SW v X Trust Company Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Clapham, Le Cornu
Judgment Date:	02 October 2007
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Text

[2007] JRC 187

ROYAL COURT

(Samedi Division)

Before:

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

In the matter of the H Trust

Between
SW
Representor
and
(1) X Trust Company Limited
(2) R W
(3) R C W
(4) AP

Respondent

Advocate R. J. MacRae **for the Representor**.

Advocate D. M. Cadin **for the First Respondent**.

Authorities

In the matter of the H Trust [2006] JRC 057.

Leasehold Reform Act 1967.

Lewin on Trust 17 th Edition.

Marley v Mutual Security Merchant Bank [1991] 3 All ER 21.

S Settlement [2001] JLR N 37.

B Trust [2006] JRC 185.

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

THE COMMISSIONER:

1 This is an application by SW, a beneficiary of the H Trust, for X Trust Company Limited (the "Trustee") as trustee of the H Trust to be directed to give effect to the Order of Coleridge J in the English High Court of Justice, Family Division, dated 27 th September, 2006, ("the English Order"), in divorce proceedings between SW and her husband RW, the settlor of the assets of the H Trust.

2 This application was brought before the Royal Court on 20 th June, 2007, when the Court convened the Trustee, RW, who has not appeared but who has submitted an affidavit, and RW's two children who all represent the interest of the spouses and minor children and any future issue they may have. They did not appear but submitted letters to the Court. The matter was heard on the 20 th August 2007.

Previous directions

3 Directions were given to the Trustee by the Royal Court on 12 th April 2006 (*In the matter of the H Trust* [2006] JRC 057) when the Royal Court:-

(i) Directed the Trustee not to submit to the jurisdiction of the Family Division. The Court made it clear (paragraph 18) that the decision not to submit was quite separate

from the question of the provision of information. The Court stressed the importance of the parties having the fullest information concerning the financial affairs of the H Trust, so that any decision of the Family Division would be based on the true financial position. It is clear that the Family Division was indeed given the fullest information in relation to the affairs of the H Trust.

(ii) Declined to make any order in relation to the decision of the Trustee to change the proper law of the H Trust from English Law to Jersey Law.

(iii) Declined to give open ended approval to the stance of the Trustee in relation to the request from the husband and wife.

4 The Court on that occasion added a postscript which is worth setting out in full:

> ***The Court would like to take this opportunity of emphasising some of the remarks which it made during the course of the hearing.*** On the evidence before the Court, the trust fund appears to comprise almost the entirety of the assets available to provide in future for the husband and the wife. The marriage has been a long one and the assets were contributed to the Trust by the husband during the course of the marriage. The Trustee has used the trust fund to maintain the husband and the wife at a high standard of living in recent years as a result of which the capital appears to have been somewhat depleted. No payments have been made to or for the benefit of any of the other beneficiaries .
>
> ***The marriage has now come to an end and clearly the wife has to be provided for as well as the husband, albeit that it would seem that both will have to live at a reduced standard as compared with the somewhat unrealistic level which has been provided in the past.*** The wife remains a beneficiary at present by reason of her status as a spouse and, even following decree absolute, it would be open to the Trustee to appoint her as an additional beneficiary. In the circumstances it would seem, on the face of it, entirely appropriate that the Trustee should agree to assist in giving effect to any reasonable arrangement reached by the parties in relation to their financial affairs. The funds in this case are limited and it cannot be in the interests of the husband or the wife (as beneficiaries) or the trust fund (and the other beneficiaries) for these limited funds to be spent on litigating this matter (whether before the Family Division or this Court). We hope very much that the Trustee, the husband and the wife will all give due consideration to this aspect of the matter .

5 As can be seen from what follows, very substantial sums indeed have since been spent on litigation, sums representing some 18% of the assets held within the H Trust at the date of the English Order and sums the benefit of which neither party can afford to lose.

English Order

6 Following two unsuccessful attempts at financial dispute resolution hearings in which apparently RW did not really take part, the financial aspects of the marriage came before the Family Division in September, 2006. At that time there were assets within the H Trust of about £2.5 million and precious little else. Judgment was given by Coleridge J on the 18 th September in which he observed:

> ***"There is barely enough to go round, barely enough to support a reasonable way of life for both spouses following the divorce for the rest of their life.*** That situation is in stark contrast to the recent past when the lifestyle of the parties can be described as "stylish" if not "lavish". It certainly would have given the impression of very significant wealth and indeed, until a few years ago, there was a lot more money to play with."

The Judgment continued:

> ***"5. So this case is bedevilled by the fact that both parties have had to come to terms with the unpalatable reality that, following their separation, they are both going to have to take a very significant drop in their living standard. When such an adjustment coincides with divorce, a wife invariably - and often justifiably - believes there is financial manoeuvring going on to defeat or reduce her claim. When that is combined with the fact that the assets are held offshore, apparently by hostile trustees, suspicion deepens. The wife in this case believes that the trustees are in the husband's pocket to do her down. Having now heard the case over five days, heard the parties give evidence at some length, read numerous statements and examined numerous documents in eleven lever arch files, I am satisfied that neither the husband nor the trustees are embarked on a campaign to deliberately do her down; however some of their actions and statements have been at times both ill-judged and intemperate. The husband has, furthermore, been unco-operative in his disclosure and erratic with interim provision. That does not help*** .
>
> ***6. Furthermore, the trustees have also entered the arena of the debate between the husband and wife, and expressed views about the outcome of these proceedings which was not their department. Particularly I am referring to a letter of 20th January 2006 which is to be found at bundle 2, p. 198. In so doing, they have become partisan and in the husband's camp, and so, predictably, the wife wants no solution to this case which contemplates them controlling assets of which she has the use*** .
>
> ***7. However, the trustees' position has not been and is not easy, as they have had to try and stem the outward flow of funds from the trust at a rate which is, quite frankly, unsustainable in anything but the short term. They have had to try and inject some reality into the parties' spending habits."***

7 Coleridge J found the evidence of SW to be transparent and honest but there were aspects of RW's evidence that he found unsatisfactory, in particular his failure to disclose an interest

he had in land owned by his brother (an asset which was not taken into account in the orders that were made) and a bank account in which the sum of US$ 96,000 was deposited.

8 The parties had married in 1983 when SW was 31 and RW 53 and had no children. Today RW is 78 and SW 56. RW's two children RCW and AP were from his previous marriage. The H Trust had been created in 1992. The assets settled by RW into the H Trust related to an investment made by him in the early part of 1983 which came good in 1997 when some 7.6 million dollars was received by the H Trust. However, Coleridge J found that SW had thrown "in her lot fully with the husband" at the outset of the marriage by selling her own property in New York and paying the profit of some US$97,000 to RW thus making a significant capital contribution at the beginning of the marriage. RW is named under the Trust Deed as the principal beneficiary but under the letter of wishes it was made clear that on his death SW was to step into his shoes and the trust assets and income devoted to her during her lifetime. That was changed in 2004 and was one of the triggers for the issuing of the divorce petition.

9 In 1989 SW and RW had acquired the lease of a manor in England in which they subsequently lived with staff relying on loans from the H Trust. By 31 st December, 2004, those loans had totalled some 4.5 million dollars which were written off by way of a capital distribution to RW. In 2005 and 2006 there have been further capital distributions of $714,000 and $508,000 respectfully, leaving the Trust with the £2.5 million worth of assets it held in September 2006. Those assets are in essence as follows:

(i) Properties in Scarborough (the "UK Properties") valued at £400,000 in one of which SW's mother resides.

(ii) Land in British Columbia (the "Canadian land") valued at £367,000.

(iii) An investment portfolio valued at £1,498,570 (as at September 2006).

(iv) A Portuguese property (the "Portuguese property") held in the names of RW and SW, but in which the H Trust has an interest, valued at £251,358.

10 Coleridge J acknowledged the fact that all the material assets available to the parties were held within the H Trust as follows:

"40. I turn, then, to look at the financial resources of the parties. Now, the preliminary point, of course, is that everything of significance is held in the H Trust. However, I shall include the assets in that trust as resources in this case for a number of reasons. Firstly, the trustees have given their blessing to both of the husband's proposals, one of which, of course, contemplates or must contemplate a significant payment out of the trust to the wife outright .

41. Secondly, the way in which both parties have approached this case indicates that they accept that these resources are available, in the sense in which it is understood in this division, for distribution between the parties. Having seen what the trustees have said, I hope very much that they will accept that the decision I make is after the most anxious consideration of all the factors under section 25. I hope and believe that they will co-operate to implement it. Accordingly, as I say the H Trust assets must be in the forefront of any decision."

11 The following orders were made in favour of SW:

(i) That RW do transfer or procure the transfer by the Trustee to SW of the UK Properties.

(ii) That RW do pay or procure the payment to SW of a lump sum of £960,000.

12 SW was ordered to transfer any interest she may have in the Portuguese property (in which RW lives) to RW. Pending the surrender of the lease of the manor (in which SW lives), RW was ordered to pay £5,000 per calendar month to SW until the 28 th February 2007 in the expectation that the lease of the manor would have been surrendered by that date (which it has not) and a further £6,000 per month towards the up keep of the manor. The maintenance in favour of SW was to cease in any event upon the payment of the lump sum. The effect of these orders was to divide the assets within the H Trust equally between SW and RW, a principle which RW has subsequently agreed as being fair.

13 There was a subsequent hearing on costs. SW had incurred costs of some £304,000 and RW £136,000 making a grand total of £440,000 near on 18% of the assets. Coleridge J found that SW had been put to considerable extra expense by the way the litigation had proceeded. He noted that it was always expensive where offshore trusts were involved and where inevitably a great deal more work was required. He took into account that RW did not really take part in the financial dispute resolution hearings which must have been an expensive and wasteful outing. The lump sum of £960,000 already contained a sum of £110,000 to provide SW with parity for loans which RW had received from the Trustee towards his own costs and RW was therefore ordered to pay a further £140,000 by way of costs to SW.

14 It is to be noted that none of these orders were made against the Trustee.

15 RW and SW had spent some £1.2 million on improvements to the manor and it was thought that there was some surrender value in the lease. Furthermore, between the Judgment of the Family Division and its formal order it had been agreed that the parties should instruct counsel to advise on the possibility of the enfranchisement of the lease, the profits of which were to be divided equally between them - orders to this effect were

included in the final order.

16 The Judgment of Coleridge concluded as follows:

> ***"I conclude by saying that I hope the trustees and, for that matter, the Royal Court in Jersey will appreciate that I have tried to be as even-handed and fair between the parties, taking into account all the circumstances and particularly the factors under section 25.*** I am aware that this award is more than the trustees have sanctioned. It is also significantly less than the wife was seeking. No-one will be happy about the outcome of the litigation, whether here or in Jersey, but it must now come to an end or there will be nothing left for anyone except the lawyers."

Trustees Response

17 The Trustee took advice on the English Order (in respect of which privilege was not waived) and considered the matter at a meeting of the directors on 23 rd November, 2006. Four directors were present and a careful record of the meeting was made. In essence the directors concluded that giving effect to the English Order would more or less exhaust the trust property and with only SW receiving any apparent benefit to the exclusion of RW and his children and grandchildren. They agreed that provision should be made for SW but such provision should not result in:-

(i) the total exhaustion of the trust property, or

(ii) RW being put into the position where he would have to rely on the support of his children for the rest of his life; or

(iii) the other beneficiaries of the H trust, namely RW's children and grandchildren, in effect being excluded from any future benefit under the H Trust.

18 The Directors decided to make a proposal as an alternative to the English Order under which in broad terms SW would be given the right to live in UK Properties (and for so long as she lived there her mother would be able to live with her), or the UK Properties would be sold and an alternative purchased for a maximum of £350,000 in which she would be able to live on the same terms. She would also be given a lump sum distribution of £158,000 towards her legal fees, £50,000 to act as a financial cushion and an annual allowance of £30,000. It was proposed that RW also be offered a similar financial cushion and monthly allowance. The Directors also resolved that if no agreement could be reached in respect of their alternative proposal the Trustee would bring the matter back before the Royal Court convening SW and RW and the other beneficiaries with a view to securing directions from the Royal Court.

19 A copy of this Minute together with an explanatory letter dated 23 rd November 2006 was

sent by Bedell Cristin, acting for the Trustee, to the parties' advisors, in which it was re-iterated that if no agreement could be reached then the Trustee had resolved to take the matter before the Royal Court for directions. On 21 st December, 2006, Advocate Michel responded on behalf of SW saying that the alternative proposal of the Trustee was wholly unacceptable and asking for the matter to be brought before the Royal Court in January.

20 In the meantime on the 8 th December, 2006, the Trustee had received a copy of the opinion of leading counsel on the prospects of the enfranchisement of the lease of the manor from which it formed the view that not only was there a realistic prospect of the enfranchisement application being successful, but there was also a real prospect of both RW and SW receiving a substantial windfall, which in monetary terms had the potential to outweigh the assets of the H Trust. The Trustee's understanding was that Coleridge J had not taken into account the possibility of the enfranchisement and its impact upon the parties and it decided therefore to revisit the question of whether it should apply for directions.

21 In January 2007 RW consulted a new English solicitor, David Mills, and in an email of the 5 th January to the Trustee RW reported him as advising that the solicitors and counsel had been negligent in proceeding with the English proceedings prior to determining the enfranchisement issue which he felt was a bonanza. He apparently advised that the Trustee should stop even thinking about a division of the assets for the time being. In his reported view the enfranchisement gave the Trustee the perfect excuse to ignore the English Order. By email dated 11 th January 2007 to the Trustee, RW wrote in the following terms:-

> *"I, however, agree with David [Mills] that there should be no division of the assets of the Trust until the re-enfranchising exercise is completed — I think you now have another string to your bow as a defence for not implementing the English Court Judgment.* We have already discussed the point last week and you also agreed with that position as you do in your fax today".

We were not shown the Trustee's responses to these emails from RW. What we were told was that sometime towards the end of January 2007 the Trustee formed the view that it would be inappropriate for it to utilise the limited resources of the H Trust to bring a further application before the Royal Court and that it should not bring an application until such times as the outcome and the quantum of the enfranchisement was known which at that stage it expected to be within six months. There was no signed minute of this meeting. However this second decision was not communicated to Advocate Michel until 15 th May, 2007, by which time it had become apparent to the Trustee that the freehold owner of the manor was resisting the claim and that the road to enfranchisement may be far from quick. Whilst it is clear from the papers before us that RW was fully aware and supportive of and indeed may have prompted the Trustee's decision in this respect, the Trustee accepted that there had been no consultation with SW.

22 Meanwhile SW's financial position had become dire. From the date of the English Order the Trustee had paid £10,000 a month to RW on the basis that he would utilise half of that

sum to discharge his obligation under the English Order to pay £5,000 a month to SW. He failed to do so. SW herself wrote to the Trustee on 18 th October, 2006, asking for her monthly payments to be made directly from the Trust as she had received nothing from RW. She told the Trustee that RW made it clear to her that he intended to pay her absolutely nothing from the £10,000 per month which he needed to pay his own expenses and debts. In his letter of the 21 st December, 2006, Advocate Michel informed Bedell Cristin that SW was in dire financial straits and asked for confirmation that the application to the Court for directions would be undertaken during the month of January, 2007. The Trustee had drafted a letter to the parties on the 22 nd December 2006 giving notice that as from the 1 st January 2007 it would commence payments to each of the parties direct but for reasons which were not explained this was not implemented. A reminder was sent by Advocate Michel on 6 th February, 2007, with a warning that unless the Trustee brought the matter back before the Court SW would have to make an application herself.

23 Bedell Cristin did not respond until the 15 th May 2007 when they made reference to the arrangement by which £10,000 was paid monthly to RW and observed that although there had been historic complaints about payments the Trustee was not aware that either party was unduly concerned about the *de facto* arrangements but that if the parties disagreed the Trustee was willing to revisit the mechanics of payment. It is difficult to see how the Trustee could have had such an apparently relaxed attitude to the financial position of SW bearing in mind the correspondence from her and her lawyers and the fact that RW himself had informed it by e-mail dated 5 th January, 2007, that he could not maintain SW out of his allowance of £10,000 per month until he had discharged his own debts. He had also made reference in an email to the Trustee dated the 3 rd January 2007 to making SW as uncomfortable as possible. SW's financial position continued to deteriorate. She came close to having her electricity cut off and had no fuel for heating, hot water or cooking. The local council had obtained judgment for arrears of council tax and had ordered bailiffs to attend at the property to enforce the Judgment. She was under constant pressure to repay the joint overdraft and the loan she had taken out from AIB. It was not until July of this year (after her application had been issued) that the Trustee commenced making direct monthly payments of £5,000 to SW and even then expected her to pay out of the first instalment urgently outstanding debts exceeding £10,000.

24 Throughout this period RW had been receiving £10,000 a month from the Trustee for the express purpose of using that amount to discharge his maintenance obligations to SW. Having been informed by and on behalf of SW that RW was not discharging his maintenance obligations to her, at no stage did the Trustee take this up with RW or make any other inquiry. As a consequence SW received no maintenance at all from the date of the English Order up until July 2007.

25 Whilst it is the case that the legal obligation to maintain SW rested upon RW, the Trustee was aware that all of the assets available to RW to discharge his obligation were held within the H Trust and it knew or ought to have known that RW was not using his allowance to do so. We think it is intolerable that SW should have been placed in this situation over

such a long period of time.

Discretion not surrendered

26 In his affidavit of 18 th July, 2007, sworn for the purpose of this hearing an officer of the Trustee stated it would seek to provide the factual background for the decisions that it had reached and seeks the directions of the Court as to how it should act in relation to the representation of SW. However, in its skeleton argument the Trustee made it clear that it had not surrendered its discretion to the Court and it stood by the decisions it had made. It was willing, however, to be guided by the Court.

Current position

27 At the time of the hearing of SW's application on 20 th August, 2007, the portfolio had reduced in value from £1,498,570 to £1,258,882, the reduction being attributable in the main to the £10,000 per calendar month distributed to RW and the monthly expenses of the manor. Under the arrangements now in force the Trustee distributes £5,000 per month to each of RW and SW and up to £6,000 per month in relation to the expenses for the manor i.e. £16,000 per month or £192,000 per annum; a quite unsustainable figure in the context of a trust whose current gross annual investment income is approximately £27,000.

28 SW currently has stated debts of some £15,698.60 in respect of household expenses, £6,800 in respect of miscellaneous matters, £302,322.85 in respect of legal fees and £294,000 in respect of bank and other borrowings so her current total indebtedness is £618,821.45. RW has stated debts of £212,638 although there is an element of double accounting in that for example both parties included in their debts the RBS joint overdraft in the sum of £47,000. Advocate MacRae pointed out that RW had been receiving £10,000 per month for at least a year and upon his analysis of RW's indebtedness it was in fact only some £30,000. Unlike SW most of RW's legal fees had been discharged by the H Trust. It is difficult for us in the absence of RW to determine the position with any certainty but we are inclined to accept that RW's debts are lower than claimed.

29 The Trustees' current strategy is to continue with the monthly distribution of £16,000 pending the completion of the enfranchisement proceedings and to fund the legal costs of those proceedings and the acquisition of the freehold if successful. For the enfranchisement proceedings to have any chance of success the manor must continue to be maintained and SW must remain in occupation. There are a number of difficulties with this strategy as follows:

(i) There have now been two further opinions from English counsel, the second of which makes it clear that there is a risk that the enfranchisement proceedings could fail and counsel cannot now consider the prospects of success until the owner pleads

his case.

(ii) The Trustee has no information as to the likely duration of the enfranchisement proceedings and any subsequent appeal.

(iii) Although the Trustee has allowed £100,000 for the legal costs, it has no real idea as to the likely quantum of those costs and the potential liability of RW and SW (in whose names those proceedings will have to be issued) in respect of any adverse costs order should the claim fail.

(iv) It involves delaying giving effect to the English Order or making any material capital distributions to SW or RW pending the outcome of the enfranchisement proceedings, leaving SW in particular unable to service or discharge her substantial debts. This is unacceptable to SW.

(v) The Trustee proposes to finance the legal costs of the enfranchisement proceedings by way of a joint loan to the parties. SW is not prepared to accept liability under a loan. Indeed the limited costs so far incurred of £7,000 have been treated by the Trustee as a joint loan to RW and SW without SW's apparent knowledge or consent.

(vi) The Trustee has no advice on the likely profit that would be made on a successful enfranchisement of the lease and sale of the manor. SW has obtained provisional advice which shows that on a freehold valuation of £2 million the price payable to the freehold owner under the Leasehold Reform Act 1967, as amended, would be approximately £1,095,000, on a freehold valuation of £3 million the price payable would be £1,772,000 and on a freehold valuation of £3.5 million the price payable would be £2,060,000.

30 The Trustee produced to us a series of helpful nine year cash flow forecasts which showed that adopting their strategy and assuming a successful enfranchisement and sale of the manor in year three (with reduced distributions thereafter) and the sale of the Canadian land in year four, the H Trust could continue for nine years at which time it would have exhausted the investment portfolio leaving it with a cash balance of only £5,000, the UK Properties and the Portuguese property. The parties would have modest homes in which they could live but no source of income and it is clear therefore that they would be entirely reliant on the proceeds of the enfranchisement proceedings.

31 At the other end of the spectrum the forecasts showed that giving effect to the totality of RW's obligations under the English Order including costs and arrears of maintenance would leave the H Trust with the Portuguese property in which RW lives and the Canadian land which will take some time to market and sell with just over £5000 to conduct that exercise.

32 The Trustee viewed the current financial position of the parties as stark with some £800,000 being required to pay off their current debts leaving only enough money to

support them for a further two years. It suggested that it might be preferable for the parties to consider personal bankruptcy leaving the assets of the H Trust in tact and able to support them financially, potentially with a new trustee if necessary.

33 Advocate MacRae regarded the suggestion of bankruptcy as absurd. He argued that it would principally affect SW as RW lives in Portugal and that any distributions made by the Trustee to SW during the course of the bankruptcy will be taken by the Trustee in Bankruptcy, who would be most unlikely to pursue the enfranchisement proceedings.

34 In her application SW seeks a direction that the Trustee put her in the position that she would have been if the English Order had been complied with by RW but at the hearing it was clear that she was prepared to ameliorate that position by having regard to the principle of equality as enunciated by Coleridge J in the English Order. Advocate MacRae provided a schedule showing the position of the assets of the H Trust today compared to September 2006 when the English Order was made. Today the assets of the H Trust total £2,277,240, of which one half would be £1,138,620. To this figure he added £170,000 (being the sum actually advanced by the Trustee to RW to fund RW's legal costs in the English proceedings and not the figure of £110,000 referred to by Coleridge J), £42,000 to pay off the joint overdrafts and £40,000 being the sum SW should have received by way of monthly maintenance from the date of the English Order giving a total of approximately £1.4 million payable to her from the H Trust. That could be funded by:

(i) A capital distribution of £960,000 being the amount of the lump sum that was awarded by Coleridge J.

(ii) The transfer of the UK property valued at £400,000 again as ordered by Coleridge J.

(iii) A further sum of £40,000.

35 On this basis the Trustee would be left with the Canadian land, the Portuguese property and approximately £258,000 in cash out of which would be deducted the costs of effecting the distributions and transfers (estimated at £45,000) and the costs of these proceedings if ordered to be paid out of the trust fund.

36 It is clear that such an order would make the H Trust financially unviable and although it would be a matter for the Trustee, in all probability, the H Trust would be terminated by the remainder of the assets being appointed out to RW. RW would have the Portuguese property (value £251,000), the Canadian land (valued £367,000) and whatever cash was left in the Trust fund after the payment of fees, expenses and his debts. Giving a total value to RW is difficult because the level of fees and debts to be paid is not clear but it would be between £618,000 (the value of the two properties) and £876,000 (the value of the two properties and the gross amount of the cash). SW would have the UK Properties (value £400,000), and, after payment of her debts, the sum of £341,000 in cash - a total of

£741,000.

37 Mr MacRae submitted the decision of the Trustee to await the outcome of the enfranchisement proceedings should be set aside on the ground that it was unreasonable and/or driven by partiality and/or bias and, even if reasonable at the time it was made was apparently made some time ago in circumstances which no longer exist, i.e. enfranchisement was anticipated within six months against the background of similar advice from counsel produced without knowledge of the defences put forward by the freeholder of the manor. This would then open the door to the Court to intervene in the exercise of the Trustee's discretion and give directions to the Trustee to enable the distributions in favour of his client to proceed. The Trustee stood by its decisions but was willing to be guided by the Court.

Applicable Law

38 Before turning to our decision in this matter, we deal next with the legal issues raised before us.

Application for directions equivalent to surrender.

39 Advocate MacRae argued that any application by trustees for directions or guidance is the equivalent of a surrender of any discretion they have with regard to that matter. His authority for that proposition was the passage set out in paragraphs 29 - 102 of Lewin on Trust 17 th Edition which was in turn based upon the observations of Lord Oliver in *Marley v Mutual Security Merchant Bank* 1991 3 All ER 21. In our view that is not the way the trust practice has developed. It is clear from the Judgment of the Royal Court in the matter of the *S Settlement* [2001] JLR N 37 that the Court today will only accept a surrender of discretion for good reason such as deadlock or conflict and that in most cases the trustee will seek the blessing of the Court to decisions it has already made. It is certainly not the case today that every application by a trustee for directions is equivalent to a surrender of its discretion in relation to that matter. In any event this is an application by a beneficiary for directions to be given to a trustee and not an application by that trustee for directions. The Trustee in this case stands by its decisions and notwithstanding the contents of the Trustee's earlier affidavit made it clear at the hearing that it had not surrendered its discretion to the Court.

Article 9 Trust (Jersey) Law 1984 ("the Law")

40 Advocate Cadin submitted that in considering this matter and giving any directions the Court must ignore entirely the fact that SW is or was the wife of RW and the English Order. His authority for this proposition was Article 9 of the Law. Article 9(1) provides:

"(1)....any question concerning -

> ***(d) the administration of the trust, whether the administration be conducted in Jersey or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment or removal....*** shall be determined by the law of Jersey and no rule of foreign law shall affect such question" .

Article 9 (2) then provides as far as is relevant:

> ***"without prejudice to the generality of paragraph (1) any question mentioned in that paragraph shall be determined without consideration of whether or not...*** ..
>
> ***(b) the trust or disposition avoids or defeats rights, claims, or interests conferred by any foreign law upon any person by reason of a personal relationship to the settlor or by way of heirship rights or contravenes any rule of foreign law or any foreign or judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interest"*** .

41 Finally Article 9 (6) defines " **personal relationship**" as including the situation where there exists or has in the past existed " **... any relationship ... by marriage**".

42 Advocate Cadin contended that the exercise of a trustee's power was a "question concerning" the "administration of the trust" and accordingly that trustees and the Court, where discretion had been surrendered, could not, when considering the exercise of powers under a trust, take into account the relationship between a beneficiary and the settlor or the orders of foreign Courts of competent jurisdiction adjudicating between beneficiaries - an exercise that we think would be highly artificial if not impossible and could not have been intended by the legislature. We accept that we are dealing with the administration of a Jersey proper law trust and should, as we would in any event on an application for directions, apply Jersey law. However we agree with Advocate MacRae that as a matter of the construction of Article 9, when giving directions under Article 51 of the Law, the Court is not concerned with whether "the trust or disposition" itself "avoids or defeats" the "rights claims or interests" conferred on SW by English law by reason of her marriage to RW or "contravenes" the English Order. The only issue or question for the Court is whether and to what extent the Trustee should be directed to exercise its powers under the H Trust in such a way as to give effect to the English Order and SW's rights under it.

43 This is consistent with the approach of the Court in the *B Trust* [2006] JRC 185 where the trustee had submitted to the jurisdiction of the English Court and the English Court had made orders purporting to vary the trust. The Court held that Article 9 had no bearing upon the exercise by the Court of its jurisdiction under Article 51 of the Law.

Control by the Court

44 There was no issue between counsel as to the circumstances in which this court should seek to control the exercise of powers vested in trustees. In *S and L and E v Bedell Cristin Trustees* [2005] JRC 109 the Court held that its role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court in that case referred to paragraphs 29 - 100 of Lewin on Trusts 17th Edition which provided a helpful guide to the sort of circumstances in which the Court is likely to intervene in relation to a trustee's decision where the trustee had not surrendered its discretion. Whilst not analysing or hearing argument on every sub-paragraph in detail the Court drew particular attention to paragraph 4 which is in the following terms:

> ***"(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."

Proper Law of the H Trust

45 By deed dated 25 th November 2005, the Trustee, pursuant to its powers under clause 8.2 of the trust deed, changed the proper law of the H Trust from English law to Jersey law. SW sought an order, if necessary, as to whether the steps taken by the Trustee in this respect were valid.

46 As mentioned in paragraph 3 above, on the previous occasion when this trust was before the Court (12 th April 2006), it declined to comment upon the validity of the Trustee's decision in this respect. On the 18 th September 2006 the Family Division set the decision aside. The Deed changing the proper law was executed by the Trustee, after SW had commenced proceedings against RW but before the Trustee had been joined into those proceedings. The Judgment of Coleridge J in this respect is in the following terms:

> ***"89. I turn now to consider the application in relation to the Jersey Trusts. I have read all the documents and especially the affidavit of Miss Vernon, which was, I think, before me in February when I made an order. I have also been provided with an extremely helpful and clear argument by Chancery Counsel, Mr Francis Barlow. I am persuaded by Mr Barlow's arguments, as set out in his skeleton, that the Deed of Amendment of the Law should be set aside, and I shall accordingly make that order"*** .

47 The Deed of 25 th November, 2005, was prepared by the Trustee's Jersey lawyers and is silent as to the law which governs it - in contrast to the earlier deeds dealing for example with the appointment of new trustees all of which were expressed to be governed by English law. It seems clear to us that the issue of whether the Trustee has properly

exercised its power under Clause 8.2 of the trust deed to change the proper law must be governed by English law as that was the proper law of the H Trust at the time the power was exercised. However, there are difficulties with this part of the English Order:

No authority was cited to us in relation to whether this part of the order of the English Court should be recognised in this jurisdiction and because of the difficulties referred to above we decline to recognise the same at this stage. Apart from the fact that the application of English law would clearly take the H Trust outside the provisions of Article 9 of the Law which only applies to Jersey Proper Law Trusts, the issue is of limited practical importance in that this Court has jurisdiction over the Trustee whether the H Trust is governed by Jersey or English law and the proper law of the H Trust makes no real difference in our view to the directions this Court would give in the current situation. We proceed therefore on the basis that the H Trust is governed by Jersey Law.

(i) It emanated out of the Family Division of the High Court and was made in the absence of the Trustee at a time when the English Court knew that the Trustee had been directed not to appear in those Family Law proceedings.

(ii) Whilst SW and RW were represented in those proceedings, none of the other beneficiaries had been convened as far as we are aware.

(iii) No reasons were given for the decision of the English Court and we have not seen the skeleton argument of Mr Francis Barlow referred to in the Judgment.

Our decision

48 Whilst this Court would have reached a different decision as to how to respond to the English Order, we do not regard the Trustee's decision of the 23 rd November 2006 as being one which no reasonable body of trustees could arrive at. The directors rightly sought legal advice and reached their own view as to how they should respond, in what they considered to be the interests of the beneficiaries, to the English Order after what was clearly careful consideration. In essence they decided that it was not in the interests of the beneficiaries to give effect to the English Order but to make their own proposals to both parties in an even handed manner and if agreement was not reached within a short time frame to refer the matter to the Royal Court for directions. It was necessary for the matter to be resolved quickly not just to bring finality to the matrimonial proceedings between SW and RW but because of the unsustainable rate at which the trust fund was being depleted.

49 We think it was optimistic of the directors to believe that their counter proposal to the English Order was likely to be accepted by SW bearing in mind that she had just emerged from a five day hearing before the Family Division which after very full investigation had decided what was a fair allocation of the assets within the H Trust. Whatever the merits of the Trustee's counter proposals however, the decision to refer the matter to the Court failing agreement would ensure the issue was resolved expeditiously in the presence of all interested parties.

50 As we have seen above, at some stage towards the end of January 2007, the Trustee then made a decision not to apply to the Court but to await the outcome of the enfranchisement proceedings - we will refer to this as the "second decision". The second decision, which appears not to have been the subject of a written minute which we have been shown, involved setting aside the earlier decision to apply for directions, notwithstanding that the Trustee was then aware from Advocate Michel's letter of the 21 st December 2006 that the counter proposal had been firmly rejected thus triggering the application to court. In proceeding in this way, the Trustee appears to have abandoned its even handed approach in that it is clear that RW had been consulted on (or even had prompted) the second decision, whereas there had been no consultation with SW at all. The second decision was simply communicated to her in writing some three and half months later. The second decision directly affected SW in that it delayed consideration by the Court of the English Order and thus the possibility of the Court directing the making of material capital distributions to her pending the outcome of the enfranchisement proceedings and the strategy adopted by the Trustee in relation to those proceedings required her co-operation. The Trustee proffered no reason for its failure to consult with SW.

51 This conduct of the Trustee had led inevitably in our view to SW consulting Jersey lawyers and herself bringing the Trustee to Court where we find ourselves dealing with the matter some eleven months from the English Order with the Trust Fund depleted by a further £240,000. We find that the second decision was one which no reasonable body of trustees could have arrived at and stands to be set aside on that ground as per paragraph (4) of Lewin referred to in paragraph 44 above. We find it was unreasonable on two grounds:-

Accordingly we set aside the second decision.

(i) In terms of the quality of the decision, it is plain in our view that the H Trust simply cannot afford to maintain the parties at the present rate of distributions and administration costs and at the same time to back what can only be described as speculative litigation as well as funding the acquisition of the manor if that litigation is successful. There is a real risk of the parties losing what limited assets that are now available to them within the H Trust and losing the enfranchisement proceedings - an outcome that would be disastrous. We accept that in January 2007 the Trustee thought that the enfranchisement proceedings would last about six months but by May 2007 it knew this was no longer the case and still maintained its position.

(ii) In terms of procedure, we do not see how any reasonable body of trustees in the position of the Trustee, having formally and openly resolved on 23 rd November 2006 to refer the matter to the Court if agreement could not be reached between the parties on its counter proposal, could abandon that position and make the second decision without even consulting one of the two parties directly affected namely SW. We have in mind the immense importance of these matters to SW as with any spouse in her position. She was totally dependent on this trust, had no material assets of her own and had incurred very substantial debts, which she was under pressure to discharge. It was of critical importance to her that, the Trustee's counter proposal having been

rejected, the matter proceed to Court as the Trustee had openly resolved.

52 In reaching our decision we have of course taken into account the affidavit of RW dated 27th July 2007. The thrust of his position is to endorse the second decision of the Trustee or what he described as the "wait and see" approach of the Trustee. It is of course more than "wait and see" as the H Trust will continue to leech funds at an unsustainable rate supporting the parties and the manor as well as funding unquantified litigation costs and the acquisition of the manor if the proceedings are successful. He regards SW's approach as the most risky of all possible courses. If the enfranchisement proceedings fail to deliver value, he says the H Trust will be left with nothing to support him but if they transpire to have value the H Trust would have distributed everything to the present generation depriving the next (his children). He says he would be shocked if the Trustee were to act in such a reckless way. It seems clear to us, however that both approaches will diminish the liquid assets of the trust as borne out by the Trustee's projections. In our view it is the "wait and see" approach that is imprudent.

53 The conduct of the Trustee now entitles this Court to exercise its supervisory powers by giving directions to the Trustee as to how its powers should be exercised so as to bring finality to this unhappy state of affairs.

54 In this case, RW had placed his assets into trust for tax purposes as he makes clear in paragraph 10 of his affidavit of the 2nd July 2007, for his benefit, that of his wife and ultimately his children. However the reality of this trust today, as observed by Coleridge J, is that its assets are no longer sufficient to support RW and SW let alone the next generation. It is not a matter of excluding RW's children (as stated in the Trustee's minute of 23 rd November 2006) but simply that there are insufficient funds to take their interests into account and we were not in any event made aware of any particular need on the part of the children.

55 As is clear from Coleridge J's Judgment, the Trustee's conduct has closed the door to any solution under which SW retains an interest under the H Trust. Coleridge J makes reference to the Trustee's letter of 20 th January, 2006, in which it states that SW was capable of earning her own living, that marriage was not a bread ticket for life and that SW had formed a relationship with another man who should contribute towards her maintenance - an allegation incidentally which proved to be incorrect. We would also cite the Trustee's treatment of SW in relation to her maintenance.

56 In our view it is unwise of trustees in a situation such as this to enter the arena of debate and to take sides. There may well be good reason for financial provision for a spouse to be provided through the trust but for that to be a practical possibility, the spouse concerned must have trust and confidence in the trustee. By conducting themselves in an openly partisan way the trustee undermines that trust and confidence thus removing that option which is not in the interest of either spouse.

57 We conclude that the interests of comity and of the beneficiaries in this case lie in achieving the result contemplated by the English Order as far as reasonably possible. The reality is that RW and SW are the principal beneficiaries of a trust with insufficient funds to properly provide for them let alone the next generation. At great cost to them financially and emotionally they have participated in and completed a five day hearing before the English Court that has personal jurisdiction over them. They did so on the basis as per paragraph 41 of Coleridge J's Judgment that the resources of the H Trust were available. The English Court clearly investigated the matter very fully, heard the parties giving evidence and under cross examination, received full argument from counsel and reached a reasoned decision as to how those assets should fairly be divided between RW and SW. The English Order was not manifestly unreasonable. It has not been appealed and RW, who fully participated in the proceedings, has not sought to attack it in his affidavit submitted to this Court. It is true that the English Order does not override the Trustee's discretion but there would have to be good reason in our view for the Trustee on the facts of this case not wishing to give effect to such an order.

58 We appreciate that giving substantial effect to the English Order will leave insufficient funds in the H Trust to make its continuation financially viable. In terms of viability, we note from the accounts of the H Trust (which are maintained in US Dollars) that it incurred trustee and administration fees in 2005 of $84,826 and in 2006 of $78,778 (admittedly busy years as a consequence of the breakdown in the parties marriage) taking no account of legal fees. The Trustee projects on going trustee costs of £50,000 per annum, reducing to £35,000 per annum, and company costs of £15,000 per annum totalling some £480,000 over nine years. These annual administration costs exceed the current gross annual income of the trust derived from its investment portfolio - it has no other current source of income. We raise this not to imply that the Trustee is overcharging for its services - there has been no such suggestion from either party and we make none. We raise it to make the simple observation that the assets available to the parties have been depleted to such an extent that the costs of maintaining the structure have become quite disproportionate and in reality can no longer be afforded.

59 If the assets are effectively divided broadly in the manner set out in paragraph 37 above, there will be, inevitably, a reduction in the living standards of both parties but at least they will own those assets freed from the ongoing costs of the structure. The steps they take in relation to the enfranchisement proceedings will be entirely a matter for them. Individuals can speculate with their assets - trustees should not. We reject the suggestion that RW will be left destitute as the calculations in paragraph 37 demonstrate.

60 Subject to the issue to which we refer below, our decision is that the Trustee should be directed:-

following which she can be removed as a beneficiary of the H Trust. SW's monthly income distribution will continue up to the date the capital distribution is paid to her. This will leave just approximately £250,000 in cash within the H Trust (the precise sum being dependant on the cost of the transfers and of realising the investments), the remaining assets of which

the Trustee is authorised to appoint out to RW, In making this decision we are giving substantial effect to the English Order but we are not giving effect to the orders against RW in relation to costs and arrears of maintenance. We cannot do so as that would leave insufficient funds within the H Trust. The injunctions over the assets of the H Trust and the caution over the Canadian Land will be lifted.

(i) to make a capital distribution of £960,000 to SW;

(ii) to discharge the RBS overdrafts (a joint liability); and

(iii) to procure the transfer to SW of the UK Properties or the company that owns them;

61 The difficulty with giving effect to the English Order to this extent is that it leaves both parties with material outstanding obligations under the English Order as follows:-

(i) RW remains liable to SW in relation to arrears of maintenance and the costs order in the sum of £140,000; and

(ii) SW remains liable to transfer the Portuguese property to RW. In this respect we note that in her second affidavit SW asserts that this property is not beneficially owned by the H Trust although she accepts that it is a family asset and falls into the pot to be divided between them.

62 The underlying assumption in the way the case was argued before us and on which we have proceeded, is that RW and SW receive property and assets freed from the claims of the other. Standing in the shoes of the Trustee, as we do for this purpose, we do not regard it as fair as between these two beneficiaries for SW to remain the legal if not beneficial owner of half of the Portuguese property (RW's home) whilst she receives the UK properties into her sole name or that she be able to bring claims against the Canadian land or the proceeds of its sale or the cash appointed out to RW when she receives her capital distribution free from any claims on the part of RW. Accordingly the directions we give and as summarised in paragraph 60 above will be conditional upon:-

(i) SW transferring any interest she may have in the Portuguese property to RW each party bearing their own costs; and

(ii) SW undertaking not to enforce any claims she may have under the English Order whether for arrears of maintenance, costs or otherwise against the Portuguese property or the property from time to time representing the same or against any assets appointed out of the H Trust to RW or any property from time to time representing the same.

63 We invite counsel to address us on the precise form of the order.