VG Corporate Trustee Ltd v D on his own behalf, and on behalf of his son

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Olsen, Austin-Vautier
Judgment Date:	27 March 2019
Neutral Citation:	[2019] JRC 48
Date:	27 March 2019
Court:	Royal Court

Text

[2019] JRC 48

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Olsen **and** Austin-Vautier.

In The Matter of VG Corporate Trustee Limited

And In The Matter of the C Trust

And In The Matter of Articles 51 and 53 of the Trusts (Jersey) Law 1984, as Amended

Between
VG Corporate Trustee Limited
Representor
and

D on his own behalf, and on behalf of his son, E
First Respondent

And

F
Second Respondent

And

G and H through their guardian ad litem Advocate Mark Renouf
Third Respondents

Advocate N. G. A. Pearmain **for the Representor**.

Advocate M. P. Renouf, **guardian** *ad litem*.

Authorities

Children Act 1989.

Re S Settlement [2001] JLR N 37

Re Otto Poon Trust [2015] (1) JLR N 31

Re Otto Poon Trust [2015] JCA 109.

Re C Trust [2012] JRC 086B

Trust — Representor seeks the blessing of its decision to terminate the C Trust.

THE COMMISSIONER:

1 The representor seeks the blessing of its decision to terminate the C Trust. The background, which is not in contention, is taken from the representor's representation of 21st February, 2019.

The Trust

2 The C Trust is a Jersey law discretionary trust created by trust deed dated 3rd May, 2007, ("the Trust"). The settlor of the Trust is the first respondent, D and the trustee is the representor.

3 The current beneficiaries of the Trust are:-

(i) D and his son E, whom he represents;

(ii) The second respondent, F, the spouse of D;

(iii) The third respondent, G, who is aged 11, the son of D and his former spouse J;

(iv) The fourth respondent, H, who is aged 9, and is the daughter of D and J;

(v) The remoter issue of D, represented by him.

The trust assets

4 The directly owned trust assets comprise (a) cash at the bank in the amount of £205 and (b) 100 Ordinary shares of Euros 1.00 each in the wholly owned BVI incorporated (non-UK resident) holding company, Aloma Limited (in liquidation) ("Aloma"), which itself holds the following assets:-

(i) Cash at bank —£14,594;

(ii) 798,857 shares in Apax Global Alpha Limited ("the Apax Shares"), trading at £1.44 each (total value circa £1,154,348); and

(iii) 13,002,626 carried interest shares in Apax Europe VII Founder O.P. ("the Apax VII carry"). This fund may go into "carry" at some point during or about 2020 and could release substantial value circa Euros 10 million, although it is accepted by the representor and D (who settled the Apax VII Carry) that the value of the Apax VII Carry is difficult to determine at present with precision, which is apparently inherent with carried interest as an asset class at large.

Background concerning D

5 D is based in Dubai and is a managing director in the healthcare team of K, which was a leading private equity investor until it went into provisional liquidation recently. He is one of the remaining personnel still employed by K, but his future is uncertain given the well-publicised circumstances in which K currently finds itself. It is likely that the settlor will leave in the near future and, possibly, re-establish himself in London, given that his professional life requires him to be based in a major financial centre.

6 On 20 th September, 1998, D married J and they had two children of that marriage, namely G and H. Unfortunately the marriage did not last and they separated in September 2012. J subsequently petitioned for a divorce and issued an application for a financial order. The Decree Absolute was pronounced on 29 th May, 2014, being issued out of the Family Court at the Central Family Court in London, England (the "Family Court"). The financial proceedings concluded with orders in 2015 ("the 2015 orders").

7 The 2015 orders dealt with, *inter alia*, the application of specific assets as between D and J and with respect to the assets contained in the Trust, the parties agreed, *inter alia* (references to paragraphs being references to paragraphs in the 2015 orders):

> (i) pursuant to paragraph 30, that D would account to J for 50% of any trust assets that he received;
>
> (ii) pursuant to paragraph 54, that J would cease to be a beneficiary of the Trust from the date of the 2015 orders;
>
> (iii) that the costs of the ongoing maintenance of the Trust would be met 50/50 as between D and J and pursuant to paragraphs 81, 82 and 84, the share dividends on the underlying trust assets were to be distributed to D and J joint account (with all taxes and trustee's costs to be paid from the same account with documentary evidence of the costs and tax calculations to be provided by the representor to both of them);
>
> (iv) pursuant to paragraphs 85, that D will not seek to bring about the charging, assignment or other alienation of trust assets other than by way of a sale at full market value without the written consent of J;
>
> (v) pursuant to paragraph 86, that the trusteeship of the Trust shall not change without the consent of J; and
>
> (vi) pursuant to paragraph 91, that each of D and J agreed jointly and irrevocably to instruct the representor to abide by and respect, as far as possible, the terms of the 2015 orders.

8 At the time of the entry into the 2015 orders, the holding by Aloma of the Apax Shares was not part of the trust fund, but it is accepted by D that this does not in any way detract from the fact that, in the event that he were to receive a distribution/appointment of these assets, he would account as to half of that property to J. The cardinal principle at the centre of the 2015 orders (subject to any variation to them) with respect to the assets in the Trust is that D has agreed to hand over and account for 50% of the trust fund that he might receive to J.

9 On 20 th January, 2015, and as agreed, J was excluded as a beneficiary on an irrevocable basis pursuant to the exercise by the representor of its powers under Clause 9 of the trust deed. This decision was essentially driven by tax considerations. The potential tension between J receiving one half of the trust assets distributed to D and her excluded status did not escape the attention of the Court, but no point was taken in relation to this by the parties.

Surrounding circumstances concerning the establishment of the Trust

10 The establishment of the Trust in 2007 with VG (formerly known as Volaw Group) occurred following D having taken tax advice. At the time he was UK resident and non-UK domiciled under the general law but as he had always lived in the UK, he was considered deemed UK domiciled for inheritance tax ("IHT") purposes when the Trust was originally established. As such, the Trust was established to assist with tax planning objectives reliant upon his non-domiciled status at that time.

11 Since September 2012, D has been resident outside the UK, initially in Russia and thereafter from January 2014 in Dubai and, as such, has been continuously non-UK tax resident since that time.

12 At present the Trust is, potentially, a tax efficient structure from a UK income tax ("IT") and Capital Gains Tax ("CGT") perspective, as foreign income and gains can be rolled up tax free until such time that trust distributions or benefits are taken. This is particularly relevant to the Trust with respect to dividends that it receives from the Apax Shares, which would otherwise be taxable if received directly by a UK resident and domiciled (or deemed domiciled) beneficiary. When trust distributions are paid to a UK resident and domiciled (or deemed domiciled) beneficiary they would normally be liable to either IT or CGT. J, G and H have always been and remain UK resident and domiciled.

13 If the proceeds of the Apax VII Carry are received into the Trust whilst D remains non-UK resident then no UK IT or CGT would be payable by D personally on these proceeds. In addition, the proceeds can be reinvested into other non-UK assets (non-private equity investments) which will benefit from tax free roll up arrangements from a UK tax perspective (though such benefits are only realistically available if there are no demands by beneficiaries for the corpus of the Trust to be distributed to meet liquidity requirements of the beneficiaries).

14 In the event that D were to reacquire UK tax residence at any time in future, it would be necessary to review his domicile status at the time f he were returning to live in the UK on an indefinite and permanent basis then he would be treated as UK domiciled under the general law, as well as for tax purposes. This would make him liable to IT and CGT on all directly held assets without the ability to claim the remittance basis, or the ability to settle assets into a new offshore trust with protected status.

15 It is expected that, in as far as D receives distributions from the Trust whilst he remains non-UK tax resident, then, upon tax advice, payments that he makes over to J are likely to be free from UK taxation to the extent that they are in discharge of his obligations under court orders, even if the monies are subsequently remitted into the UK. The tax advice received is that this is likely to apply to existing court orders (such as the 2015 orders) or future court orders such as those in the Schedule 1 Proceedings referred to below. On the other hand, if the representor makes distributions to, say, the UK based children of D, such as G and H, in their capacity as trust beneficiaries, then either IT or CGT are expected to be payable on such distributions in general terms, based on their marginal rates of tax.

Additions to the 2015 Orders

16 The representor has not been involved in the matrimonial proceedings concerning D and J and is not subject to any orders of the Family Court, but it has become embroiled in the middle of an ongoing dispute between J and D. The thrust of the dispute centres upon what are known as the Schedule 1 proceedings under the Children Act 1989 and relates to issues that flow from a disputed claim made by J for additional maintenance as a result of G being diagnosed with dyspraxia after the 2015 orders.

17 In essence, J is seeking for the Family Court to have regard to G additional needs and for that Court to make orders in relation to capital lump sums in respect of reimbursement of expenses that she has incurred with respect to G in various regards, together with an increase in spousal maintenance and an increase in child maintenance, the same to be determined by the Family Court.

18 A case management hearing took place on 11 th October, 2018, in the Family Court. J represented herself and applied for the Schedule 1 Proceedings be stayed for 6 months, supported by evidence from her psychiatrist that her mental health was deteriorating. Her solicitors also applied to come off the record on the grounds that they were unable to take instructions from her and were without funds to meet their outstanding and continuing fees. The Court ordered the Schedule 1 Proceedings be adjourned generally with liberty to restore and that D should not make an application to restore before 11 th March, 2019, without leave of the Court. Thus despite the fact that the Schedule 1 Proceedings were commenced in September 2016, they have yet to be concluded.

19 On 17 th May, 2017, Advocate Mark Renouf was appointed as guardian *ad litem* in Jersey of G and H “in connection with proceedings in respect of minors' beneficial interest in a trust”. This arose shortly after J was notified by the representor in 2017 of proposals to terminate the Trust at that stage. The principal concern expressed by Advocate Renouf at the time was that a transfer of assets should be done in such a way as to ensure that any orders made by the Family Court would be enforceable against D. In other words, the trust fund should not be put beyond the reach of J, given that she was the parent with whom the beneficiaries G and H resided and relied upon for day to day care and given that she had agreed to be excluded to save the Trust substantial UK tax.

20 Advocate Renouf also raised the issue of the representor reimbursing substantial sums to J *“on account of”* the Schedule 1 Proceedings and providing a regular monthly sum for G pending conclusion of the Schedule 1 Proceedings. If such monies were distributed to J or G directly as UK resident and domiciled persons, it would have been highly tax inefficient. However, if such distributions were made on account of the existing or future orders of the UK Court and paid to D, for his onward transmission to J in satisfaction of UK Court orders, such payments are likely to be free from taxation. The representor has generally not been

persuaded to accede to these requests for distributions, albeit that it has earlier distributed certain sums set out below, mainly in a tax efficient manner.

21 Since the appointment of Advocate Renouf the representor has been in regular contact with him to deal principally with requests made by J (on behalf of G) for repayments of sums that she has previously expended on behalf of G, with requests for child maintenance relating to his Dyspraxia and with matters concerning the potential closure of the Trust. The representor has distributed the following sums:-

(i) On 14 th July, 2017, £15,000; on 13 th November, 2017 £20,000; on 21 st December, 2017, £30,000 and on 1 st June, 2018, £25,000 – all together payments totalling £90,000. These sums were paid to the Barclays joint account which requires both parents to consent to release and J enjoyed the benefit of them exclusively. The mechanism of paying to the joint account means the funds have been sent to D, which he can then release to J pursuant to his obligations under the 2015 orders and thereby constitutes the tax efficient method of payment.

(ii) On 18 th May, 2018, £50,000 was paid by the representor to the Barclays joint account. £25,000 was paid in order to fund future legal fees for the Official Solicitor to be appointed for J when she lost her litigation capacity in the Schedule 1 Proceedings and was unrepresented. The Family Court subsequently ruled that J could not be required to fund these fees from what was effectively her own share of the trust assets (as allocated under the 2015 final order) without her consent. J rejected this payment, which she then returned to the representor. The returned funds were not accepted by the representor as an accretion to the trust fund in case of adverse tax consequences and the same were paid to the Barclays joint account for D from where they were made available to J. However, the Official Solicitor was not and has not been appointed.

(iii) On 20 th July, 2018, a further sum of £175,000 was paid into the Barclays joint account, to add to the sum of £25,000 in the preceding paragraph, in order that these funds should be available to both D and J in equal shares under the 2015 orders to apply as they wish. To date, J has refused to accept her share of these funds (or any part of them) or to release D share, on the basis that a 50%-50% distribution simply represents payment of her own share of the trust assets and does not represent assistance towards the additional costs she has expended on G in relation to his dyspraxia. Accordingly, D has not been able to draw down his share of this distribution in the absence of J consent.

(iv) On 15 th August, 2018, a further payment of £14,000 was made by the representor for emergency funding for G, pursuant to J request on behalf of G and paid directly to J (and therefore subject to UK tax estimated at £4,000).

The request

22 D has asked the representor to distribute the whole of the trust fund to him whilst he is resident in Dubai because of his liquidity problems and before he returns to the United Kingdom, which is likely due to the uncertainty of his employment, when the Trust will cease to be tax efficient.

23 The representor has no issue in ensuring that the mechanism for the distribution of the trust fund is a secure one for J (and hence for G and H), if such a decision is made and actioned, because D, his legal advisers and the guardian can collaborate on this matter as needs be. In particular, on 26 th January, 2019, Goodman Ray on behalf of D granted an undertaking to the representor that, *inter alia*, it will ensure that the obligations of D under the terms of the Court order of 1 st May, 2015 are upheld upon receipt of any assets distributed to Goodman Ray by the representor, in connection with the proposed closure of the Trust.

24 There is no issue as to the power of the representor to distribute the whole of the trust fund to D as it is empowered to do so under the terms of both Clause 4(a) and 5(a) of the trust deed.

25 However, given the contentious background to this matter and the potential value of the trust fund, the representor considers that the appointment of the trust fund to D is a momentous event.

The representor's in-principle determinations

26 On 17 th December, 2018, the representor resolved in principle to distribute the trust fund to D subject to the involvement of Advocate Renouf over the mechanics of the distribution of the trust fund and any order of the Jersey Court. We will refer to this as “the Decision”.

27 The principal considerations for the representor surrounding the Decision include (a) the request of D for closure of the Trust given his need for liquidity and his likely return to the UK; (b) associated tax advice; (c) the fact that the Trust is not fit for the purpose of delivering liquidity to J (her exclusion envisages receipt of benefit via D and winding-down the Trust piecemeal is not practical) and (d) bringing to an end the involvement of the Trust in ongoing disputes concerning financial demands flowing from the Schedule 1 Proceedings.

The position of the guardian *ad litem*

28 Advocate Renouf was retained by J in 2017 when she thought it might be necessary for proceedings to be issued to prevent the representor from terminating the Trust as then proposed. He was appointed guardian *ad litem* on 17 th May, 2017, at her request with litigation in mind. His retainer by J has now terminated. He said he was neutral as between the parents, and was representing G and H, who we will refer to together as “the Children”.

29 Advocate Renouf was very concerned for J and the Children, and it is his view that the Court should err on the side of caution in protecting J as their sole carer. It was vital, he said, to ensure that the 2015 orders were enforceable as against D, but he agreed with the representor that it should be possible to identify a mechanism to transfer the trust assets, or such share of them as necessary, out of the Trust in future, in such a way as to minimise or eliminate the risk of them not being available to J, and thus available to support the Children. We note however that there was no suggestion that D had in the past avoided or had any intention in the future of avoiding his financial obligations under the 2015 orders.

30 Whilst the 2015 orders expressly contemplated the trust assets being distributed, at that stage J was unaware of G diagnosis of dyspraxia, which Advocate Renouf said changed the position fundamentally. Furthermore, H was also showing signs of dyspraxia, although less severely than her brother, and J informed us that she was looking to the trust fund for financial assistance in respect of the special needs of both of the Children.

31 He submitted that the Court should refuse to bless the Decision on the grounds that it was irrational and unreasonable for the reasons set out below.

The law

32 The approach of the Court where a trustee applies for approval of a momentous decision (i.e. a decision of real importance for the trust), is well established. It was first laid down in *Re S Settlement* [2001] JLR N 37 and was approved by the Court of Appeal in *Re Otto Poon Trust* [2015] (1) JLR N 31 and *Re Otto Poon Trust* [2015] JCA 109. The Court must satisfy itself of three things:

> (i) that the trustee's decision has been formed in good faith;
>
> (ii) that the decision is one which a reasonable trustee properly instructed could have reached; and
>
> (iii) that the decision has not been vitiated by any actual or potential conflict of interest.

33 In seeking such approval, the trustee is not surrendering its discretion to the Court, a discretion vested in it by the settlor, and the Court's function is succinctly summarised in this oft quoted passage from Lewin on Trusts at paragraph 27 – 079:-

> *"Application without surrendering discretion – role of court*
>
> *The court's function where there is no surrender of discretion is a limited one.* It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as

> ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

34 It was not suggested by Advocate Renouf that there was any question as to the good faith of the representor, or as to the Decision being vitiated by any actual or potential conflict of interest, so the Court was concerned with the second part of the test, namely the limits of rationality.

35 It is correct, of course, that the Court must proceed with caution, for the reasons set out in paragraph 27 – 080 of Lewin:-

> *"The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings.* If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). The court may also withhold approval where the trustees have demonstrated a general unfitness to act, by conduct before the taking of the decision in question."

Grounds for irrationality

36 Advocate Renouf submitted that the Decision was irrational and unreasonable for a number of reasons:—

> (i) Termination of the Trust entirely extinguished the Children's interest as beneficiaries and such a decision must be considered with the utmost care, which was demonstrably not the case in respect to the Decision.
>
> (ii) In circumstances where J has made it clear that she will not apply any funds to the Children which D pays to her from a distribution of trust assets, because she says that is in fact simply payment from her own funds as designated by the English court, the Decision *"leaves the Children with no provision"*.

(iii) The Decision ignores *"the desperate financial situation of the Children"* by virtue of their reliance on the mother's financial position as their sole UK resident carer.

(iv) the Decision ignores the mental health position of the mother as the Children's carer, which will be aggravated by it failing to alleviate some of the pressure on her financial position in respect of the Children.

(v) The Decision ignores the fact that the father lives in Dubai and cannot provide any care for the Children in the event the mother cannot.

(vi) The Decision ignores the fact that G is within six months of gaining entry into a premier school, which if successful will set him on an advantageous path for his future educational success and social standing; indeed, he is sitting an entry exam this March.

(vii) The decision ignores the fact that J has made it very clear to the representor that she would have to terminate additional support for G unless financial assistance was received.

37 Advocate Renouf submitted that the Decision, as set out in the minute, was fundamentally flawed and he raised objections to nearly every paragraph in it. We set out the minute in its full form:-

"Proposed termination of the Trust

The Chairman reminded the meeting that as part of the divorce proceedings between D, a beneficiary of the Settlement, and his former wife, J, an excluded beneficiary of the Settlement (excluded for tax purposes as envisaged under UK Court Order) a Financial Order was issued by the UK Family Court on 1 May 2015. The thrust of the Financial Order (which was issued following agreement between D and J) is that the Trust assets should be split equally with D to account to J for 50% of that which he receives (given that J had agreed to be excluded as a beneficiary for reasons stated above). The meeting notes that the Trustee had not been joined into the UK proceedings.

The meeting noted the contents of an e-mail received on 12th November 2016 from D legal advisor, and in particular noted:

(a) D wishes to have greater access to the assets that he settled into Trust (taking into account the fact that he will be accounting to J for 50% of whatever is distributed) particularly given that his financial position has become more precarious and worsened over the past 18 months or so;

(b) if D has the Trust assets in his name (after his giving effect to the terms of the said Financial Order) then if he needs to undertake further tax planning (say because he wants to return to the UK after April 2019) he can do so pursuant with a UK tax report (provided to the Trustee) by BDO LLP on 10th November 2017) (which is to be updated ahead of any formal

action to termination) in relation to any issues concerning taxation;

(c) the matrimonial issues over the "Schedule 1 Proceedings" In the UK have meant that a significant amount of time has been taken up with the Trustee being embroiled in discussions with J. Advocate Mark Renouf acting for the two children of D and J (G and H) who are beneficiaries of the Trust and D/his legal adviser over the provision of further maintenance on top of UK orders that have already been made. This has proved to be a continuing source of contention between the spouses and especially so given the delays with the UK proceedings.

(d) D considers that continued existence of the Trust creates another ontext for the continuation of the matrimonial dispute which can be settled more efficiently if the matter is simply one as between J and himself (and being subject to the UK Family Court process);

(e) J is making continued requests to the Trustee for reimbursement of expenditure she claims has been incurred on G behalf without any form of suitability assessment or prior approval from the Trustee; and

(f) subject to a UK Court order, J is being paid a monthly stipend by D to maintain their children, which sum is considered to be sufficient (given school fees are also being met by D in addition to this maintenance payment) to meet these various expenses.

The Chairman noted that the possibility of retaining a small percentage of the trust fund for the benefit of the children was explored previously however, the following reasons to close the Trust should be considered:

After due and careful consideration IT WAS RESOLVED that the Trustee should seek to close the Trust and seek the blessing of the Royal Court of Jersey to distribute all the assets of the Trust to D after payment of all necessary professional fees due (the "Court Approval");

IT WAS FURTHER RESOLVED, SUBJECT TO THE COURT BLESSING SUCH ACTIONS TO:

FINALLY, IT WAS ALSO RESOLVED that no further distribution shall be made from the trust fund until such time as the Court Approval (as defined above) has been obtained."

(a) D financial need is greater than that of his children given his job as a fund manager at K is in severe jeopardy;

(b) If the Trust Fund were to be closed and distributed to D, there will be one less target for litigation by J as the said assets would all fall within scope of UK court orders;

(c) Maintaining a Trust with an asset in the form of carried interest which has not yet

and may never realise means it will become more challenging to meet Trust obligations in future if liquid or realisable assets are distributed in short order to meet the demands made on the Trust;

(d) It would be a fiscally efficient manner of distribution of the Trust Fund as D is outside the UK and his prospects of remaining in Dubai are slim given the current market condition. The nature of D work requires him to reside in a finance centre and London would be the likely destination should he leave Dubai.1

(e) There is no way to determine with certainty the value of the [Apex VII carry] and indeed when [it] will go into carry;

(f) If [Apex VII] carry does hit its carried interest hurdle in the future, the children will be older and less support may be required (particularly if the liquid/realised assets of the Trust had already been distributed); and

(g) D is already paying for his children's schooling and maintenance and therefore providing him with the means to do so going forward will be of direct benefit to the children. There is no reason to believe he will not upkeep these payments.

(1) That such net assets in the first instance be paid/transferred over to D legal advisor, Goodman Ray ("GR") in order to be able to discharge obligations D has with regards to the UK Court Orders;

(2) Before the practical distribution of Trust assets as defined above is undertaken, that the Trustee seek a written undertaking from GR acknowledging they are prepared to act in the manner proposed and that they will ensure D obligations under the terms of the UK Court Order are upheld upon receipt of the distributed assets; and

(3) To authorise any two Directors of the Trustee or any one Director together with an authorised signatory of CVG Secretaries Limited, as Secretary of the Trustee, as appropriate, for and on behalf of the Trustee to sign any documentation, under the Common Seal of the Trustee if required, relating to the distribution of the Trust assets, discharge of any/all appropriate professional and legal fees due and to the termination of the Trust.

Presence of J

38 J came to Jersey for the hearing and asked to be able to attend. Notwithstanding the fact that the Court was a sitting in private in respect of a trust from which she was now excluded and the fact that D was not present, we decided that as the mother of the Children it was appropriate to let her attend which she did. Furthermore we allowed her to address the Court, which she did very capably. In essence she was very supportive of the submissions made by Advocate Renouf. She has followed that up with a letter again supportive of the position of Advocate Renouf. We will not set out what she says as we agree with Advocate Renouf that the points made are already covered in the material submitted to the Court for the hearing.

Decision

39 Advocate Renouf placed some emphasis on the case of *Re C* [2012] JRC 086B, in which the Court, in what it described as a ***"bold move"***, set aside an instrument excluding the two grand-children of the deceased settlor from the trust concerned. However, the facts in that case are entirely distinguishable. The grand-children were living in Peru with the mother, who worked full-time as a teacher, and the means of both the mother and the father (who lived in England) were limited (Paragraph 14). Exclusion followed a request for assistance for the grand-children and the Court found (Paragraph 150) that the trustee had been unduly influenced by the invective of the widow of the settlor, confused the issues before it and as a consequence, did not independently and dispassionately consider the request for assistance. If it had done so, the Court found that it could not have taken such a drastic step. It was, on any analysis, a perverse decision, which the Court was duly-bound to set aside.

40 In contrast, by terminating the Trust, the Children are not, as claimed, being left with no provision. Far from it. They have two resourceful parents more than capable of meeting their needs. It is worth setting out the assets which the parents shared following the divorce, as set out in D statement of 4 th March,2019, and not challenged by J:-

In total therefore J has received capital of some £3.98 million and, we assume, D an equivalent amount.

(i) They each received £1.1 million from the sale of the matrimonial home.

(ii) J received a property in Morocco, valued at £450,000.

(iii) After payment of all debts, J received a balancing payment of £230,000.

(iv) A significant distribution was made from the Apax Shares in March 2016, from which each ultimately received £2.2 million.

41 Despite his current employment uncertainties, D has a successful record in private equity and J is an ophthalmic surgeon, although she told us that she is currently working three days a week, so that she can devote more time to the Children.

42 Under the 2015 order, D pays global child and spousal maintenance to J of £5,606.50 per month (£67,274.40p per annum) in addition to the Children's private school fees, currently £38,004 per year. He is thus paying out over £105,000 per annum for the Children. D says that over and above these sums, he has paid over £38,000 in additional funds requested by J in relation to the Children since 2015.

43 D complaint is that J has put in place what he describes as a complicated, convoluted and incredibly expensive regime of professional help for G, which is unreasonable. In her

statement of 4 th March, 2019, J claims to have spent some £570,000 in additional costs associated with G dyspraxia since 2015. Advocate Renouf had prepared a detailed schedule setting out the current additional costs claimed by J for G dyspraxia, namely £3,830 per month or £123,029.15p per annum. We note that D complaint has some support from District Judge Alderson, who at the hearing on 24 th January, 2017, in the Family Court, described the claims that J was then making in the sum of £45,000 per month as ***"absolutely radically over the top"*** and ***"not even real"***.

44 Whilst D is currently employed, he may well have to return to the UK at short notice if his employment is terminated. He says he is in urgent need of the trust assets (half of which would be payable to J) as he is currently depleting his own capital reserves, in order to meet his outgoings in respect of his own family as well as the Children.

45 At the same time the capital of the trust fund is being depleted because its outgoings exceed its income. Its sole income is dividends from the Apax Shares of approximately £70,000 per annum, reducing proportionately as shares are sold. In terms of outgoings and leaving aside distributions, some £300,000 has been paid out in administrative costs and legal fees (including £85,000 to Advocate Renouf) since 2015, to which must be added the costs of this application, estimated at £20,000 for each of the representor and Advocate Renouf. There is every indication that these heavy administration costs are set to continue as J applies though Advocate Renouf for distributions for the Children which are opposed by D. The future potential illiquidity of the Trust was one of the issues which the representor took into account in its decision, as the minute shows.

46 In addition to arguing that the Decision was irrational and unreasonable, and should not be blessed by the Court, Advocate Renouf sought the following directions:-

(i) That the Trust should not be terminated, but if termination was permitted, it should only be implemented after D had served notice of his intention to return to the UK.

(ii) The representor and Advocate Renouf should be directed to agree the mechanism for the termination of the Trust in order to secure the funds payable to J under the 2015 orders.

(iii) The representor should be directed to give J the same information as a beneficiary of the Trust, and to ensure that full and proper information was available to the English court in the Schedule1 Proceedings.

(iv) The representor should make a distribution to fund the independent representation of the Children in the Schedule 1 Proceedings though an English appointed guardian *ad litem,* given J lack of litigation capacity, the cost of which was estimated at £60,000.

(v) The Representor should be directed to make a distribution in the sum of £110,000 or such other lump sum or monthly payment as the Court may direct to meet the

additional costs in relation to G.

47 Advocate Renouf conceded, however, that as there had been no surrender of discretion by the representor and no suggestion that it was in any way unfit to act as trustee, the Court had no grounds to intervene in the administration of the Trust, and direct the representor as to how it should exercise its discretionary powers. He suggested instead that the Court should give the representor judicial encouragement to exercise its powers to the same effect.

48 We agree with Advocate Pearmain that it is impossible for the representor to determine to what extent the sums being claimed by J for G are justified; in effect to take on the role of the Family Court. She maintains forcefully that they are justified, but D says equally forcefully that they are out of all proportion, putting the representor in an untenable position.

49 The Children are not in danger of any neglect. J is clearly devoted to their care, and there is no suggestion that D seeks to avoid his financial obligations to them. The Children have parents who are more than able to support their needs out of their own resources, and the issue of how much D should contribute to what J decides to spend should be and can only be properly determined by the Family Court. We note in this respect that D has the ability to apply to re-activate the Schedule 1 Proceedings after 11 th March, 2019.

50 In any event if the Trust is terminated all of its assets will go, ultimately, to the parents in equal shares, the very persons responsible for the Children's support. Of the traded Apax Shares now worth some £1.1 million and allowing for the payment of costs, that will result in each of them receiving around £500,000. J was more optimistic as to the potential value of the Apax VII Carry, which she said could realise as much as €13 million, and if that is right, they would each receive the further sum of €6.5 million. She will, in any event, receive one half of whatever value is realised from the whole of the trust fund. All of the trust assets will be freed from the burden of the heavy cost of administration of the Trust, which is currently depleting the capital.

51 We are not going to go through all of the criticisms made by Advocate Renouf of the minute, because, seen in context, it demonstrates in our view that the directors present gave very careful consideration to the matter, and reached a rational and, we think, eminently reasonable decision. We would, however, make the following observations in response:-

(i) As already mentioned, the Children are not being left with no provision and *"in a desperate financial position"*. They have parents who are more than able to meet their reasonable financial needs.

(ii) Whilst not expressly referring to G dyspraxia, the minute makes extensive reference to the Schedule 1 Proceedings which are, of course, entirely concerned

with issues arising out of G dyspraxia.

(iii) The termination of the Trust and the distribution of its assets do not put D in breach of any of his obligations under the 2015 orders; indeed, distribution of the trust assets was expressly contemplated by those orders, the timing being left to the discretion of the trustee.

(iv) There is no lacuna in the financial provision for the Children between the termination of the Trust and the eventual outcome of the Schedule 1 Proceedings. D obligations under the 2015 orders to pay maintenance for them will continue and both J and D will have their earnings, their existing capital, a further £500,000 in realisable assets (the Apax shares) and potentially more in currently unrealisable assets (the Apax VII Carry) from which to provide for the Children.

(v) The minute expressly covers the arrangements made to ensure that J receives one half of the assets distributed to D and Advocate Pearmain stressed in Court that the representor had no difficulty in discussing those arrangements with Advocate Renouf.

(vi) It was not unreasonable for the representor to consider D financial needs above those of his three children, because his employment was in severe jeopardy. The Children in particular are already well provided for and termination of the Trust simply increases the financial resources of the parents and their ability to continue to meet the Children's needs.

(vii) It was not inappropriate for the minute to describe termination as creating one less target for litigation by J. She has indeed embroiled the Trust in the Schedule 1 Proceedings through the appointment of Advocate Renouf as guardian *ad litem* and as the minute states, the trust assets will on termination fall within the scope of the Family Court, simplifying those proceedings.

(viii) Resolving to make no further distributions until the Court approval had been obtained was not an improper fetter of the representor's powers as trustee. As Advocate Pearmain says the representor could always change its mind, but in any event, it was a statement made in the context of the recent distribution, which has resulted in it languishing in the Barclays joint account unused.

52 In conclusion we bless the Decision and decline to give the judicial encouragement suggested by Advocate Renouf, all of which is premised on the Trust continuing. The timing of the final distribution will be a matter for the representor, which will be taking appropriate tax advice.