The Bird Trust

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	28 January 2008
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[2008] JRC 13

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Bullen **and** Liddiard.

In the Matter of the Bird Charitable Trust and the Bird Purpose Trust

Between
Basel Trust Corporation (Channel Islands) Limited
Representor
and
Ghirlandina Anstalt
First Respondent
Larona Trust Reg
Second Respondent

Roenne Corporation
Third Respondent
Gary Kaplan
Fourth Respondent
Advocate P. D. James as representor of the beneficiaries of the Bird Charitable Trust
Fifth Respondent

Advocate M. J. Thompson **for the Representor**.

Advocate L. J. L. Buckley **for the First, Second and Third Respondents**.

Advocate M. St. J. O'Connell **for the Fourth Respondent**.

Advocate P. D. James **appeared in person**.

Authorities

Proceeds of Crime (Jersey) Law 1999.

The Law of Trusts — Thomas & Hudson (2004).

Vatcher v Paull [1915] AC 372.

Law of Trusts and Trustees — Underhill & Hayton (17th Edition) (2006).

Re Skeat's Settlement (1889) 42 Ch D 522.

Re Osiris Trustees 2 ITELR 404.

von Knierem v Bermuda Trust Co Limited [1994] Butterworth Offshore Cases Vol 1, 116.

IRC v Schroder [1983] STC 480.

Re Freiburg Trust [2004] JRC 056.

Alhamrani v Russa Management [2005] JLR 236.

Rawcliffe v Steele [1993-95] MLR 426.

Re the Circle Trust, HSBC International Trustee Limited v Wong [2007] 9 ITELR 676.

Re the Z Trust [1997] CLR 248.

The Deputy Bailiff

1 This is an application by the representor ("Basel or the Trustee") for directions as to whether the first respondent ("Ghirlandina") has been validly appointed as protector of the

Bird Charitable Trust ("the Charitable Trust") and the Bird Purpose Trust ("the Purpose Trust") and whether the second and third respondents ("Larona" and "Roenne" respectively and together "the Additional Trustees") have been validly appointed as additional trustees of both trusts.

2 The concerns expressed by Basel fall into two distinct categories. The first relates to certain alleged technical deficiencies in the appointment of Ghirlandina and the Additional Trustees. The second relates to a suggestion that the exercise by the fourth respondent ("Mr Kaplan") and Ghirlandina of their respective powers amounted to a fraud on a power and that the appointments of Ghirlandina and the Additional Trustees respectively are therefore invalid on that ground. We propose to deal with these two categories of objection separately.

TECHNICAL OBJECTIONS

(i) The Purpose Trust

(a) The background

3 The Purpose Trust was created by a declaration of trust dated 19 th April, 2004 made by Basel as trustee. It is governed by the law of Jersey. The purpose of the Trust is expressed in clause 4 of the deed as being to facilitate the study of the effects of e-commerce on the world's economy. Mr Kaplan was named as the protector and the protector is also the enforcer. Under clause 13 the protector has the power to appoint new or additional trustees and also the power to remove any trustee.

4 For present purposes, the critical provision is that contained in clause 14 which deals with the appointment, removal and resignation of protectors. The relevant provisions are as follows:-

> *"(1)(a) The protector shall have the power to nominate a person to act as the successor of the protector by instrument in writing revocable by the protector and delivered to the Trustees and to the successor named therein and if the protector so nominating shall for any reason cease to be the protector then the person who is the subject of such a nomination that has not been revoked shall forthwith become and be the protector.*
>
> *(b) .....*
>
> *(c) In the event that there is no protector in office and no successor protector shall have been nominated by the protector previously in office the Trustees shall forthwith upon receiving notice of the same by deed appoint any person who is not a trustee hereof to be the protector.*
>
> *(d) Any protector hereof may resign as a protector hereof by giving notice*

thereof in writing to the Trustees and any successor who is the subject of any nomination under sub-clause (1)(a) of this Clause (that has not been revoked) and to any other protector hereof then in office and after the expiration of thirty days from the date of so giving such notice (or such shorter period as may be agreed in writing between the protector so resigning and the Trustees and all other, if any, protectors hereof then in office) the protector who has so given such notice shall thereafter cease to be a protector thereof.

(e) Any person serving as the protector shall immediately cease to be the protector of this Trust if such person dies (or being a company is dissolved or passes a resolution for its winding-up or liquidation or is struck from the register or a petition for relief is filed by or against the company which is not dismissed, discharged, stayed or restrained within sixty (60) days of being filed or the doing or suffering of any comparable act in any competent jurisdiction), becomes of unsound mind or otherwise becomes unable to fulfil the office of protector hereunder."

5 On 6 th September 2006, Mr Kaplan, in his capacity as protector, executed a document in the following terms:-

"APPOINTMENT OF SUCCESSORS

The undersigned Gary Kaplan, being the protector of the Bird Purpose Trust, on the basis of Article 14 of the trust deed dated 16th January 2004 establishing the Bird Purpose Trust herewith appoints Ghirlandina Anstalt to be his successor as protector of the Bird Purpose Trust with immediate effect."

Mr Kaplan holds all the founder's rights in Ghirlandina.

6 On 8 th September, 2006 Ghirlandina executed a deed whereby it purported as protector to exercise the powers under clause 13 so as to appoint Larona and Roenne as trustees of the Purpose Trust and remove Basel as the trustee thereof. On 20 th September Larona, Roenne and Ghirlandina executed a deed purporting to change the proper law of the Purpose Trust to that of Liechtenstein. Larona and Ghirlandina are Liechtenstein entities; Roenne is incorporated in the British Virgin Islands.

7 On 31 st October, 2006 Basel was informed by fax of the fact that it had been removed as trustee and that Larona and Roenne had been appointed in its place. A copy of the document of 6 th September was supplied to it on 3 rd November. Following a meeting in Geneva on 16 thNovember at which Basel's representatives expressed the view that the document of 6 th September did not constitute a resignation by Mr Kaplan as protector, Mr Kaplan sent a letter dated 21 st November 2006 to Basel in the following terms:-

"Reference is made to the written Appointment of Successors dated 6th September 2006 executed by me by which I have appointed Ghirlandina Anstalt

as my successor as protector of the Bird Purpose Trust with immediate effect.

For the avoidance of doubt I hereby confirm that by appointing a successor protector it was my intention at the same time also to retire as protector of the Bird Purpose Trust and therefore wish to record that I retired as protector of the Bird Purpose Trust by executing the said Appointment of Successors on 6th September 2006."

8 As can be seen from the provisions of clause 14(1)(d) of the trust deed, a protector can only cease to be the protector on the expiry of 30 days notice to, *inter alia*, the trustees for the time being. It is therefore now accepted by Ghirlandina that it was not the protector on either 8 th September or 20 th September, 2006 because Mr Kaplan had not given notice at that stage to Basel of his retirement and accordingly he was still the protector. It is therefore further accepted that the deeds of those dates purporting to appoint Larona and Roenne as trustees, to remove Basel as a trustee and to change the proper law were invalid. However, on 13 th April, 2007 Ghirlandina executed a further deed appointing Larona and Roenne as additional trustees (to act with Basel) and it is submitted that they have both been trustees since that date.

(b) Submissions

9 On behalf of Ghirlandina and the Additional Trustees Mr Buckley submits that the document of 6 th September is effective not only to appoint Ghirlandina as successor protector to Mr Kaplan under clause 14(1)(a) but also as a resignation under clause 14(1)(d); and that accordingly it took effect 30 days after delivery of the document to Basel on 3 rd November, 2006 (i.e. on 3 rd December). He points in particular to the words *'with immediate effect'* and argues that they are meaningless unless they are construed as a clear intention on Mr Kaplan's part to resign as protector by means of his execution of the document.

10 He is supported in his submissions by Mr O'Connell who further submits that there is no requirement for any particular formality for resignation as a protector as compared with appointment of protector. He draws an analogy with the strict requirements concerning the execution of a will as compared with the lack of any particular formality required for the revocation of a will. He argues that Mr Kaplan clearly intended to resign as protector by means of the document of 6 th September and he draws support from the fact that Ghirlandina began to act as protector within two days by purporting to appoint new trustees and remove Basel as trustee.

11 Both counsel further submit that, even if the document of 6 th September did not amount to a resignation by Mr Kaplan, the letter of 21 st November certainly did so. That was delivered to Basel and Ghirlandina the same day and accordingly, at the very latest, Mr Kaplan had ceased to be protector 30 days later, namely on 21 st December, 2006. Thus Ghirlandina became the new protector on that date and could accordingly validly appoint

the Additional Trustees on 13 th April, 2007.

(iii) Decision

12 In our judgment Mr Kaplan has not effectively resigned as protector. Accordingly Ghirlandina is not the protector at present and its purported appointment of Larona and Roenne as additional trustees on 13 th April, 2007 is therefore of no effect. We would summarise our reasons as follows:-

(i) The document of 6 th September, 2006 must be construed against the background of the provisions of the trust deed.

(ii) Clause 14(1) sets out a somewhat unusual structure. Sub-clause (a) clearly envisages the appointment of what was called in argument a 'protector in waiting'. Thus the protector, by revocable instrument in writing, appoints another person to act as his successor as protector. However the person so nominated as successor protector does not become the actual protector by means of such appointment. He remains a protector in waiting. His appointment only takes effect upon the protector who made the nomination ceasing to be the protector and his appointment as successor protector not having been revoked at that stage.

(iii) It is clear therefore that the trust deed envisages a two-stage process. First, the appointment of a successor protector (protector in waiting) under sub-clause (a) and secondly the current protector ceasing to be the protector either by resignation pursuant to sub-clause (d) or for any of the causes (e.g. death) set out in sub-clause (e). It is only upon the current protector ceasing to be the protector that the successor protector becomes the actual protector. In the context of this particular case, we have to consider therefore whether Ghirlandina has been appointed as successor protector under sub-clause (a) and whether Mr Kaplan has ceased to be the actual protector by means of a resignation pursuant to sub-clause (d), with the consequence that Ghirlandina has become the actual protector.

(iv) We accept of course that the two matters may be dealt with in one document. Thus a properly drawn up deed could state clearly that a successor protector is being appointed pursuant to sub-clause (a) and that the current protector is resigning. On delivery of that document to the trustees and the successor protector in accordance with sub-clause (d) and the expiry of the 30 day period, the resignation would become effective and the successor protector would become the actual protector. However the two steps are required. Appointment of a successor protector under sub-clause (a) without a resignation simply means that one has a successor protector ready and waiting who will only become the actual protector once the current protector ceases to be the protector.

(v) The document of 6 th September undoubtedly amounts to the appointment of Ghirlandina as a successor protector (i.e. a protector in waiting) pursuant to sub-

clause (a). However we do not consider that it contains any resignation by Mr Kaplan. Mr Buckley and Mr O'Connell placed weight upon the words "herewith appoints Ghirlandina Anstalt to be his successor as protector....". They argue that these words are only consistent with an intention on Mr Kaplan's part to cease immediately to be the protector. But this is simply not so. As we have shown above, the framework of clause 14(1) is to provide for the appointment of a successor protector who does not become an actual protector until the current protector ceases to be protector. There is an immediate appointment of a successor protector but he remains just that, namely a protector in waiting. In our judgment the words referred to above are entirely consistent with the immediate appointment of a successor protector pursuant to sub-clause (a).

(vi) Counsel next argued that the words *"with immediate effect"* make it clear that this is a resignation on the part of Mr Kaplan. They argue that the words are unnecessary for an appointment of a successor protector under sub-clause (a) and accordingly they can only properly be construed as a resignation by Mr Kaplan. We accept that the words are unnecessary for an appointment under sub-clause (a). If they were deleted the document would still have effect as an appointment of Ghirlandina as a successor protector under sub-clause (a). Nevertheless we cannot construe them as a resignation. One has to ask rhetorically what it is which is to have 'immediate effect'. The answer can only be that it is the appointment contained in the preceding words, namely the appointment of Ghirlandina as a successor protector (i.e. a protector in waiting) pursuant to sub-clause (a).

(vii) Counsel next relied upon the letter of 21 st November. They argued that this made it clear that Mr Kaplan had meant the document of 6 th September to constitute a resignation on his part. But it is trite law that it is not an admissible aid to the construction of a document for a party to the document to explain what he meant. If, as we find, the document of 6 th September did not amount to a resignation, it cannot become one simply because, two months later, Mr Kaplan says that he meant it to constitute a resignation. If the letter of 21 st November had said simply *'I hereby resign as protector'* that would most certainly have constituted a resignation and, 30 days after notification of that letter to the Trustee, it would have taken effect under sub-clause (d). At that point, Ghirlandina, as successor protector by reason of the document of 6 th September would have become actual protector. But that is not what the letter said. The letter was directed entirely towards the document of 6 th September and sought to give Mr Kaplan's version of what he meant when he signed that document. The letter therefore achieved nothing.

(viii) The same argument is raised in respect of the actions taken by Ghirlandina on 8 th September. It is said that, as Mr Kaplan owned Ghirlandina, the fact that Ghirlandina acted as protector by appointing new trustees on that date shows that Mr Kaplan intended that Ghirlandina should become the actual protector by reason of the document on 6 th September, not simply a successor protector in waiting. However the argument runs into the same difficulty as the preceding one. What Mr Kaplan thought he had achieved by the document of 6 th September cannot alter what he

actually achieved.

(ix) Finally, counsel argued that, if we were to construe the document of 6 th September in the manner in which we have, this would be to take an unduly narrow view which would have the effect of defeating the clear intention of Mr Kaplan and Ghirlandina. However, documents in relation to trusts can have important consequences, not only for the parties to the document but also for others who may not be parties, such as beneficiaries. We think therefore that there is an important public interest in demanding a certain level of clarity and formality in relation to trust documents. A trustee and others are entitled to know where they stand following receipt of a document such as that of the 6 th September. Given the provisions of clause 14(1) of this particular trust deed, it would require a considerable feat of imagination to interpret the document as constituting a resignation by Mr Kaplan.

(x) Furthermore the position is easily rectified. As we have already said, the document of 6 th September amounts to a valid appointment of a successor protector under sub-clause (a). All that is now required is a letter of resignation as protector by Mr Kaplan coupled with delivery of that letter to Ghirlandina and Basel. At the expiry of 30 days thereafter, Ghirlandina will become the actual protector. It will then be open to Ghirlandina to consider whether to exercise any of the powers conferred upon it by clause 13 in relation to the appointment and removal of trustees. It would be well advised to take advice on Jersey law prior to doing so.

13 It follows that, in relation to the Purpose Trust, Mr Kaplan is still the protector and Basel remains the sole trustee.

(ii) The Charitable Trust

14 The Charitable Trust was created by deed dated 16 th January, 2004 between Clement Bird as settlor and Basel as trustee. The name 'charitable trust' is something of a misnomer as it is in fact a conventional discretionary trust with no limit on the category of person who may be added as a beneficiary. Indeed, although the original named beneficiaries were two charities, further charities and various individuals have since been added pursuant to the power conferred by the trust deed. Although Mr Bird was the nominal settlor, it is clear from the letter of wishes that Mr Kaplan and his family are to be regarded as the main persons to benefit from the Trust, albeit that none of them has as yet been added formally as a beneficiary.

15 The trust deed named Mr Kaplan as protector and, pursuant to clause 23 (a) and the 8 th schedule, most of the significant powers of the trustees can only be exercised with the written consent of the protector. In addition, the power of appointing new or additional trustees is vested in the protector although, unlike the Purpose Trust, there is no power for the protector to remove a trustee.

16 The provisions concerning the appointment of a new protector are set out in clause 22 as follows:-

> *"(a) .....*
>
> *(b) A new protector shall be appointed whenever the protector for the time being (being an individual) shall refuse or become unfit to act (through insolvency, incapacity or otherwise) dies or wishes to be discharged from the position of protector or (being a company) is put into liquidation (whether voluntary or compulsory) or is declared en désastre or otherwise ceases to exist or passes a resolution to the effect that it desires to be discharged from the position of protector.*
>
> *(c) Such new protector shall be appointed by declaration in writing or by will or codicil signed by the person making such appointment and the same shall be effective at the time or upon the occurrence of the events mentioned in the declaration or (in the event that no such time or event is mentioned) when the declaration or certified copy thereof effecting the same is received by the Trustees who shall cause a memorandum of such appointment to be endorsed on or permanently annexed to this Settlement.*
>
> *(d) Power to appoint a new protector shall be vested in such persons as are specified in the 7th schedule in the order of priority and in the manner and subject to such conditions (if any) therein specified.*
>
> *(e) ....."*

The 7 th schedule names the protector for the time being as the person with power to appoint a new protector. There are default provisions allowing the trustees to appoint a new protector should the protector be unable or unwilling to act for 60 days.

17 The events in September 2006 in relation to the Charitable Trust follow a similar pattern to those concerning the Purpose Trust. Thus, on 6 th September Mr Kaplan, as protector executed a document as follows:-

> *"APPOINTMENT OF SUCCESSORS*
>
> *The undersigned Gary Kaplan being the protector of the Bird Charitable Trust, on the basis of Article 22 of the trust deed dated 16th January 2004 establishing the Bird Charitable Trust herewith appoints Ghirlandina Anstalt to be his successor as protector of the Bird Charitable Trust with immediate effect."*

18 On 8 th September Ghirlandina, as protector, executed a deed purporting to appoint Larona and Roenne as additional trustees. On 20 th September those two companies, with Ghirlandina, executed a deed purporting to change the proper law of the Charitable Trust to that of Liechtenstein.

19 Basel was informed of these events on 31 st October and received copies of the documents on 2 nd and 3 rd November. Following the meeting in Geneva referred to earlier Mr Kaplan wrote a letter to Basel on 21 st November in identical terms to that described in paragraph 7 above save that it referred to the Charitable Trust rather than the Purpose Trust.

20 Mr Thompson has submitted that, although the provisions of the two Trusts are very different, there is still a requirement for the protector of the Charitable Trust to resign before a new protector can be appointed. He says that the document of 6 th September does not amount to a resignation for much the same reasons as in relation to the Purpose Trust and that it would be very odd if the two identical documents of 6 th September had a different effect in relation to each Trust.

21 However, as we have already stated, each document of 6 th September must be construed against the provisions of the relevant trust deed. The framework for a change in protector is completely different in the two Trusts. Whereas the Purpose Trust envisages the appointment of a protector in waiting who will subsequently automatically become protector upon the current protector ceasing to hold office, the Charitable Trust envisages (save in specific circumstances to which we shall refer) a contemporaneous appointment of a new protector and retirement of the current protector.

22 Thus, omitting irrelevant wording, clause 22 (b) provides "A new protector shall be appointed whenever the protector for the time being ..... wishes to be discharged.....". Clause 22 (c) provides "Such new protector shall be appointed by declaration in writing ..... and the same shall be effective at the time ..... mentioned in the declaration .....".

23 The document of 6 th September is completely unambiguous in this respect. It states that Ghirlandina is appointed as successor protector *'with immediate effect'*. In accordance with clause 22 (c) the appointment therefore has immediate effect and it is a necessary implication from this that the declaration is also an indication that Mr Kaplan 'wishes to be discharged'.

24 It is correct of course to say that clause 22 (c) has three alternative times at which the appointment of a new protector can take effect. It is also true to say that the second alternative envisages the possibility of a protector in waiting along the lines of the Purpose Trust. This is because of the wording which provides that the declaration appointing a new protector may become effective *"*..... upon the occurrence of the events mentioned in the declaration...." Thus it would be possible to execute a declaration appointing a new person as protector but specifying in the declaration that such appointment should only take effect upon (for example) the death of the current protector. However, there is no such event specified in the declaration of 6 th September; on the contrary the appointment is specifically stated to take effect 'with immediate effect'. Thus this second alternative has no

application to the present case.

25 The third alternative in clause 22 (c) provides that the appointment in a declaration may take effect "..... when the declaration ..... is received by the trustees ...." However this is specifically stated only to be applicable in the event that no time or event when the appointment is to take effect is mentioned in the declaration. That again is of no application in this case because the declaration states unambiguously that the appointment of the new protector is to take immediate effect.

26 For these reasons we hold that, when construed in the context of clause 22 of the trust deed of the Charitable Trust, the document of 6 th September is effective as an immediate appointment of a new protector and, by necessary implication, is sufficient indication that Mr Kaplan *'wishes to be discharged'*. We find therefore that Ghirlandina was, subject to the argument in relation to fraud on a power, duly appointed as protector of the Charitable Trust on 6 th September, 2006 in place of Mr Kaplan.

27 It is to be noted that we have placed no weight upon the letter of 21 st November, 2006 from Mr Kaplan for the reasons mentioned previously in connection with the Purpose Trust. Had we concluded that the document of 6 th September was not effective to replace Mr Kaplan by Ghirlandina, the letter of 21 st November would, for the reasons given in relation to the Purpose Trust, not have assisted in overcoming any shortcomings of that document.

28 It follows that, subject to the argument concerning fraud on a power, Ghirlandina as protector was entitled on 8 th September to appoint Larona and Roenne as additional trustees of the Charitable Trust.

FRAUD ON A POWER

29 As a second limb to his argument, Mr Thompson raises the question of whether, even if the various appointments of Ghirlandina, Larona and Roenne are technically valid, they are nevertheless void because their exercise amounted to a fraud on a power. In view of our findings above, we do not need to consider this aspect in relation to the Purpose Trust; but we do need to consider it in respect of the Charitable Trust. In order to do so, we must explain the factual background in a little more detail. We should add that Basel does not assert definitively that the appointments amount to a fraud on a power. It simply seeks the Court's direction and raises concerns as to the validity of the appointments. It is made clear in para 37 of Miss Coward's first affidavit that the Trustee will abide by whatever decision this Court reaches having heard the relevant parties.

(i) Factual background

30 Mr Kaplan has over the years built up a substantial telephone and internet sports bookmaking and gaming business under the name BetonSports. As a result of a reorganisation in 2004 BetonSports Plc ("BOS") became a group holding company with its shares being owned by Boulder Overseas Corporation ("Boulder") a Panamanian company. In 2004, shares in BOS were placed on the London AIM market and there was subsequently a private placement of further shares. A total sum of approximately US$120m was raised from institutional investors. Boulder retains approximately 15% of the shares in BOS. The papers before us do not disclose exactly how the proceeds of the public listing were dealt with but it would seem that, for the most part, they found their way into the Charitable Trust, whereas the Purpose Trust retains indirectly the 15% shareholding in BOS. As already explained both Trusts were created in 2004 in anticipation of the listing on the AIM market. The assets in the Trusts (other than the shareholding in BOS) represent the proceeds of sale derived from the listing. Mr Kaplan was the effective settlor of both trusts.

31 It would seem that BOS was fully licensed to carry on its business in all the various jurisdictions where it physically did so, but inevitably an internet business can be accessed by persons anywhere in the world. There was a long section in the prospectus at the time of the AIM listing making it clear that there was a substantial risk that BOS was in breach of the gambling laws of the United States to the extent that it accepted bets from residents of the United States. It was also clear from the prospectus that business from US residents was indeed accepted.

32 On 17 th July 2006 an indictment against BOS, a number of associated companies, Mr Kaplan and other individuals was unsealed in the District Court in Missouri. The indictment contains 22 counts. For the most part they arise out of the alleged illegal gambling conducted by BOS with US residents but there are associated counts of racketeering and tax evasion.

33 The employee of Basel responsible for advising Mr Kaplan on the setting up of the Bird Trust structure was Mr Edmund Bendelow, then the chief executive of Basel. It is clear that he and Mr Kaplan had developed a close working relationship. Although Mr Kaplan and his family were not technically beneficiaries of the Charitable Trust, there seems little doubt that Basel regarded them as such in accordance with the letter of wishes. Thus, as well as the consultancy fees paid to Mr Kaplan, sums were periodically made available towards the living expenses of the Kaplan family. These were treated as loans and no doubt they would have been cancelled and treated as distributions as and when Mr Kaplan and his family were formally appointed as beneficiaries.

34 Mr Bendelow became aware of the indictment almost immediately, not least because of the arrest in Dallas of the then chief executive of BOS. As a result, on 20 th July, 2006 Basel made a suspicious activity report (SAR) to the Financial Crimes Unit (JFCU) of the States of Jersey Police pursuant to the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law"). It is clear from Mr Bendelow's affidavit that there was much concern at Basel as to whether various employees at Basel might themselves be at risk of prosecution in the United States.

35 The making of the SAR no doubt caused difficulty. Until Basel had received the consent of the JFCU, it would not make payments out of the Trusts; nor could it inform Mr Kaplan of the reason for any difficulties because of the tipping off provisions of the 1999 Law. We will return to this aspect later but we accept that there certainly were some problems with communication as a result and at least two types of payment were refused. The first and most significant was the sum of $10m which was due to be paid by the Purpose Trust to Mr Kaplan (or his assignee) pursuant to a loan note which arose out of the restructuring in 2004. This sum remains unpaid. Secondly, Basel had been paying a regular consultancy fee to Mr Kaplan and this ceased on the making of the SAR, although it was later re-commenced.

36 The evidence suggests that Mr Kaplan convened a meeting of his advisers in Geneva in late August 2006 (probably 24 th August, based upon para 17 of Ms Coward's second affidavit) and it would seem that a plan was developed at that stage or shortly thereafter to sideline Basel. On 1 st September Mr Bendelow met Mr Barg, an American lawyer advising the Trusts, in Iceland and we shall return to that meeting later.

37 In any event, as previously mentioned, on 6 th September Mr Kaplan executed two deeds purporting to appoint Ghirlandina as protector of both Trusts in place of himself and on 8 th September Ghirlandina executed a deed appointing Larona and Roenne as additional trustees of the Charitable Trust and a deed removing Basel as trustee of the Purpose Trust and replacing it by Larona and Roenne.

38 One of the companies owned by the Charitable Trust is Leecroft Investments Group Limited ("Leecroft"), a BVI company. Leecroft holds an account with Banque Privée Edmund de Rothschild SA ("Rothschild") in Geneva, in which there is a substantial amount of cash. On 25 th September 2006, unknown to Basel, Larona and Roenne purported to hold a shareholders' meeting of Leecroft, remove the Basel employees as directors and appoint new directors. The next day those new directors resolved to change the authorised signatories for the bank accounts maintained by Leecroft with Rothschild and also at Pictet et Cie. It appears that Rothschild were willing to act on these documents and certain payments, referred to below, were made. It is now conceded by the Additional Trustees that the actions they took in connection with Leecroft were invalid and of no legal effect because they gave no notice to Basel of the relevant meetings.

39 However it came to the attention of Basel that Rothschild were making payments without reference to Basel and the matter was then taken up with Rothschild. The result was that the bank put a freeze on the account until the matter was sorted out and, as described earlier, at the end of October Larona and Roenne informed Basel of what had taken place in terms of their appointment and the actions they had taken in respect of Leecroft.

40 Before Basel was informed of these matters, Larona and Roenne had made the following

payments made out of the Leecroft account at Rothschild without the knowledge of Basel:-

(i) On 10 th October, 2006 the sum of $100,000 was paid to an account in Costa Rica in the name of H K Unique Design. This was apparently a company within the trust structure which operated a furnishing business in Costa Rica managed by Mrs Kaplan. Apparently Basel had been in the habit of lending monies from the Charitable Trust to this company for payment of invoices etc and Mr Bendelow conceded in his affidavit that, although he was not aware of the payment, it was highly likely that Basel would have agreed to it if it had been asked. Furthermore, it was a type of payment for which the consent of the JFCU had by then been obtained.

(ii) On 13 th October an invoice from Delta Voyagers in the sum of €400,000 was paid. This related to the hire of a private plane and chalet for the Kaplan family for Christmas/New Year 2006. Basel had refused to pay this sum when asked in late September because it did not have the consent of the JFCU to such a payment. However, it is accepted that Basel had previously been in the habit of paying invoices of this nature for the benefit of Mr Kaplan. Such payments were apparently treated as loans and would no doubt have been converted to distributions as and when Mr Kaplan was added as a beneficiary of the Charitable Trust.

(iii) On the same date $500,000 was paid to the client account of Mr David Lipton, an attorney in Georgia, USA, who had been retained both by Basel on behalf of the Trusts and by Mr Kaplan personally. According to Mr Lipton's affidavit, the sum in question was a payment on account of his retainer for Mr Kaplan personally. He was also paid $7,296 in reimbursement of travel expenses.

(iv) On the same date two fairly small payments were made to Dr Pedro Suarez. He is a lawyer in Costa Rica retained by Basel on behalf of the Trusts. The payments related to travel expenses or similar matters.

(v) On the same date, the sum of $14,100 was paid to Bulmer International, a company within the trust structure. The payment apparently related to the maintenance of a farm and livestock in Costa Rica.

41 On 30 th March, 2007 Mr Kaplan was arrested in the Dominican Republic. He was subsequently extradited to the USA and is now in custody in Missouri awaiting trial on the indictment. Subsequently the Attorney General obtained a *'saisie judicaire'* under the 1999 Law at the request of the US authorities in respect of the assets of the Trusts. However there had been no 'saisie' in existence at the time of the various appointments which we are considering.

(ii) The intentions of Mr Kaplan and Ghirlandina

42 Basel is concerned that the intention of Mr Kaplan and Ghirlandina was to procure that the assets of the two Trusts were put beyond the reach of the US authorities and/or extract

them from Jersey where they were subject to the restrictions caused by the 1999 Law. It is said by Basel that such a purpose would amount to a fraud on a power. It is necessary therefore for the Court to determine what the intention was of the relevant parties when they executed the various deeds on 6 th and 8 th September, 2006.

43 The Court directed that evidence should be filed on this issue. Basel relied on an affidavit sworn by Ms Julie Coward who is the current managing director of Basel. That affidavit in turn exhibited an earlier affidavit which she had sworn together with two earlier affidavits of Mr Bendelow, who had left the company in March 2007. Basel also relied upon an affidavit sworn by Mr Michael Blackie, one of the directors of Basel. A number of affidavits were sworn on behalf of Ghirlandina and the Additional Trustees. Dr Lambert von Grasern is a partner of Larona, which is licensed to conduct trust company business in Liechtenstein. He is a lawyer who has specialised in trusts for 15 years and is a founding partner of Larona which was established in 1997. He is also a director of Roenne which is a company incorporated in the BVI. He swore two affidavits in the proceedings. Ms Christina Vogt is an economist and is recognised by the Liechtenstein government as being entitled to practice as a professional trustee. She is a director of Ghirlandina. She too has sworn two affidavits. Mr David Lipton is a US attorney who practises in Atlanta, Georgia. In June 2006 he was appointed as counsel to Basel in respect of the two Trusts. He also acts for Mr Kaplan personally. Dr Pedro Suarez is a lawyer in Costa Rica. He was retained by Basel on behalf of the Trusts in connection with the management of various investments made by the Trusts in Costa Rica. Finally, Mr Kaplan also swore an affidavit.

44 At the original hearing, considerable reliance was placed by Ghirlandina and the Additional Trustees upon the suggestion that, following the unsealing of the indictment against Mr Kaplan, there had been a complete breakdown in communications between the Trustee and Mr Kaplan and those advising him. Advocate O'Connell spoke powerfully of Basel freezing 'like a rabbit caught in the headlights of a car'. Mr Kaplan referred in his affidavit to this continuing 'for several months'. In the light of the production of the note of a meeting held in Jersey between Basel on the one hand and Mr Lipton and Dr Suarez on the other on the 16 th August, 2006, the Court acceded to Mr Thompson's application that the parties should file further evidence on this topic. The matter came back before the Court on 16 th November, 2007 at which time the Court received supplemental affidavits from Mr Lipton, Dr Suarez and Mr Kaplan together with a second affidavit from Mr Blackie. The Court has since received further written submissions from the parties.

45 The Court was referred to many e-mails and other documents exhibited to the various affidavits and we have considered all the material put before us. However we do not think it necessary to lengthen this judgment by setting out the evidence in detail because the essential facts do not appear to be seriously in dispute; rather it is the inferences to be drawn from those facts which are contested.

46 The picture which emerges is as follows. There is no doubt that Mr Bendelow and Mr Kaplan had developed a close relationship in relation to the Trusts. Mr Bendelow had been

a key adviser at the time of their establishment; he was the person at Basel with whom Mr Kaplan dealt; and Mr Kaplan as well as being the de facto settlor and protector was also regarded (together with his family) as the real beneficiaries of the Charitable Trust, albeit that they had not been formally added as such. We accept Mr Kaplan's evidence that he had regular and frequent contact with Mr Bendelow.

47 All of this changed dramatically following the unsealing of the indictment against Mr Kaplan on 17 th July 2006. Basel submitted an SAR to the JFCU on the 20 th July and, until guidance was received from the JFCU, felt unable to have any contact with Mr Kaplan for fear of breaching the tipping off provisions of the 1999 Law. Thus, it is clear that Mr Bendelow and all those at Basel refused to have any more personal contact with Mr Kaplan. Confirmation of this is seen from an e-mail from Mr Stanley Barg of Duane Morris, American lawyers to the Trusts and Mr Kaplan, who stated that he was informed of this by Mr Bendelow at meetings on 30 th/31 st July 2006 and was asked by Mr Bendelow to advise Mr Kaplan accordingly. Indeed, Mr Bendelow has not spoken to Mr Kaplan since the unsealing of the indictment. None of Mr Kaplan's telephone calls during this time were taken or returned.

48 . We accept that, during this initial period, Basel simply disappeared off the radar screen so far as Mr Kaplan and his team were concerned; nor was Basel able to make any payments during this period. However, on 26 th July, Mr Bendelow was able to respond to Mr Lipton by e-mail saying "I have had my ability to communicate severely restricted by the Jersey Regulatory Authorities. But due to very good work by our local counsel, matters are gradually getting better. I have recently been given permission to fund Boulder's appropriate legal fees and just a few minutes ago Gary's legal fees as well. I am permitted to meet with legal advisers in appropriate circumstances .....". On the same day he e-mailed Dr Suarez saying "As you are aware we have up until now been restrained from communicating with you by the regulatory authorities in Jersey. However, by very good work by our legal advisers we have now obtained consent to contact you and confirm that we would like you very much to continue as the Costa Rican legal adviser to both the Bird Purpose Trust and the Bird Charitable Trust and all related entities. The authorities here have also consented to the trustees continuing in all their normal investment activities and we therefore would be very grateful if you would continue to supervise the various real estate projects the structures have in progress in Costa Rica..... Could you also think about how much additional consultancy assistance you will need from Gary Kaplan? I am hopeful that the authorities here will allow us to make various payments to Gary under the terms of his existing consultancy agreements."

49 In a subsequent e-mail to Dr Suarez on 1 st August, Mr Blackie said "Unfortunately, it is highly unlikely that the regulators here would allow us to fund the entire budget on any project as one transfer. But they may allow us to make monthly payments against the cash flow forecast..... We would also need an undertaking from your law firm that no funds would be paid to any member of the Kaplan family without our agreement and we would need regular architect reports informing us of progress on each project....."

50 Mr Bendelow had also re-established contact with Duane Morris on 24 th July when he sent an e-mail to Mr Ostrander of that firm stating "I have up until now been prevented by Jersey legislation and regulatory requirements from communicating with you. Having now received clearance from the relevant authorities, I am now able to respond to future communications from you provided that they are in written form". Mr Bendelow attended an urgent meeting with Mr Ostrander in London the next day (25 th July) but, as he explained in an e-mail of 24 th July to Julie Coward, he had told Mr Ostrander that he (Mr Bendelow) could not discuss any matters relating to Gary Kaplan personally and the SAR. Further meetings were held with Mr Barg and Mr Ostrander on 30 th/31 st July. Because Duane Morris were lawyers to the Trusts as well as to Mr Kaplan, they were informed of the fact that, through Messrs Olswang, English solicitors, English counsel were being instructed by Basel in relation to the proceeds of crime issues. On 17 th and 18 th August there was further e-mail correspondence, which included Mr Barg of Duane Morris, concerning the fact that Basel had received a more general consent from the Jersey police which included reasonable legal fees (including fees for indicted individuals), all normal asset management decisions, all payments due on consultancy agreements (i.e. with Mr Kaplan), all reasonable living expenses of the Kaplan family and interest on the outstanding loan note. On 21 st August a letter from Ogier setting out the exact terms of this more generous consent was e-mailed by Basel to Mr Barg and Mr Ostrander of Duane Morris.

51 As mentioned earlier a meeting was held in Jersey on 16 th/17 th August attended by Mr Lipton and Dr Suarez as well as employees of Basel including Mr Bendelow. Most of the discussion concerned the various Costa Rican projects and what was required in respect of them. However para 11 of the note of the meeting records:-

> *"That the Jersey regulatory authorities had recently given their consent to the payment of reasonable living expenses to GK and his family.* DL was asked to liaise with Cedric Berger of Kostenbaum & Associes in Geneva and ask him to provide an estimate. Consideration was given to the most suitable and most tax efficient way to make payments of living expenses, the alternatives being:-
>
> *(a) As expenses under GK's consultancy agreements*.
>
> *(b) To appoint GK and his family as beneficiaries of the Charitable Trust and make distributions*.
>
> *(c) To make loans*.
>
> *As the tax issue was primarily an issue for the recipient, DL was asked to liaise with Mr Berger and with GK and revert in due course."*

52 In addition, Basel were in contact with Penny Tucker, the personal assistant to Mr Kaplan. For example, on 27 th July Mr Blackie was in e-mail contact with Ms Tucker concerning the payment of legal fees for Mr Kaplan and sent her a copy of an e-mail which he had sent to the lawyers including the phrase "The Jersey regulatory authorities have now given us

permission to communicate with you and we can confirm that we can very shortly be advancing the necessary funds as requested in your fee note....." There was subsequent correspondence with Ms Tucker concerning the payment of legal fees.

53 According to Dr von Grasern (the date is not entirely clear but seems to have been in the latter part of August 2006, possibly the 24 th), a meeting of advisers to Mr Kaplan was held in Geneva, the result of which, we infer, was that (either then or shortly afterwards) a decision was taken to proceed with a plan to appoint additional or replacement trustees of the two Trusts. Dr von Grasern (and no doubt Ms Vogt) was approached shortly afterwards.

54 There was also a meeting on 1 st September in Iceland between Mr Bendelow and Mr Barg, one of the lawyers from Duane Morris who had worked closely with Mr Bendelow in connection with the Trusts. Although the meeting concerned other clients, it is alleged that there was a discussion between Mr Bendelow and Mr Barg concerning the possibility of a change in the trusteeship of the Charitable Trust and the Purpose Trust. However, no mention of such a conversation was made by Mr Bendelow in either of the two subsequent affidavits which he swore for the purposes of proceedings before this Court. The content of the alleged conversation is contained in the affidavit of Miss Coward. She was apparently given this information by a member of Ogiers (Basel's advocates) who in turn had been given the information by Mr Bendelow. It is therefore double hearsay from a witness who never mentioned the conversation when he had the opportunity to do so. Mr Barg apparently vehemently disputes the alleged content of the conversation as reported by Miss Coward and has asked Basel to waive privilege so that he may give his side of events. However Basel has refused to do so. In the circumstances the Court proposes to ignore anything that is said to have occurred in Iceland.

55 It is however clear that Duane Morris, through Mr Barg, were actively involved in the changes to the Trusts because they subsequently rendered an invoice which showed that Mr Barg had undertaken considerable work in September 2006 in advising the Trusts, when such work had not been requested by Basel. Furthermore, there is an entry on 13 th September showing that another member of the firm had advised on Jersey law concerning whether a majority of co-trustees could act without notice to the minority. That is, of course, just what the Additional Trustees purported to do in relation to Leecroft a few days later.

56 As we have already mentioned, the changes to the protector and trustees were effected behind the back of Basel. Furthermore, attempts were made by the Additional Trustees to gain control of Leecroft, again without informing Basel. When, eventually, Basel was informed by Dr von Grasern on 31 st October of the purported changes in the trustee, he said that the structural organisational changes had been decided upon *"due to personal circumstances concerning the settlor"*.

57 In his first affidavit Mr Kaplan gave the reasons for the decisions which had occurred. As to the replacement of himself as protector by Ghirlandina, he said that, given the existence of

the indictment, he was concerned that he might be arrested and held in custody in the United States (as has in fact occurred). He felt that he would then not properly be able to carry out his functions as protector. The appointment of Ghirlandina would enable the protectorship function to be undertaken by that entity but, as owner of the founder's shares, he would still have ultimate control.

58 As to the decision to appoint the Additional Trustees, he summarised his reasons as follows:-

> (i) He was concerned at the fact that, following the unsealing of the indictment, Basel had become non-responsive and non-communicative, impairing the functioning and administering of the Trusts and undercutting the trust and confidence he had in Basel's desire and ability to function as trustee. After this had gone on for 'several months', it had become apparent to him that changes were necessary to protect the Trusts and their assets and beneficiaries. He referred elsewhere to a total breakdown in communication with the Trustee.
>
> (ii) Partly by reason of the breakdown in communication but also because of delays and refusals by Basel to make various payments, great difficulties had been caused in connection with the administration of the Trusts. Thus monies had not been made available in time so that investment opportunities (particularly in Costa Rica) had been lost and there was often a crisis as to whether contractors, architects, lawyers etc would be paid. In this respect he relied also upon the affidavits of Mr Lipton and Dr Suarez.

59 Conversely, in the affidavits filed on behalf of Basel, the concern was raised that the appointments of Ghirlandina and the Additional Trustees was part of a plan to put the assets of the Trusts beyond the reach of the US authorities in the event of Mr Kaplan being convicted and an order confiscating the trust assets being made. By the time of the hearing, Basel's case had changed somewhat and what was being said was that Mr Kaplan intended to wrest control of the Trusts away from Jersey so that the restrictions and inconvenience which resulted from the application of the 1999 Law (and in particular the need for Basel to obtain the consent of the JFCU) would be avoided.

60 We have carefully considered the evidence and submissions of the parties on this point. Our findings as to the intentions of the relevant parties are set out in the following paragraphs. However we should begin by saying that, as a matter of strict analysis, we must consider the intention of Mr Kaplan in connection with the appointment of Ghirlandina as protector and the intention of Ghirlandina when considering the appointment of the Additional Trustees as trustees of the Charitable Trust. Having said that, it is clear that an overall plan had been developed by those advising Mr Kaplan whereby Ghirlandina would become protector and would then appoint the Additional Trustees. No evidence has been produced to us about Ghirlandina's intentions and Ms Vogt says nothing about it in her various affidavits. However, given the background and the fact that Ghirlandina made the appointment of the Additional Trustees only two days after itself being appointed as

protector, we find that Ghirlandina adopted the reasons and intention of Mr Kaplan for wishing to appoint the Additional Trustees. We shall therefore consider the validity of the appointment of the Additional Trustees on the basis that Ghirlandina had exactly the same intention as Mr Kaplan.

61 We take first the suggestion by Basel that Mr Kaplan had a 'broader intention' to place the assets of the Trusts beyond the reach of the US authorities. We do not find that to be the case. Our reasons briefly are as follows:-

(i) As Miss Coward states in her second affidavit, Basel itself has been advised by its Swiss lawyers on the extent to which the Swiss authorities under Swiss law are able to offer assistance to US requests for assistance (such as to gather evidence and/or seize assets). The advice of the Swiss lawyers is that any change in the trustees of the Trusts whilst leaving the cash assets in accounts maintained in Swiss banks would not put the assets beyond the reach of the US authorities.

(ii) There was a period when the Additional Trustees had assumed control of the Leecroft account (which contained much of the cash) because they had purported to restructure the board of that company and change the mandate with Rothschild in Switzerland. If the plan had been to put assets beyond the reach of the US authorities, one might have expected them at that stage (when they knew that Basel knew nothing of their activities) to pay the money away to some distant jurisdiction; but nothing of this sort occurred.

(iii) On the contrary, all the payments made out of the Leecroft account during this period were payments which it is accepted that Basel, in the absence of the need to get the consent of the JFCU, would have been happy to make. They were either payments concerned with investments of the Trust or they were payments to or for the benefit of the Kaplan family or they were payments to lawyers who were to represent Mr Kaplan in connection with the US proceedings. Dr von Grasern (on behalf of Larona and Roenne) and Ms Vogt (on behalf of Ghirlandina) have both sworn that they are not aware of any such broader purpose. We see no reason to disbelieve their evidence in this respect. If there was such a purpose, we would expect them to have been aware of it, given that the Additional Trustees would have had to put the plan into effect.

(iv) It is clear that Dr von Grasern, on behalf of Larona, has met with the Liechtenstein Financial Investigation Unit ("FIU") and has obtained their confirmation that it is in order for Larona to take on the administration of the Trusts, subject to confirmation that the trust structure itself will not be accepting any betting money. Mr Thompson was critical of the nature of the disclosure made by Dr von Grasern to the FIU but we do not think those criticisms were well founded. If there were a broader plan to put assets beyond the reach of the US authorities, we would not expect Dr von Grasern to have been informing the FIU in Liechtenstein of exactly what was proposed.

(v) Basel has no direct evidence of any such broader intention and ultimately simply asks us to infer such an intention from the surrounding circumstances. In our

judgment the surrounding circumstances fall far short of compelling such an inference.

62 However, neither do we accept the suggestion that the actions taken by Mr Kaplan were simply those of a protector who had become dissatisfied with the performance (in terms of communication and response to requests for money etc) of a trustee and therefore deciding to replace that trustee or appoint additional trustees to out-vote it. First and foremost, such a suggestion does not explain the secrecy with which the matter was carried out. Secondly, Mr Kaplan's affidavit was prone to exaggeration (e.g. reference to 'some months' of non-communication when, as we have seen, the gap between the making of the SAR on 20 th July (when the non-communication began) and the meeting in Geneva in August when the decision was taken to sideline Basel) was only six weeks or so. During that time, although there had been an initial period of non-communication, there had from about 25 th July onwards been regular communication by Basel with Mr Lipton, Dr Suarez, Duane Morris and Ms Tucker. Thirdly, we did not find the affidavits of Dr Suarez and Mr Lipton concerning the difficulties in extracting money from Basel in relation to investments to be convincing. In most cases they did not give any indication as to the date of the request and where such a date was ascertainable, it was in most cases after 8 th September, and could not therefore be relevant to any decision to appoint the Additional Trustees on that date. Fourthly the explanation is not consistent with the reason given on 31 st October 2006 by Dr von Grasern, namely that the changes resulted from the 'personal circumstances' of the settlor i.e. Mr Kaplan.

63 We accept that, following the unsealing of the indictment, Basel refused to have any direct communication with Mr Kaplan for fear of breaching the tipping off provisions of the 1999 Law. Furthermore, there was complete silence from Basel from their discovery of the indictment shortly after 17 th July until 25 th July, when communications re-opened. However, as we have seen, Basel thereafter explained their difficulties as clearly as they properly could to Mr Lipton, Dr Suarez, Mr Barg and Mr Ostrander of Duane Morris and Ms Tucker and thereafter there was regular contact with all of these people. Basel made its position as clear as it could by referring to the need to obtain consent for payments from the 'Jersey Regulatory Authorities'. Although the exact subtleties of the provisions of Article 32 of the 1999 Law may not have been known to them, we have no doubt that all those referred to above understood that, as a result of the fact that Mr Kaplan had been charged with criminal offences in the United States, Basel had had to make certain disclosures in Jersey and could only make payments out of the trust funds with the consent of the Jersey authorities; Basel's freedom of action had been severely limited.

64 We also accept that, particularly in the latter part of July, there were no doubt delays in processing requests for payment out of the trust funds because of the need to obtain the consent of the JFCU. However, an interim consent allowing for normal investment activities was obtained from the JFCU as early as 26 th July (see para 48 above) and a more generous consent was obtained by 17 th/18 th August (see para 50 above). This latter consent allowed for the administration of the Trusts to continue more or less as normal save

for the payment of $10m by way of a capital instalment of the loan note referred to earlier and the fact that any payments for living expenses had to be reasonable; no doubt that was why Basel felt unable to agree to the payment of $400,000 for the chalet and travel for the Kaplan family, which was subsequently paid out of Leecroft without Basel's knowledge.

65 Mr Buckley and Mr O'Connell submitted that, although there had undoubtedly been contact between Basel and the various persons mentioned earlier, there had been no contact with Mr Kaplan. As far as he was concerned there was complete silence from Basel. There was no evidence before the Court, they submitted, that any of those mentioned had passed on their knowledge to Mr Kaplan. But this is to ignore the fact that Duane Morris acted for Mr Kaplan as well as Basel and it had long been understood that if ever there was a conflict, they would remain with Mr Kaplan and Basel would go elsewhere; i.e. their first loyalty was to Mr Kaplan. Similarly, Mr Lipton acted for Mr Kaplan as well as Basel. Ms Tucker was Mr Kaplan's PA and therefore her duty was to him. Finally, Dr Suarez was engaged by the Trusts but he was carrying on business in Costa Rica where Mr Kaplan resided. There was nothing to prevent these individuals from communicating to Mr Kaplan that Basel now had to get the permission of the Jersey Regulatory Authorities in order to make payments and we regard it as inconceivable that they did not do so. Indeed, as stated at para 51, Mr Lipton was asked at the meeting on 16 th/17 th August to consult with Mr Kaplan in the light of the decision of the Jersey Regulatory Authorities to allow the Charitable Trust to pay reasonable living expenses for the Kaplan family. Similarly, as set out in para 48, Mr Bendelow had on 30 th/31 st July, asked Mr Barg (who was aware of the reason) to inform Mr Kaplan that he (Mr Bendelow) could not speak to him. We find that Mr Kaplan soon became aware that, as a result of the fact that he had been charged in the US, Basel had made contact with the Jersey authorities and could not now make payments out of the Trusts unless those payments were approved by the Jersey authorities.

66 Pulling matters together, the Court's finding on the intention of the relevant parties is as follows.

67 As to the appointment of Ghirlandina as protector on 6 th September, Mr Kaplan's intentions were twofold. We find that his primary reason was as set out in his affidavit. He was aware that he had been indicted in the US and that there was a real likelihood of his being arrested and being remanded in custody. This in fact is what has since occurred. He considered that it would be very difficult for him to act effectively as protector if he were remanded in custody. We can well understand his view that it would be preferable to have a corporation of some sort to act as protector. The corporation could act through its officers but he could retain ultimate control by way of ownership of the corporation. In reaching this conclusion, we have noted that it was not necessary for Mr Kaplan to appoint Ghirlandina as protector in order to achieve his objective of sidelining Basel. There was nothing to prevent him as protector from appointing Larona and Roenne as additional trustees in exactly the same way that Ghirlandina did on 8 th September. The appointment of Ghirlandina was unnecessary to the scheme. In our judgment Mr Kaplan acted in good faith in the best interests of the Trust and its beneficiaries as a whole in deciding for this reason that he should be replaced as protector by Ghirlandina. However, we find that he had a

secondary intention in that he intended that Ghirlandina should appoint the Additional Trustees as trustees of the Trust in accordance with the scheme which, as we have found, was formulated at or shortly after the meeting held in Geneva in the latter part of August (see para 53).

68 As to Ghirlandina's intention when appointing Larona and Roenne as additional trustees on 8 th September, we have already stated that we find Ghirlandina to have accepted the reasons given to it by Mr Kaplan and its reasons are therefore to be taken as those of Mr Kaplan himself. We find that Mr Kaplan realised that Basel's freedom of action had become restricted by the need to obtain the consent of the Jersey authorities in relation to the Trust and that this arose as a consequence of his having been indicted. He did not find this acceptable. He had been used to a situation where there was a close relationship between the Trustee (through Mr Bendelow) and himself (as protector) and where the administration of the Trust had proceeded smoothly and harmoniously. Basel made prompt decisions on investments and paid out monies, all in close liaison with the protector. Suddenly, all that had changed. Basel would not speak to him at all and all decisions were subject to the consent of the Jersey authorities, even if they were willing to give some general consents.

69 We find that Mr Kaplan decided that this was unacceptable and not in the best interests of the Trust. We find that he decided to move the control and administration of the Trust to a jurisdiction where these restrictions would not arise. He wished simply to return to a situation where the administration of the Trust was in the hands of the trustees unfettered by the need to obtain permission of a governmental authority. He wished the administration of the Trust to return to exactly as it had been before Basel made the SAR. He did not believe that this could be achieved in Jersey because of the effect of the 1999 Law. He therefore decided that the control and administration of the Trust should be moved out of Jersey. He realised that Basel would almost certainly be unable to obtain consent from the Jersey authorities to transfer the Trust out of the island and therefore, in consultation with his advisers, he decided to try and achieve this by appointing the majority of trustees outside Jersey who would take control of the assets before Basel became aware of the position; hence the secrecy. We find that, in so doing, he was acting in good faith in what he believed to be the best interests of the beneficiaries of the Trust. He believed that it was in the interests of the beneficiaries as a whole (including in due course him and his family) that the trustees should be able to make decisions on investments and distributions without governmental (or police) interference and that the administration of the Trust should be carried on in the same manner as it had been prior to his being indicted and Basel making the SAR.

(iii) What is fraud on a power?

70 Almost all of the cases dealing with fraud on a power concern the exercise of special powers of appointment, i.e. powers for the appointor to select, within a limited class of objects, the person or persons who should benefit from the property. The statements of principle in various cases reflect that fact.

71 A useful summary of the principle is to be found in Thomas & Hudson - The Law of Trusts at para 19.01:-

> ***"The donee of a limited power must exercise it bona fide for the end designed by the donor, which requires that the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which it was conferred.*** If the donee, in good faith, exercises a power in favour of a stranger or in some other way which is not consistent with the terms and scope of his power, such exercise is excessive. If, however, the donee deliberately attempts to secure the effect of an excessive execution without actually making one, the exercise of the power is not simply excessive; it is fraudulent and void. The donee:-
>
> ***"..... must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power and not for the purpose of accomplishing or carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and intent of the power).""***

72 The leading judicial statement of the principle is that of Lord Parker in *Vatcher v Paull* [1915] AC 372, on appeal from this Court. At 378 Lord Parker said:-

> ***"The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral.*** It merely means that the power has ***been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power."***

73 A simple example illustrates the difference referred in the extract from Thomas & Hudson referred to above. If the donee of a special power of appointment makes an appointment in favour of A (who is not within the class of objects of the power), that is an invalid exercise of the power because the power of appointment does not entitle the appointor to appoint assets to A. It is simply an excessive exercise of the power. If, on the other hand, the appointor makes an appointment in favour of B (who is an object of the power) but with the intention that B should immediately transfer the assets to A, that would be a fraud on a power. The appointment is valid on its face in that it is an appointment to an object of the power; but the true intention of the appointor is to benefit A who is not an object of the power. He has therefore exercised the power for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power.

74 Over the years various authors have tended to divide the circumstances in which fraud on a power will arise into three categories. The first arises where the appointment is made as a result of a prior agreement or bargain with the appointee as to what he will do with the proceeds. The second is where the power is exercised corruptly so as to benefit the appointor himself. The third is where an appointment is drafted so that the intent appears to

be to benefit an object of the power, but the real intent is to benefit a non-object. However these are really all examples of the underlying principle that a power only be exercised for the purpose for which it was conferred and in accordance with its terms.

75 Although there are few examples in the cases, the principle is capable of application to what might be called administrative powers, as well as distributive powers. For example, suppose that a trustee, who has the power to appoint new trustees, is requested by a beneficiary to invest the whole of the trust fund in an investment which is not permitted by the trust deed. The trustee knows that it would be a breach of trust to make such an investment and refuses to agree to the request. However, he wants to help the beneficiary and he therefore retires as trustee and appoints in his place as trustee a person whom he (the trustee) knows will do exactly as the beneficiary has requested. Such an appointment would amount to a fraud on a power because the trustee is not making the appointment in good faith for the benefit of the beneficiaries but is doing so to facilitate a breach of trust. To use Lord Parker's words, he has appointed the new trustee for a purpose or with an intention beyond the scope of or not justified by the trust deed which conferred upon him the power to appoint new trustees.

(iv) To which powers does the principle apply?

76 A distinction is to be drawn between personal powers and fiduciary powers. A useful, although by no means exhaustive, summary can be found in Underhill & Hayton - Law of Trusts and Trustees (17 th Edition) at para 1.76 as follows:-

> ***"1.76 A personal power may be one of three types.*** In a rare case a settlor may confer a beneficial personal power on a donee with intent to confer full dominion over the relevant property on the donee or full power to withhold consent to particular courses of action so as to enable the donee to protect his own interests, so that the donee can act as selfishly as he wishes purely to benefit himself, e.g. in discharging his legal or moral obligations to persons whom he would otherwise seek to benefit from his own resources. More commonly, a settlor will confer a non-beneficial personal power on a donee (e.g. his widow) with intent that the donee is to be wholly unaccountable in the courts in respect of the power's exercise or non-exercise, so long as upon any exercise of the power only objects of the power are to benefit, it being a fraud upon the power (actionable by the beneficiaries entitled in default of a proper exercise of the power) if the donee exercises it to benefit persons (like herself) who are not objects of the power. Otherwise, the donee of the power is under no duty to consider exercising it and 'is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the court will uphold it'. In a third scenario, the holder of the power will be under a fiduciary duty from time to time to consider whether or not it is appropriate to exercise a power (e.g. a trustee with power to add anyone in the world other than a member of an excepted class to the class of beneficiaries or of objects of powers of appointment or to delete anyone from such a class), but the actual

decision to exercise or not to exercise the power is to be an unchallengeable personal function unless amounting to a fraud on the power .

1.77 In contrast, a fiduciary power is one conferred upon someone (usually holding an office like that of trustee or protector) for the benefit of the beneficiaries, so that he must independently consciously consider from time to time whether or not to exercise it and he must exercise it responsibly according to the purpose for which it was conferred on him and not perversely to any sensible expectation of the settlor, e.g. by exercising it capriciously or arbitrarily or in bad faith; moreover, a fiduciary power cannot be released unless the trust instrument specifically authorises it."

77 As can be seen, the doctrine of a fraud on a power does not apply to general personal powers where the donee may benefit himself as well as anyone else in the world; but it does apply to limited personal powers and to fiduciary powers. In the case of a personal power, the doctrine is often the only controlling mechanism on the exercise of the power, whereas, in the case of a fiduciary power, the Court of course has very wide powers to supervise and control the exercise of such powers. There is no suggestion by Basel in this case that the appointments of Ghirlandina and of the Additional Trustees, even if they were fiduciary appointments, are liable to be quashed on any ground other than that their exercise amounted to a fraud on a power. There is no suggestion that Larona and Roenne are not suitable entitles to act as trustees of the Trust. Nevertheless, it is necessary to consider the nature of the two powers in question in order to ascertain the true purpose for which those powers were conferred. It is only once that purpose is ascertained that consideration can be given as to whether the appointments in this case were made for a purpose or with an intention beyond the scope of or not justified by the power, and therefore amounted to a fraud on the power.

(v) Are the powers in this case fiduciary powers?

78 Mr Thompson argues that the power to appoint new trustees and the power to appoint a successor protector are both fiduciary powers. Mr Buckley and Mr O'Connell, on the other hand, argue that the latter is not a fiduciary power; it is a general power of appointment on the basis that the protector for the time being can appoint anyone in the world as his successor. The only person who the current protector cannot appoint is himself but that is not a limitation on the category of objects of the power; it is simply a function of the fact that he is already the protector. The protector is not obliged to consider exercising the power and should he do so, he may exercise it on whatever grounds he thinks fit and in favour of whomever he chooses.

79 We propose to consider the two powers of appointment in turn.

(a) Power to appoint new or additional trustees

80 There seems to be general acceptance in the text books that the power to appoint new or additional trustees is normally to be regarded as a fiduciary power even where the power is conferred upon someone who is not a trustee (e.g. a protector). See for example Thomas & Hudson, para 22-36, Snell's Equity (13 th Edition) para 10-11, Underhill para 1.83. The leading judicial authority in support of the proposition is *Re Skeat's Settlement* (1889) 42 Ch D 522. More recent cases to like effect are *Re Osiris Trustees* 2 ITELR 404 (power to appoint new or additional trustees vested in the settlor); *von Knierem v Bermuda Trust Co Limited* (1994) Butterworth Offshore Cases Vol 1, 116 (power to remove and appoint trustees vested in the protector); *IRC v Schroder* [1983] STC 480 (power to remove and appoint trustees vested in a committee of protectors).

81 We find nothing in the terms of the trust deed of the Charitable Trust to suggest that the power to appoint new or additional trustees is not a fiduciary one. Clause 17 (read with the 5 th schedule) confers the power of appointing new or additional trustees on the protector, failing whom upon the trustees for the time being. The first protector is named in the trust deed as Mr Kaplan but thereafter, as we have seen, the protector for the time being has power to appoint his successor. Thus the power of appointment of trustees is attached to the office of protector rather than any individual in his own right and if there is no protector the power vests in the trustees, who invariably owe fiduciary duties. In all the circumstances we are satisfied that the power conferred on the protector by Clause 17 to appoint new or additional trustees is a fiduciary power and must therefore be exercised in good faith in the best interests of the beneficiaries as whole.

(b) The power to appoint a successor protector

82 The powers of a protector vary considerably from one trust to another. In some he may be given very limited powers; in others they may be extensive. It is a question of construction of the particular trust deed as to whether a particular power of a protector is fiduciary or not. It may well be the case that, in relation to a particular trust, some powers of a protector are fiduciary and others are personal.

83 A convenient summary of the present position can be found in Underhill at paras 1.81 - 1.83:-

> ***"1.81 In determining the scope of duties affecting particular powers of a protector a court will need to consider the settlor's purposes in conferring particular powers on the protector so that, ideally, the purposes should be properly documented, e.g. in a general letter of wishes or a specific protector's memorandum.*** The court also needs to consider the terms of any exemption or other clause in the trust instrument that in any way relates to the protector's position. Indeed, a court may well take the view that if the protector is an unpaid friend or relative of the settlor then there may be no duties in relation to some protector's powers (e.g. of appointment or of consenting or not to a

trustee's proposed appointment), but that in relation to other powers, e.g. to remove the trustee and appoint a new trustee, the extent of the fiduciary duty is to act in good faith in the best interests of the beneficiaries, while if the protector is a paid professional then he is subject to the full fiduciary responsibilities applicable to trustees, but, like trustees, he can be expressly exempted from liability for breach of fiduciary duty if a clause so provides, so long as the breach does not involve recklessness or dishonesty .

1.82 Exceptionally, where the first protector office-holder is the settlor with a selfish interest to promote in respect of a particular trust asset it will be possible to hold that some of his powers are personal, as also is likely where the first protector is a beneficiary with selfish interests that the settlor must have taken into account. Alternatively, if it be fiduciary, the court may hold that there is a necessarily implied authorisation of a conflict of interest which allows the beneficiary, after due consideration of other beneficiaries' interests, to exercise the power despite personal benefit accruing therefrom .

1.83 However, normally where the settlor or a beneficiary is a protector the powers of such protector that affect the investment and managerial role of the trustee will be presumed fiduciary so far as concerns the exercise of a power of removal and appointment of trustees and the exercise of a power to direct investments to be made by the trustees, because those powers will be presumed to be exercisable to promote the interests of the beneficiaries as a whole. In respect of the trustees' role as discretionary distributors of income or capital to beneficiaries it seems that there is good scope for argument that the protector's power to withhold consent to proposed distributions or to direct distributions is a personal power, especially in the case of a settlor who is the protector."

84 Thomas & Hudson at p715 is to like effect:-

"The role of office of protector is usually regarded as a fiduciary one, but it need not necessarily be so. Thus, a protector with a power to remove or appoint trustees will be a fiduciary, just like any other person with such a power; but there is no reason why a protector with a dispositive power must necessarily be in a fiduciary position any more than any other non-trustee appointor or a person who holds or reserves a power to revoke or amend the trust. A protector is not a trustee and it cannot be presumed that all and any other powers conferred on him are necessarily fiduciary powers. On the other hand, a protector does not have to be a trustee to be in a fiduciary position. Moreover, powers are not inherently fiduciary or non-fiduciary and there is little to be gained, in this context at least, from classifying them as such: they become fiduciary powers when they are conferred on a person who occupies a fiduciary office. A protector, unlike an ordinary individual, holds an office. This does not necessarily make all his powers fiduciary in nature, but it tends to equate the protector more with the trustee. It may also be added that it would be odd if a protector, unlike a trustee, were not bound, for example, by the rules against

self-dealing or profiting from the trust, or could exercise his powers for his own benefit. Clearly, the trust instrument should specify ***whether or not the office of protector in relation to that trust is intended to be a fiduciary office and whether all the powers (and, if not, which powers) conferred on the protector are intended to be fiduciary powers.*** However, if this is not done, then, in the final analysis, the court must consider the nature and function of the protector, and of the particular power(s) under scrutiny, within the context of that particular trust and in the light of the purposes for which it or they were conferred. It will be material whether the protector is an office holder without a direct personal interest under the trust or in the beneficiaries, or simply a named individual with such an interest. If the function of the power is crucial to the proper running of the trust as a whole and for the welfare of the beneficiaries as a whole, or if a failure or refusal to act could jeopardise the proper administration of the trust, it is suggested that it is likely that the protector is a fiduciary and, as such, subject to duties similar to those of the trustees. The court's primary function, after all, is to protect the trust and its beneficiaries and not the settlor or the protector. There is also the added advantage to the protector that, as a fiduciary, it becomes easier to claim remuneration and an indemnity from the trust fund."

85 In this case we are concerned solely with the power conferred upon the protector to appoint a successor protector under Clause 22(d). Nevertheless, when considering the nature of that power, it is helpful to consider the overall role of the protector on the basis that, if the protector's role in a trust is a fiduciary one, it is more likely that the power of appointing a successor protector is also a fiduciary power. In this case, in addition to his power of appointing new or additional trustees, the consent of the protector is required to any decision by the trustees to pay or appoint income or capital, make payments to minors or charities, add or exclude beneficiaries, change the proper law, delegate their powers, amend the trust deed, employ agents, employ an investment adviser or manager and make a loan to any beneficiary.

86 We were referred to a number of cases concerning whether a protector holds a fiduciary position. In *Re Freiburg Trust* [2004] JRC 056, this Court held that the protector in that case (whose consent was required to the exercise by the trustees of a number of their powers including payments of income or capital) was in the position of a fiduciary and the Court accordingly had jurisdiction to remove him.

87 In *Alhamrani v Russa Management* [2005] JLR 236 this Court held that a power conferred upon the protectors to amend the trust deed was a fiduciary power (albeit qualified as both protectors were also beneficiaries).

88 In *Rawcliffe v Steele* [1993-95] MLR 426, the Staff of Government Division (i.e. the Court of Appeal) of the Isle of Man had to consider a trust where the protector's consent was required for payments of income and capital and for the exercise by the trustees of a number of administrative powers. The protector also had power to appoint new or

additional trustees. Unfortunately no protector was appointed when the trust was created and an issue arose as to whether the trust was therefore invalid. The court held that the position of protector in that case was fiduciary and that the court could accordingly appoint a protector with fiduciary powers in the same way that it could appoint a trustee in order to prevent a trust from failing for want of a trustee.

89 In *Re the Circle Trust, HSBC International Trustee Limited v Wong* [2007] 9 ITELR 676, the Grand Court of the Cayman Islands was concerned with whether an appointment of a protector by a majority of beneficiaries was valid. We shall refer to that aspect shortly but in reaching its conclusion, the court found that the protector in that case was a fiduciary and was therefore to exercise his powers only for the good of the beneficiaries as a whole. Conversely, in *Re the Z Trust* [1997] CLR 248 the Grand Court of the Cayman Islands held that the power conferred on the management committee (comprising two beneficiaries and one non-beneficiary of the trust) to amend the terms of the trust with the agreement of the settlor was a personal and not a fiduciary power.

90 In our judgment, the role of the protector in relation to the Charitable Trust is a fiduciary one. There is no indication from the trust deed that the powers of the protector are to be regarded as personal powers. On the contrary, although Mr Kaplan was appointed as the first protector, there are a number of provisions in the trust deed which support the proposition that the protector is to be a fiduciary. Thus, a protector may appoint his successor (clause 22); there is provision for remuneration of the protector and for him to retain commissions and fees paid as a director of a company (clause 21); the protector may release or suspend the need for his consent (clause 24); he is not to be liable for loss unless it arises from fraud, wilful misconduct or gross negligence on his part (clause 25). Construing the trust deed as a whole, we find that the protector of the Trust is a fiduciary.

91 Given this finding, is the power of appointing a successor protector also a fiduciary power? In our judgment it is. We would summarise our reasons as follows:-

(i) There is little authority on this point. However what authority there is supports our decision. In *Re the Circle Trust* (supra) the trust deed conferred the power to appoint a protector upon a majority of the beneficiaries of full age. A majority purported to exercise the power but this was challenged by a minority who alleged that the majority had been acting in their own interests. The Grand Court held that the power to appoint a protector (who it had held was in a fiduciary position) was itself a fiduciary power and could therefore only be exercised in good faith in the interests of the beneficiaries as a whole. The appointment was declared invalid.

(ii) In *IRC v Schroder* (supra) a committee of protectors had the power to remove and appoint the trustees of the settlement. A committee member could be removed by a majority of the committee and in the event of a vacancy on the committee occurring, the settlor had power to fill the vacancy and appoint additional members. The case was in fact concerned with whether the settlor had power to enjoy the income of the settlement for tax purposes. This in turn depended upon the nature of his powers in

respect of the committee. Vinelott J held that the settlor's power to appoint members of the committee of protectors, like a power to appoint new trustees, was a fiduciary power and could not properly be used to 'pack' the committee in order to ensure that the settlor had a majority which would follow his directions.

(iii) In *Rawcliffe v Steele* (supra) clause 18 of the relevant trust deed provided that, on wishing to retire, the protector for the time being should nominate a successor. At 502 the court said:-

> ***"I refer to clause 18 of the declaration of trust in the present case.*** Mr Steinfeld did not seriously challenge the proposition that this power would be a fiduciary power, and I think he was right not to do so. If, therefore, a power to appoint a person to exercise such powers is itself a fiduciary power, and if there is no individual to exercise those powers under the trust, and if the person having the power to appoint such an individual simply refuses to do so, it seems to me that in such a case the court could and should itself exercise the power and appoint some fit and proper person to exercise the powers under the trust."

The court returned to the point at 512 when it said:-

> ***"It seems to me, for reasons that I have previously set out, that the power to appoint a new protector is likely to be a fiduciary power, the exercise of which could be compelled by the court."***

(iv) The power of appointing a successor protector in this case rests with the protector for the time being. It follows that, although Mr Kaplan as settlor was the first protector, the power to appoint a successor protector thereafter is vested in the office holder rather than in an individual in his personal capacity.

(v) If the protector is unable or unwilling to act for 60 days, the 7 th schedule of the trust deed provides that the trustees may appoint a successor protector. Given the fiduciary position of the trustees, it is clear that their power to appoint a new protector would be a fiduciary power. It would be illogical for the power of appointment of a new protector to be personal where the appointment is made by the protector but fiduciary where it is made by the trustees.

(vi) The trustee of the Charitable Trust is responsible for administering and executing the Trust. The protector selects the trustee. We have already explained that in general the selection of a trustee is a fiduciary power which must be done in good faith. The selected trustee cannot be manifestly unsuitable for the task. It would be illogical if the person who had the power to appoint the trustee could himself be selected with impunity and without control by the Court. As Henderson J said at para 26 of the *Re Circle Trust*:-

> ***"The law requires the power to remove and appoint trustees, even when exercised by beneficiaries, to be exercised in good faith for the benefit of the trust as a whole.*** In my view, where a protector is given the

right to do that, the right of nomination of the protector must equally be exercised in good faith for the benefit of the trust and all the beneficiaries."

(vii) It may be argued that, because the decisions and actions of the protector are reviewable by the Court because he is fiduciary, this is enough protection for the beneficiaries; there is no reason to add an additional layer of supervision by allowing a review of the process whereby the protector is elected to office. This was an argument addressed to Henderson J in *Re Circle Trust* and which he rejected at paragraph 27 of his judgment. We respectfully agree with his reasoning. The Court raised an example during argument of what would happen if the protector were to exercise his power to appoint Mr Al Capone as his successor protector. Mr Buckley argued (correctly on his analysis) that the Court could not prevent Mr Capone from being appointed because the protector was exercising a general personal power. The Court could only remove Mr Capone if he misbehaved as protector. Like Henderson J we do not find this an attractive proposition. It means that the Trust would be at the mercy of Mr Capone as protector unless or until there were grounds to remove him. During that time, damage could perhaps be done to the interests of the beneficiaries. It is more appropriate in our judgment to hold that the power of appointing a new protector is itself a fiduciary power so that the Court can review and supervise it on conventional grounds.

92 Having held that both the power to appoint additional trustees and the power to appoint a successor protector are fiduciary powers and that accordingly they can only be exercised in good faith in the best interests of the Trust and the beneficiaries as a whole, we turn to consider whether there was a fraud on a power in either case here, in the sense that the relevant power was exercised for some other purpose or with some other intention.

(vi) Was there a fraud on a power in this case?

93 Insofar as Mr Kaplan's intention in appointing Ghirlandina as successor protector was to enable the protectorship to function more efficiently and effectively should he be remanded in prison in the United States, we consider such an intention to be entirely consistent with the purpose for which the power of appointment of a successor protector was conferred. Mr Kaplan was acting in good faith in the best interests of the beneficiaries in trying to ensure the smooth functioning of the Trust in the event of his incarceration.

94 However, we have found that Mr Kaplan had a secondary intention because the appointment of Ghirlandina was part of a scheme whereby Ghirlandina would appoint the Additional Trustees as co-trustees with Basel with the intention of procuring the removal of the administration of the Trust from Jersey because of the difficulties caused to the administration of the Trust by reason of the anti-money laundering provisions of Jersey law. We have already found that Ghirlandina's intention in appointing the Additional Trustees was to like effect. Did the exercise of the powers with this intention amount to a fraud on a power?

95 Mr Thompson submits that it did. He argues that, as the Trust is governed by Jersey law, the beneficiaries' rights must be read subject to the provisions of that law. Jersey law includes the 1999 Law. The effect of Article 32 of the 1999 Law is that where a trustee suspects that funds in his trust may be the proceeds of crime, he is entitled to withhold any payments to beneficiaries unless he obtains the consent of the police. What Mr Kaplan and Ghirlandina were seeking to do in this case was to circumvent the restrictions caused by Jersey law and to make payments which Jersey law prohibits. This was an improper purpose and cannot have been contemplated by the donor of the power to appoint a new protector and the power to appoint additional trustees.

96 We do not accept Mr Thompson's analysis. We begin by reminding ourselves that we are sitting as a Court exercising a supervisory jurisdiction over trusts. We are not sitting in proceedings brought by the Attorney General, where the Court may have to balance the interests of the community in seeking to restrain what may be the proceeds of crime against the right of a person who has not been convicted of any offence to do as he wishes with his assets. A separate composition of the Court is dealing with such matters and has indeed granted a *saisie* in respect of the assets of the Charitable Trust. Our duty is to consider simply whether, in terms of the law of trusts, the appointments of Ghirlandina as successor protector and the Additional Trustees as trustees were valid or not.

97 Mr Thompson submits that they were 'improper' appointments because they sought to circumvent the effects of the 1999 Law. However we have found that they were made in good faith and in the best interests of the beneficiaries. Mr Kaplan and Ghirlandina genuinely believed that it would be better in the interests of the Trust and the beneficiaries as a whole if the trustees (with the consent of the protector as necessary) were free to deal with the assets of the Trust as they thought best in the interests of the beneficiaries without having to seek the consent of the police in Jersey.

98 In our judgment, far from being an intention which is beyond the scope of or not justified by the instrument creating the power, such an intention would be entirely consistent with the purposes for which the powers were conferred.

99 In modern times the administration of trusts is frequently moved from one jurisdiction to another because the person with the relevant power considers that the former jurisdiction has become undesirable for one reason or another, so that the continued location of the trust in that jurisdiction is no longer in the beneficiaries' best interests. For example, the jurisdiction might decide to introduce exchange control. It would clearly be a proper exercise of the relevant power to appoint foreign trustees so as to avoid being caught by such exchange control. Similarly the jurisdiction might decide to introduce new taxation measures which would impact upon the trust. Indeed many thousands of United Kingdom trusts have over the years been exported in order to avoid or reduce the impact of UK taxation. Appointments of foreign trustees to avoid such measures are clearly entirely consistent with the reason for the powers having been conferred in the first place. A decision to move a trust or appoint new trustees because this is in the best financial

interests of the trust and the beneficiaries as a whole is highly unlikely to amount to fraud on such a power. Indeed, this is likely to be the very purpose for which the power was conferred. As Underhill & Hayton note at para 1.79:-

> ***"The particular powers conferred upon a protector normally are fiduciary powers intended to enable him to play a fiduciary role (unless expressly or necessarily implied otherwise in the trust instrument or from the circumstances, as where the settlor or a beneficiary is a protector with power to protect his own self interest).*** The fiduciary powers are to enable the protector to safeguard the trust from various hazards, whether relating to the trustee ..... or to beneficiaries ..... or to the trust arrangements (e.g. tax ***or other problems relating to the trust jurisdiction or to a corporate trustee's change of residence or ownership or opening of offices in a jurisdiction where pressure could be exerted).*** ....." [Emphasis added]

100 Mr Thompson argued that the position is somewhat different here because Article 32 is dealing with the criminal law as opposed to simply the law of taxation or exchange control. We intend to focus on Article 32 because none of the other anti-money laundering provisions of the 1999 Law adds anything to the argument.

101 In this connection it is important to analyse exactly what Article 32 prohibits. Article 32 creates the criminal offence of entering into an arrangement to facilitate the retention or control by another of that person's proceeds of criminal conduct where the person entering the arrangement knows or suspects that the other has been engaged in criminal conduct. Thus, where a bank holds an account for a customer and, with the requisite suspicion, makes a payment out of the account on the instructions of the customer in circumstances where it eventually transpires that the monies in the account were indeed the proceeds of criminal conduct, the bank will have committed an offence of money laundering under Article 32.

102 In order to enable commerce to be carried on in these circumstances, Article 32(3) provides a defence for the bank. Even where it has the requisite suspicion, provided it obtains the consent of the police to make the payment, it will not be guilty of an offence even if the money later turns out to be the proceeds of crime. Naturally, it is the policy of most banks, where the consent of the police is not forthcoming following the making of an SAR, to refuse to make a payment on the customer's instructions because to do otherwise is likely to open it up to having committed an offence if it subsequently transpires that the monies are the proceeds of crime.

103 Nevertheless it is important to note that Article 32(3) does not prevent a bank from making a payment without police consent. Unless or until it is proved that the monies in question are the proceeds of crime, there is nothing unlawful about the bank making such a payment. It is a matter of choice for the bank. Unless a *saisie judiciaire* is in existence, there is nothing to prevent a bank making a payment upon a customer's instructions even after it has made an SAR and formed the requisite suspicion. In practice, of course, not many

banks will do so because of the risk that the bank runs of thereby committing an offence should the money turn out to be the proceeds of crime but the making of such a payment at a time when it is not known whether one is dealing with the proceeds of crime or not is not prohibited by Article 32.

104 We have used the example of a bank because it is a simple one; but the point is of course equally applicable in respect of a trust. At present Mr Kaplan has been charged with various offences in the US but he denies them and has not been convicted. He is therefore at this stage innocent. Even if he is in due course convicted, there is likely to be an issue as to whether the assets of the Trust (which came from the flotation of the shares on the AIM market for which the consent of NCIS in England was obtained) are the proceeds of crime. Basel has obtained a joint opinion from leading and junior English counsel who have advised that there is a real issue as to whether the Trust assets could be said to comprise the proceeds of criminal conduct even if Mr Kaplan is convicted.

105 Thus at this stage it is open to Basel to make payments out of the trust fund without the consent of the police. For reasons which we fully understand, Basel has opted not to do so as it does not wish to run the risk of having committed an offence under Article 32 in the event of Mr Kaplan being convicted and the assets being found to be the proceeds of criminal conduct. However, at the time when the appointments were made in September 2006, there was nothing in Article 32 which in law prohibited Basel from making such payments.

106 It follows that the intention of Mr Kaplan and Ghirlandina in seeking to remove control of the Trust assets from Basel so that payments could be made without restriction was not to circumvent a prohibition imposed by Jersey law; it was to circumvent a restriction which Basel had chosen (for perfectly understandable and proper reasons) to impose.

107 Furthermore, all that is achieved by the appointments (if valid) is a change in the identity of the protector and the trustees. This in itself does not result in any movement of assets. Let us take the simple case where an old trustee is removed and replaced by a new trustee. That of itself is not a breach of Article 32. It simply puts the new trustee in a position whereby, under trust law, he can demand that the old trustee transfer the trust assets to him. It is at that stage that Article 32 may become relevant. Where a bank holds money in an account for a customer, the bank is under an obligation on ordinary principles of banking law to pay the money to the customer on demand. However, if the bank has made an SAR and has the requisite suspicion, the bank may refuse to comply with the customer's demand unless the police consent. The position is analogous to that which arises in relation to a trust. If the old trustee has made an SAR, then although as a matter of trust law, the new trustee is entitled to demand the assets, the old trustee may be able to refuse to transfer the assets to the new trustee if the police do not consent. Again the position is somewhat analogous to where a company, in respect of whose account an SAR has been made, changes the signatories on its account. That of itself does not achieve any retention or control of criminal proceeds; it is only when the signatories attempt to remove the funds that the bank may, in order to protect itself, refuse to make payment. In short, we do not see that

a simple change in the identity of trustees is something which is prohibited by Jersey law.

108 For these reasons we find that there is no fraud on a power either by Mr Kaplan in appointing Ghirlandina as protector on 6 th September, 2006 or by Ghirlandina in appointing Larona and Roenne as additional trustees on 8 th September, 2006. Their respective intentions when exercising these powers were consistent with the purposes for which the powers were conferred, namely to act in good faith in the interests of the beneficiaries as a whole. Furthermore, for the reasons given, we consider their intention to remove control of the Trust from Basel was not an unlawful intention in that they were not seeking to achieve by the appointments something which was prohibited by the law of Jersey.

109 We hold therefore that in relation to the Charitable Trust, Ghirlandina is the current protector having been so since 6 th September, 2006 and Larona and Roenne are trustees jointly with Basel, having been so since 8 th September, 2006.

110 We have during this part of the judgment concentrated on the Charitable Trust because of our ruling that, on technical grounds, Mr Kaplan remains the protector of the Purpose Trust. However, we have held that, technically speaking, the document of 6 th September, 2006 was effective to appoint Ghirlandina as successor protector of the Purpose Trust with the result that, if Mr Kaplan now writes a letter of resignation, delivers it to Ghirlandina and Basel and allows 30 days to expire, Ghirlindina will become the actual protector. In the circumstances we need therefore to rule on whether Mr Kaplan's appointment of Ghirlandina as successor protector is nevertheless void as being a fraud on a power.

111 We find that Mr Kaplan's intention when appointing Ghirlandina as successor protector in relation to the Purpose Trust was exactly the same as his intention in appointing Ghirlandina as protector of the Charitable Trust. The provisions of the two Trusts are very different. In particular clause 14(4)(a) of the Purpose Trust provides that the protector shall not owe any fiduciary duty towards any person interested under the Trust for any act of omission or commission of the protector in relation to the powers given to the protector by the Trust. Even assuming (in favour of Basel) that it was able to persuade us that, despite this wording, the power of appointment of a successor protector under clause 14(1)(a) (unlike the other powers of protector) was nevertheless a fiduciary power, this would not avail Basel. Our reasoning for concluding that there was no fraud on a power in relation to Mr Kaplan's appointment of Ghirlandina as protector of the Charitable Trust is equally applicable to its appointment of Ghirlandina as successor protector of the Purpose Trust. We hold, therefore, that Ghirlandina has been validly appointed as successor protector of the Purpose Trust and that accordingly, as mentioned earlier, on submission of a letter of resignation as protector by Mr Kaplan coupled with delivery of that letter to Ghirlandina and Basel and the expiry of the 30-day period, Ghirlandina will become the actual protector.

Postscript

112 We would note that very different considerations might apply if the appointments had been made following a conviction by Mr Kaplan and a finding that the Trust assets were the proceeds of criminal conduct. In those circumstances an intention on behalf of an appointor to engineer the removal of funds from Jersey would be likely to amount to an offence under Article 32 and therefore a crime under the law of Jersey. It seems probable that the Court would not recognise an appointment made with the intention of committing a crime.

113 Finally we should note that our decision is concerned only with the validity of the appointments in question. Our decision says nothing about the practical consequences of the fact that the Additional Trustees are co-trustees of the Charitable Trust. We have already mentioned that, after the various appointments were made, a *saisie judiciaire* over the trust assets of both Trusts was obtained by the Attorney General at the request of the United States pursuant to Article 16 of the 1999 Law (as modified by the Proceeds of Crime (Designated Countries and Territories) (Jersey) Regulations 1999). The effect of our decision in the light of the saisie is a matter for consideration by another Court.