appears to be the case that none of B and C nor A (sic) were in a position to appoint a new Trustee.* I say this because none of them challenged the appointment by John McLuskie, presumably not knowing they had such a power…'. He concludes that Appledore's view is that Mr McLuskie did have a power to appoint a new trustee because those with a power to appoint were unaware of the fact that they had such a power. He goes on to speak to disputes between B on the one hand and Appledore and C on the other, which is irrelevant for the purposes of this application. C has also sworn an affidavit in support of the application saying that when the DoRA was executed she had *'no idea'* that she had a power to appoint the trustee of the Trust. She says that her relationship with her brother, B, has been difficult since 2018.

22 Appledore also relied upon the evidence of A contained in a statement uploaded to the electronic bundle the evening before the hearing. Pursuant to directions made by consent on 20 th May 2022, all beneficiaries convened to the proceedings (including A) were obliged to file any evidence by 13 th June 2022. Only B did so. C's evidence was filed on 20 th June 2022. A made a statement on 1 st February 2022 which was not uploaded onto the hearing bundle until 1 st July 2022 and which was not served by A but by the English lawyers representing Appledore. The upshot of this is that the statement (which was neither in the form of a sworn affidavit nor was subject of a declaration of truth which normally accompanies a witness statement) states that at the time that the DoRA was drafted and executed, A thought that it was Mr McLuskie and Miss McLuskie who had priority power to appoint new trustees and that he had no power to do so himself; that he and his fellow beneficiaries were consulted at the time that the DoRA was approved and believed Appledore was validly appointed as Trustee.

23 It was accepted by counsel for Appledore that little weight could be given by the Court to this document having regard to its terms and the fact that it had come not from A but from Appledore.

24 Whether or not this document represented A's views at the time of the hearing, it was a statement that we took into account but to which we gave little weight, particularly having regard to the fact that the answer to the question as to the validity of the DoRA was mainly a matter of construction in the context of a factual matrix where the key facts were in effect undisputed.

25 It was also argued on behalf of Appledore that if Appledore had not been validly appointed then the Trust assets would have ceased to be held on trust which may give rise to adverse UK tax consequences.

26 Reliance was placed upon Article 16(4) of the Trusts (Jersey) Law 1984 (“the Law”). Article 16 provides that:

> ***“16. Number of trustees***
>
> ***(1) Subject to the terms of the trust, a trust must have at least one trustee*** .
>
> ***(2) A trust shall not fail on grounds of having fewer trustees than required by this Law or the terms of the trust*** .
>
> ***(3) If the number of trustees falls below the minimum number required by paragraph (1) or, if greater, by the terms of the trust, the required number of new trustees must be appointed as soon as practicable*** .
>
> ***(4) While there are fewer trustees than are required by the terms of the trust, the existing trustees may only act for the purpose of preserving the***

trust property."

27 It was argued that the Trust became a bare trust under Article 16(4) in circumstances where there was no trustee. No authority was cited in support of this proposition. Although no UK tax advice was placed before the Court, various authorities were cited to us on the footing that the Court may draw an inference from them that a UK charge tax may arise in these or similar circumstances. Whether or not that is the case, it was clear, in our view, that if the DoRA was invalid then the Trustees had never ceased to be trustees of the Trust and accordingly there is no question of the Trust failing on the grounds of having insufficient or no trustees.

28 When challenged as to whether it was appropriate for a trustee who knew or ought to have known the terms of the Trust to pray in aid the alleged ignorance of donees of a power (in this case beneficiaries) to appoint successor trustees, counsel for Appledore said that the Trustees had *'no duty to spoon feed'* a beneficiary; and that the Trustees would expect the beneficiaries to have understood the nature and extent of the fiduciary powers donated to them under the terms of the Trust.

29 Appledore assert (and we accept) that the only provisions of the Trust relevant, or potentially relevant, to the Representation are those contained in Clause 16 and Schedule 5 of the Trust. Appledore argue that the Trust does not provide any guidance as to when one *'moves down the order of priority in Schedule 5'* and argue that the order of priority must *'apply where the first persons listed are unable to make an appointment'*.

30 Appledore rely on the evidence filed and referred to above including that of B to the effect that B and C were not aware that they had priority to appoint, and A was not aware that he preceded Mr McLuskie in order of priority and that *'all parties appear to have accepted that [Mr McLuskie] was the person with the power to appoint'* – alongside Miss McLuskie who, of course, in fact had no power to appoint at all. It is argued that as none of the persons preceding Mr McLuskie in order of priority knew that they preceded him, that they were accordingly *'not able to make an appointment'* so that the right to appoint in fact passed to Mr McLuskie or, in the alternative, that since B, C and A were content with Mr McLuskie making the appointment of Appledore, they had ceded their entitlement to appoint to Mr McLuskie.

31 Appledore rely on Article 17 of the Law which provides:

"17. Appointment out of court of new or additional trustee

(1) Paragraph (1A) applies if –

(a) the terms of a trust do not provide for the appointment of a new or additional trustee;

(b) any such terms providing for any such appointment have

lapsed or failed; or

(c) the person who has the power to make any such appointment is not capable of exercising the power, and there is no other power to make the appointment .

(1A) A new or additional trustee may be appointed by — (a) the trustees for the time being;

(b) the last remaining trustee; or

(c) the personal representative or liquidator of the last remaining trustee .

(2) Subject to the terms of the trust, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed a trustee .

(3) A trustee having power to appoint a new trustee who fails to exercise such power may be removed from office by the court .

(4) On the appointment of a new or additional trustee anything requisite for vesting the trust property in the trustees for the time being of the trust shall be done."

32 It is argued that Article 17 applies in these circumstances because, on Appledore's arguments, the terms providing for the appointment of a new trustee had either lapsed or failed, or the person with the power to make an appointment was not capable of exercising the power because they did not know of it and, in these circumstances, the Trustees for the time being, i.e. Mr and Miss McLuskie (but for the purposes of this argument, Mr McLuskie) had the power to appoint new trustees.

33 We now consider the arguments advanced by B on the issue of the validity of the DoRA before turning to the ancillary arguments, in particular rectification.

34 B says that shortly after Appledore's purported appointment, the quality of Appledore's administration of the Trust deteriorated. These complaints do not concern us for the purpose of this application. This resulted in B taking advice from an English law firm, Payne Hicks Beach ("PHB"). In September 2021, B was advised by PHB that the purported appointment of Appledore was invalid. B advised Appledore of the defects in the DoRA. This was followed by various correspondence, in particular a letter from PHB to Appledore's lawyers dated 11 th November 2021. The letter explained that there was an *'immediate problem'* in Appledore's purported appointment as trustee of the Trust. In summary, the Trustees did not have the power to appoint Appledore at the time of the appointment and those with the relevant power were C and B. Schedule 5 required those with the power to appoint Trustees to be approached in order of priority and as at 31 st

January 2020 those with the relevant power were C and B acting unanimously. The retiring Trustees had no power to appoint Appledore and accordingly the appointment was ineffective. The letter went on to say that Appledore was accordingly a Trustee *de son tort* and subject to the duties set out in Article 21 of the Law, requiring them, *inter alia*, to act with due diligence; as a prudent person would; to the best of the trustee's ability and skill; and to preserve and enhance the value of the Trust. In the same letter, PHB said:

> ***"On the basis that you were never validly appointed all decisions and actions taken by you to date, including any director appointments, distributions or other steps, will be invalid or ineffective.*** Please provide a schedule of all such steps taken since 31 January 2020 as soon as possible."

35 Notwithstanding repeated requests, this schedule was only provided the day before the hearing before us.

36 The letter went on to draw to Appledore's attention that the McLuskies remained Trustees of the Trust and will *be 'jointly liable with you for all acts and omissions you make as Trustee de son tort'*.

37 B says that although Appledore's case depends on being able to show that the power of appointment vested in Mr McLuskie alone (he had been the last person in order of priority under the proper version of Schedule 5) it is not clear how even on Appledore's own interpretation of Schedule 5 this is the result. On Appledore's case all the parties, including Mr McLuskie, shared the belief that the power of appointment was vested in the Trustees jointly, i.e. him and his daughter.

38 In fact, it was suggested that all the relevant parties shared the same 'erroneous belief' as Mr French, on the part of Appledore, claimed in his affidavit that the power of appointment vested in Mr and Miss McLuskie. B said in his evidence that he was not aware of the existence of the 'incorrect' version of Schedule 5 and accordingly cannot have shared such a belief. Appledore's interpretation of Schedule 5 would deprive the donee of the power of appointment and the right to exercise it simply because they were operating on the basis of a mistaken belief as to the correct identity of the donee or were ignorant of the correct identity of the donee. It is argued that, on any view, it is unfair in circumstances where B and C were not responsible for the Trustees' error, for them to be deprived of their power of appointment simply because of a mistake which was not of their own making. There is no suggestion that B and C were under any disability at the time – they were able to exercise the power of appointment and presumably would have done so had they been consulted and had they been able to agree upon a new Trustee. Accordingly, it is argued that the power of appointment was and remained vested in B and C jointly. That being the case, the Trustee's purported exercise of a power pursuant to the DoRA was invalid.

39 As to the argument as to the provisions of Article 17 of the Law, it is said that it is misplaced as none of the conditions provided in Article 17(i)(a) to (c) can be satisfied – the terms of the

Trust do provide for the appointment of a new Trustee; the terms have not lapsed or failed and the persons with the power of appointment are capable of exercising it. Accordingly, Article 17 has no application on these facts.

40 In its final analysis, the arguments of B were very simple – the persons in whom the power was vested to appoint new or additional Trustees had not exercised that power. Others who did not have that power purported to exercise it and accordingly the exercise of the power was invalid. B argued that however the mistake in terms of referring to the wrong version of the Trust arose, it cannot have deprived him and C of their rights under Schedule 5. Mere ignorance on the part of the donee cannot deprive such a person of their right to exercise the power.

41 We have only summarised above the arguments which merited examination. By not setting out all the arguments ventilated by the parties it is not because we have overlooked them.

42 We also received submissions from Advocate Le Maistre, who was appointed guardian for the minors and unborn beneficiaries of the Trust by way of a Consent Order dated 20 th May 2022. The guardian observed that as a general proposition it is important for there to be stability in relation to a trust and trusteeship and that that is in the best interests of the beneficiaries. He observed that even if the Court determined that the DoRA is invalid, then the Trustees will remain trustees of the Trust which will likely lead to a new Trustee being appointed in the near future. The guardian did not adopt a positive stance on whether or not the DoRA is valid or invalid.

Decision on validity

43 We unhesitatingly accepted the arguments advanced on behalf of B. The DoRA is accordingly invalid.

44 There is nothing unusual or surprising about the terms of Schedule 5 and, in our view, the effect of Clause 16 and Schedule 5 is – per Clause 16 – that the persons specified in Schedule 5 ‘in order of priority’ were empowered to appoint new or additional Trustees and that in those circumstances the Trustees were obliged to approach that person for the purpose of them exercising that power of appointment. Initially this meant approaching B and C. It is to our mind irrelevant that B and C were unaware of the terms of Schedule 5. On any view, they at no stage misled the Trustees as to the terms of the instrument and were in no position to do so. In our view, if B and C were both dead or incapacitated through ill health, or for any other legitimate reason, then the power of appointment would pass to A and thereafter to Mr McLuskie. We do not determine whether or not the power of appointment would pass to A if B and C were simply deadlocked as both parties invited us not to rule on that issue and it may need to be the subject of further argument. But on the facts available in this case, there can be no serious suggestion that B and C had by virtue of circumstances lost their power to appoint new or additional Trustees.

Rectification

45 Appledore advanced an alternative claim to the effect that rectification of the DoRA will put the parties in a position that they would have been in had the DoRA been drafted in accordance with the intention of the parties. The prayer to Appledore's Representation seeks an order from the Court in the alternative to the declaration that the DoRA is valid, that the Court should rectify the DoRA so that it validly appoints Appledore as trustee of the Trust.

46 We proceeded on the footing, as invited by counsel, that the test for rectification in a bi-lateral contract such as a DoRA is the same test as pertains when consideration is whether or not the Court should rectify a voluntary settlement. In this regard, our attention was drawn to the decision of Commissioner Clyde-Smith in *BB, A and C v E, F and G in the Matter of the D Retirement Benefit Trust* [2011] JRC 148, where the Court considered the traditional test for rectification at paragraph 22. In respect of the test for rectification, we agree with the approach recently set out in the judgment of the Royal Court in *The Maria Trust* [2022] JRC 164. It may be that a different approach is warranted in the case of a bi-lateral contract such as a Deed of Retirement. In any event, whatever the test is, we were satisfied that this was not a case in which rectification ought to be granted.

47 It is argued that Appledore can meet the requirements for rectification of a DoRA because:

(i) The DoRA does not carry out the intentions of the parties because, if it is invalid, it does not carry out the intention of Mr McLuskie and Miss McLuskie and Appledore, the parties to the DoRA, to appoint Appledore as trustee of the Trust; and

(ii) There has been full and frank disclosure by the Trustee; and

(iii) There is no other practical remedy.

48 The draft Instrument of Rectification produced on behalf of Appledore describes Mr McLuskie alone as the *'consenting appointor'* and adds to Recital (D), which is set out above, the words *'and the person with power to appoint under Schedule 5 is the Consenting Appointor'*. The operative provisions of the Deed also provide that the Retiring Trustees ' *and the Consenting Appointor*' hereby appoint the New Trustee (i.e. Appledore). Accordingly, the proposed words of rectification do no more than provide that the powers are being exercised by Mr McLuskie alone rather than by the Trustees jointly as provided for by the DoRA as executed.

49 In our view, the claim seeking rectification was hopeless. The power of appointment has never vested in Mr McLuskie alone – it is and was always vested jointly in B and C. Accordingly, there is no advantage to Appledore in attempting to rectify the DoRA even if this would give effect to Mr McLuskie's true intentions at the time of execution, as the DoRA

as rectified would not amount to a valid exercise of the power of appointment under the provisions of Schedule 5.

50 In any event, Mr McLuskie never had any intention of exercising the power of appointment by himself; he intended to exercise it jointly with his daughter.

51 Accordingly, the claim in rectification is doomed. Even if it had merit it would still fail on the footing that it is not the only *'practical remedy'* available to the Court. As the DoRA is invalid, it follows that the Trustees remain in place – it is clear from the wording of the DoRA itself that the Trustee's resignation was intended to take effect simultaneously with the appointment of Appledore per Recital C and paragraph 5 of the DoRA.

Appointment of Appledore now

52 A further ancillary argument advanced by Appledore was that in the event of the Court finding the DoRA to be invalid and declining to order rectification, the Court should now appoint Appledore as trustee of the Trust with prospective effect. We can see the attractions of the argument advanced by the guardian that it is in the interests of the beneficiaries for there to be stability in respect of the trusteeship and a change of trustee is inevitably disruptive and costly and may be difficult in circumstances where there is, as in this case, a dispute between B and C, two of the three principal beneficiaries.

53 However, whatever the position in early 2020, we know today that one of the three beneficiaries is wholly hostile to Appledore. In those circumstances it would be unusual for the Court to appoint a trustee in the face of strong opposition from a person with a significant beneficial interest under the Trust.

54 Further, without the need to make any settled findings of fact and putting to one side, as we do, many of the complaints made by B about Appledore's purported trusteeship, it is on any view the case that the DoRA was executed without reference to the terms of the Trust in circumstances which, even today, remain opaque; Appledore failed to reply timeously to correspondence; Appledore delayed in producing a schedule of decisions that it invited the Court to ratify and filed the schedule at the eleventh hour in breach of the terms of a Court order requiring evidence to be filed by a much earlier date. We also note that B's suggestion by letter dated 10 th February 2021 that mediation could help resolve matters between the parties was not taken up. It is surprising that Appledore, notwithstanding their long involvement with some of the underlying businesses of the Trust, are still unclear as to the value of the assets held in Trust.

55 In these circumstances, B is entitled to say that he has no confidence in Appledore and it would be quite wrong for us to impose, by way of an appointment at this stage, Appledore upon the beneficial class. Accordingly, we decline to appoint Appledore as trustee of the Trust and express the hope that B and C will work together, cognisant of the fiduciary duties

that they owe to the beneficial class by virtue of their power, to appoint a new trustee in a spirit of cooperation and to assist them in resolving their disputes.

Ratification

56 Finally, we turn to ratification of the acts carried out by Appledore as a trustee *de son tort* since their purported appointment.

57 As to ratification, although the Trustees remain in office, legal title to the assets was, we understand, transferred to Appledore as trustee de son tort. Accordingly, Appledore held those assets as bare trustee for the Trustees i.e. for Mr McLuskie and Miss McLuskie.

58 As we have said, shortly before the hearing Appledore provided a schedule entitled *'Schedule of Trustee Actions'* exhibited to a witness statement made by Mr French on behalf of Appledore on 3 rd July 2022. The statement did not explain the actions but merely exhibited them to the statement and the actions are listed briefly in six paragraphs as follows:

> ***"Schedule of Trustee Actions***
>
> ***1. Continued the practice of the Former Trustees to fund D(mother of C & B) medical bills and expenses*** .
>
> ***2. Paid legal & professional fees for the Trust as normal*** .
>
> ***3. Entered into a loan with E Settlement (C's Family Trust) as previously agreed by Former Trustees but not executed by them prior to their retirement. €250,000 was sent July 2020 (previously it was agreed to be more but we took the decision following COVID to reduce the amount). To date circa £130,000 has been repaid to the Trust*** .
>
> ***4. Recovered £4.5 Million of loan outstanding from storage businesses*** .
>
> ***5. Instructed [a firm of accountants] to do a full business review of all Trust assets*** .
>
> ***6. Signed off on a new storage acquisition in August 2021, pursuant to a 15 July 2021 investment proposal presented by B's team…."***

59 It was difficult, if not impossible, for counsel for B and for the minors and unborns to comment in any detail on this Schedule. For example, the item at number two does not identify any of the precise sums paid for legal or professional fees, when they were invoiced or provide any breakdown in relation to those fees.

60 As to the Court's power to ratify, our attention was drawn to two authorities. First, in the matter of *Re BB* [2011] JLR 672, where the Court, having declined to order rectification considered ratification of the acts of a trustee de son tort. At paragraph 35, the Court quoted an extract from Lewin where the author stated 'There is limited authority on the validity or otherwise of the exercise of powers and discretions by a trustee de son tort'. The Court continued:

> ***"36. The status of a trustee de son tort was considered in*** *Jasmine Trustees Limited v Wells & Hind* [2007] EWHC 38 (Ch) ***where Mann J said this at paragraph 42:-***
>
> ***"The status of a trustee de son tort is limited.*** He will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee de son tort will be obliged to hold the property for, and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement …" .
>
> ***37. The representors, notwithstanding their defective appointments, remain accountable to the beneficiaries of the Trust as if they had been validly appointed as express trustees and this on the principle that a person who assumes an office ought not to be in a better position than if he were what he pretends; he is accountable as if he had the authority which has been assumed (see Lewin at paragraph 42–74)*** .
>
> *****
>
> ***39. We are then left with the actions taken by the representors as trustees de son tort from the date of their respective appointments to the present. The representors have helpfully provided us with a schedule setting out everything done by them, including appointments and distributions of capital and income to the beneficiaries. These they seek to have ratified pursuant to the Court's powers under Article 51 of the Trusts Law which permits the Court to make orders concerning inter alia "the exercise of any power, discretion or duty of the trustee" and "the conduct of the trustee"*** .
>
> ***40. There appears to be a dearth of authority on ratification. Mr MacRae drew our attention to an order made by the Court, Sir Philip Bailhache, Bailiff, presiding in a representation brought by Barclays Private Bank and Trust Company Limited in relation to the PDK Settlement on 1st November 2004, in which the Court ratified the acts of the trustee de son tort in the following terms:-***
>
> ***"The Court …. ratified the past acts of the representors since 28th October 1991 taken in its capacity as the purported trustee of the PDK Settlement, subject to any claim alleging breach of trust that any person beneficially interested under the PDK Settlement might be entitled to make"*** .
>
> ***No judgment was issued by the Court when making that order*** .

…..

42. Lewin has the following passage on the powers of trustees to confirm the acts of trustees de son tort at paragraph 42–82:-

"42. In some trusts, powers may be available to properly constituted trustees such as enables them to confirm the exercise of powers purportedly exercised by the trustee de son tort. While it would not be open to the properly constituted trustees to exercise powers of this character merely so as to save the trustee de son tort from liability, nonetheless the exercise of such powers may be justified so as to save the trust from the havoc that would be cause by any attempt to unscramble what was purportedly done by the trustee de son tort, and would have been properly done had there been no defect in his appointment. In a case where a settlement was de facto administered by the settlor who bought agricultural land in the name of the trustees and granted a tenancy, it was held, upon the purchase being affirmed by the trustees, that the tenancy bound them as well."

…..

44. The general principle guiding the Court in the exercise of its jurisdiction under Article 51 and of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. Where, as here, a trustee de son tort has acted in good faith, unaware that he has not been duly appointed to office, then applying that general principle, it seems to us that we should save the Trust from the havoc that may ensue from any attempt to unscramble what was purportedly done by the trustee de son tort by confirming and approving those actions (i.e. to ratify them), whilst at the same time preserving any claims the beneficiaries may have against the trustee de son tort for breach of trust assuming he had been validly appointed."

61 These principles were considered subsequently in *The Z Trust* [2016] (1) JLR 132 where the Court first held that the power to appoint new trustees was a fiduciary power even when it was vested in a person other than the outgoing trustee and that the appointor had a duty to:

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

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

(iii) Take into account relevant matters and only those matters; and

(iv) Not to act for any ulterior purpose.

62 If the holder of a fiduciary power to appoint new trustees was found by the Court to be in breach of any one of more those duties, the Court could declare the appointment to be invalid.

63 As to the case before the Court, where the settlor's appointment of the purported trustees was set aside and the retired trustee would be treated as never having retired (as in this case), the Court needed to consider the acts committed by the trustee de son tort. In Z, the Court was provided with a draft order to which had been attached a Schedule of Acts for ratification at trust level, with a separate schedule for ratification of acts at company level (paragraph 55 of the judgment). The Court considered the case of *Re BB* and held in summary that although the case was rightly decided a more extensive analysis of the Court's power to rectify was appropriate. This analysis is contained at paragraph 75 to 90 of the judgment. The Court was attracted to the distinction being drawn between three forms of ratification or confirmation, namely:

> (a) Confirmation by perfection of an imperfect act or transaction – in these cases, a transaction which is capable of being set aside or otherwise impugned becomes valid and enforceable;
>
> (b) Confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect. In such a case, the state of affairs intended to have been brought about by a tainted or doubtful act or transaction is brought about by a second act or transaction which is effective; and
>
> (c) Confirmation by non-intervention in acts or admissions which were, or may not have been authorised, but have nevertheless been acted upon so that these acts or omissions remain undisturbed and the trust administered on the footing as if those acts or omissions had been done, or admitted to be done, with the authority of duly appointed trustees. An example of this is where a trustee de son tort who had control of the trust assets and mistakenly believed that they are duly constituted trustees, operated a discretionary income trust so as to make distributions of trust income amongst the class of beneficiaries in a manner which would have been entirely proper had the trustees been duly appointed, and those distributions subsequently left undisturbed on the same footing as though they had been validly made (paragraph 64 of the judgment).

64 It is not necessary for the purpose of this judgment to analyse the schedule of actions placed before us as we gave directions to the parties as follows:

> (a) within fourteen days of the date hereof, the principal beneficiaries and Counsel for the minor and unborn beneficiaries shall set out in writing any queries they may have by the way of requests for further information arising from the Schedule, and any other convened beneficiaries shall have liberty to make their own requests;
>
> (b) within twenty-eight days of the date hereof, Appledore shall respond to those

queries raised in writing;

(c) within fourteen days thereafter, such beneficiaries, including Counsel for the minor and unborn beneficiaries, as wish to make submissions on the issue shall give reasons in writing why the Court should not ratify matters which are the subject of the Schedule.