Hawksford Trustees Jersey Ltd v A (the mother)

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Morgan, Kerley
Judgment Date:	17 December 2012
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Text

[2012] JRC 234A

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Morgan **and** Kerley.

IN THE MATTER OF THE G FAMILY TRUST

AND IN THE MATTER OF ARTICLES 51 AND 53 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED).

Hawksford Trustees Jersey Limited
Representor
and
A (the mother)
First Respondent

B (the father) (via his curator A)
Second Respondent
C (First son)
Third Respondent
D (Second son)
Fourth Respondent
E (Third son)
Fifth Respondent
F (Fourth son)
Sixth Respondent
Advocate Michael Christopher Goulborn (as guardian ad litem for the minor and unborn beneficiaries)
Seventh Respondent

Advocate F. B. Robertson **for the Representor**.

Advocate M. H. Temple **for the First, Second, Fifth and Sixth Respondents**.

The Third Respondent appeared in person.

Advocate T. V. R. Hanson **for the Fourth Respondent**.

Authorities

Re S [2001] JLR N 37.

Re S 2001/154.

The Public Trustee -v- Cooper [2001] WTLR 903.

Re Y [2011] JLR 464.

Lewin on Trusts 18th edition.

S -v- L [2005] JRC 109.

In re H Trust [2007] JLR 569.

Representation of the C Trust [2012] JRC 086B.

Scott -v- National Trust [1998] 2 All ER 705.

Trust Protectors by Andrew Holden.

Rawcliffe -v- Steel [1993–1995] MLR 426.

Mental Health (Jersey) Law 1969.

In re Skeats' Settlement [1889] 42 CHD 522.

Trust — approval of the Court sought relating to certain decisions taken by the representor as trustee.

THE COMMISSIONER:

1 The representor ("Hawksford") seeks the blessing of the Court to certain decisions it has taken as trustee of the G Family Trust ("the Trust") created by trust instrument on 7 th November, 1997, by the second respondent, B, who is now under curatorship; his wife, the first respondent, A is his curator. They have four sons who are all adult and currently five grandchildren, who are all minors. Because this judgment will be anonymised before being published, and in an effort to avoid the proliferation of initials, we are going to refer to them as "the father", "the mother", and the first, second, third and fourth sons respectively.

2 The assets of the Trust comprise shares in property development and holding companies, originally owned by the father, and settled in to the Trust. The family, to a greater or lesser degree, have been involved in the business and deep and bitter divisions have arisen between them. Extensive material has been filed with the Court detailing the allegations and counter-allegations that have been made and it is clear that the parties thirst for justice as between them. This judgment will of necessity disappoint them because of the limited role the Court has in an application of this kind (as set out below) and it would be inappropriate (even if it were possible) for the Court to attempt to make findings of fact. We will make limited reference therefore to the disputes that have arisen in our description of the background relying on facts which for the most part do not appear to be in dispute.

The Trust

3 The Trust is a discretionary trust in familiar form. The original trustee was The Royal Bank of Scotland Trust Company (Jersey) Limited. The beneficiaries comprise the father, the mother, their four sons and remoter issue. The first protector was an English solicitor and close friend of the father. The consent of the father and failing him the protector was required to the exercise of certain powers of the trustee, namely the power to add or remove beneficiaries, powers of disposition of income and capital and the power of variation. The father, or failing him the protector, had the power to appoint new or additional trustees.

4 On 5 th December, 2007, the trust instrument was varied with the approval of the Court, to remove the requirement of the consent of the father (who was by then incapacitated) and to give the mother the power to appoint and remove trustees. Provision was also made for the remuneration of the protector.

Background

5 The father brought the second son in to the business in 1995. At that stage, it comprised a diversified portfolio of commercial properties in the Island, against which there were substantial but sustainable borrowings. The structure then as now comprises a holding company and a number of subsidiaries beneath it in Jersey and later in Spain. We will refer to them generally as “the group”. Whilst ownership of the group vested in the Trust, it was for much of the material time under the control of members of the family through their positions on the various boards.

6 On 7 th November,1997, at the same time as creating the Trust (which it would seem replaced an earlier trust) the father executed a letter of wishes, the pertinent provisions of which are as follows:-

> *“3. After my death I should like you to have regard in the exercise of the trusts powers and discretions given to you by the Trust to the wishes of [the mother].*
>
> *4. In arranging for the establishment of the Trust it is my firm intention that the beneficiaries should only receive income from the Trust sufficient for their needs and for the needs of their family and that the capital of the Trust Fund should be preserved and invested and reinvested according to my wishes during my lifetime.*
>
> *5. Income from the Trust should be available to myself and my said wife during my lifetime and after my death income should be available for my said wife to enable her to live and to bring up and educate the children in the same style and manner as during my lifetime. After the death of both myself and my wife income only should be available for my children in the event of need. I ask that the trustees have due regard to my wishes that my children work and earn for themselves. In any event a maximum of 25% of the gross income of the Trust should be distributed. After the death of my children income should be available to their children in the event of need again up to a maximum of 25%.*
>
> *6. Notwithstanding the above:-*
>
> *(a) I may require capital from the Trust during my lifetime to invest in areas unavailable to the trustees or for personal use.* In the event of my death my wife may similarly need capital.
>
> *(b) after the death of both of us my children or grandchildren may need capital for investment purposes.* In this case you should carefully consider such requests and make capital available by way of loan at interest.
>
> *7. After my death I would wish that [ ] as Protector be paid a reasonable fee for his assistance.*
>
> *8. The underlying assets of [the Trust] are shares in property development and holding companies which companies have been built up by me during my period of residence in Jersey. I am now being assisted by [the second son] and*

after my death my wish is that [my second son] should continue to run this property development and holding business."

7 By way of diversification the group became involved in a quite different business in Jersey for which the first son was responsible and it was decided that the group should undertake property development in Spain, where the father and the mother had built a villa. According to the second son the father offered him a profit share of 25% in that venture. However, the father had a serious stroke in February 1999, from which he has never recovered. Consistent with the wishes of the father, the second son assumed responsibility for the group as managing director. On 8 th October, 1999, the first protector retired as protector and appointed a second protector in his place and on 31 st January, 2000, the second son together with the father's curator (a local advocate) and the mother replaced The Royal Bank of Scotland as trustees. The first son also became a director at that time. As the third and fourth sons completed their education, they too were employed in the business from time to time.

8 The policy of diversification continued under the second son. Tensions arose within the family in part over the level of the second son's control of the group, his perceived lack of accountability and concerns over conflicts of interest between the group and his personal interest in the various projects in Spain (as articulated by the father's curator in an email of 20 th July, 2004, to the second son). The level of tension can be gleaned from the fact that the second son dismissed the third and fourth sons from their positions within the group in April and May 2005. The fourth son went back into the group in 2008 and was again dismissed by the second son in May 2009.

9 On 19 th July, 2006, the father's curator, the mother and second son resigned as trustees in favour of Nautilus Trustees Limited ("Nautilus"). At or around that time, it was proposed to develop one very large commercial site in Jersey, which resulted in the realisation of the other properties in the portfolio and substantial financing. It was a complicated and demanding project, creating financial pressure on the assets of the group, not assisted by the downturn in the property market and serious financial difficulties in the business operated by the first son. The project was successfully and skilfully managed by the second son, but relations between the members of the family, essentially between the mother and the third and fourth sons on the one hand and the first and second sons on the other, had deteriorated to the extent that a clearly exasperated Nautilus applied to the Royal Court for directions on 1 st July, 2010. The mother's response to that application was to remove Nautilus as trustee and appoint Trustcorp Limited as trustee on 6 th August, 2010. Her reasons for doing so were set out in a lengthy letter from Mourant Ozannes of the same date. The first and second sons protested at the mother's actions in this respect but in the absence of a legal challenge by them as to the exercise of her fiduciary powers, the dismissal and appointment stood.

10 In August 2003 the business managed by the first son was sold to him by the group. By August 2008 it was close to financial collapse. Consideration was given to letting the

business go under at that stage, but it was felt that its collapse would cause reputational damage to the group as a whole at a time when the development loan for the commercial site being developed was up for renewal. For this and other reasons its overdraft of just over £1M was guaranteed and subsequently repaid, a loan of £855,000 entered into which remains outstanding and other financial assistance given.

11 The second son resigned as managing director on 31 st December, 2009. He subsequently brought certain claims against the Trust (which have been settled) and he and his wife actioned the group for the repayment of loans made by them at a time when it had cash-flow difficulties. The mother has also made loans for the same purpose. The loan litigation brought by the second son and his wife has now been settled. It has given rise to very substantial costs on both sides.

12 The mother was appointed curator of the father on 12 th February, 2010. On 16 th June, 2011, Trustcorp retired as trustee in favour of Hawksford, and this at the request of the mother, who made it clear in her letter of 13 th April, 2011, that she would exercise her power of removal if it failed to do so.

Current situation

13 The board of the holding company and the Jersey subsidiaries (with one exception) currently comprises the mother, the fourth son and a director who is independent of the family and Hawksford. The holding company in turn through one line of subsidiaries owns the now single commercial property in Jersey and through another line of subsidiaries the remaining assets in Spain. The mother, the fourth son and the independent director do not sit on the boards of the Spanish companies.

14 The commercial property in Jersey is let on a long lease and it is the only real asset of the Trust. Its value depends upon market conditions and the yield that can be achieved but the advice given to Hawksford indicates a value ranging from £30,370,000 on a yield of 7% to £35,840,000 on a yield of 6.25%.

15 Working form the figures given to the Court by Hawksford, the principal borrowing on the commercial property is £22,375,000, but in addition to that, there are a number of other liabilities including the loans due or claimed to be due to the mother and the second son and his wife, the guarantees on the first son's business and fees, so that the total liabilities amount to at least £27,097,502.

16 The current annual rental income (which is the only income) is £2,047,000 and that is due to increase at a rent review shortly to a minimum of £2,155,639. Out of that rental income has to be paid the outgoings on the borrowings, totalling £1,787,800, leaving an annual surplus of £249,200 to meet the administration costs of the Trust and its underlying

companies before anything is available for distribution to the beneficiaries. Those administration costs include not just the fees of Hawksford, but the directors' fees paid to the fourth son in the sum of £100,000 per annum and to the independent director in the sum of £85,000 per annum. Mr Robertson informed us that allowing for administration expenses, the Trust has an operating surplus of only £10,000 per quarter. The serious cash-flow restrictions are illustrated by the fact that Hawksford's lawyers, Appleby, were owed £555,000 as at 2 nd July of this year and Hawksford £191,000.

17 In short, Hawksford consider that the group is insolvent on the cash-flow test in that it cannot meet its liabilities as they fall due, but is solvent on the balance sheet test. The group has been actively investigating the possibility of refinancing on the security of the commercial property but given the loan to value ratio this in Hawksford's view is not a realistic option.

18 In terms of the Spanish companies, the holding company commissioned a report from BBA, the group's former accountants, but this was not completed due to a lack of funds. From the information available, it is unlikely that any of the sums invested by the group into the Spanish ventures will be recovered. In the view of Hawksford, the Spanish companies should be wound up.

Beneficiary consultations and decision

19 Hawksford has undertaken a careful and thorough process of consultation with the adult beneficiaries, starting with individual meetings with the mother and each of the sons held in January and February of this year. The purpose of those meetings was to ascertain their current financial needs (which we have not sought to set out in this judgment) and their views on the future of the Trust. Following that process, Hawksford formulated a proposal in May 2012 that it circulated to the beneficiaries inviting their comments. In broad terms, Hawksford proposed that the commercial property should be sold following the forthcoming rent review, the loan litigation brought by the second son and his wife settled, the other liabilities including the loan due to the mother repaid with the surplus being divided as to 50% for the mother and father and the remaining 50% being divided as to 10% each for the first and second sons and 15% each for the third and fourth sons; in effect terminating the Trust.

20 In response, the second son (with we believe the concurrence of the first son) agreed that the property had to be sold, blaming the current financial situation on the negligence and breach of duty of the current directors. He agreed that the Trust should be terminated but disagreed with the proposed division, in particular, he and the first son receiving less than their younger brothers. He suggested provision should be made for the grandchildren. Of the five grandchildren, four are by the second son and one by the fourth son.

21 The mother (for herself and as curator of the father) and the third and fourth sons were

broadly in agreement with the proposal. They blamed the financial situation on the stewardship of the second son and the liabilities incurred by the first son through the business he managed and subsequently owned. In view of this, and of the amount they estimated the first and second sons had already benefited from the Trust, they suggested that they should be excluded from the Trust, which would not then need to be wound up. They also raised the possibility of an action against the former trustees for breach of trust for failing to control the second son when he was managing director and for the decision to give financial assistance to the business owned by the first son.

22 Hawksford, having considered these responses, saw no reason to change its proposal save that in relation to the grandchildren, it proposed to set up a fund of £500,000 for them if the proceeds of sale net of all liabilities exceeded £5.5M.

23 Hawksford set out its decision and its reasons in detail in the first affidavit of Mr Michael Edmund Powell, a director of Hawksford, sworn in support of the representation that it brought before the Court on 21 st June, 2012.

24 Affidavits in response were filed by the mother and the four sons. Having considered these responses, Hawksford considered further the financial needs of the mother and father. In her affidavit the mother explained in more detail how she acted as nurse and carer for the father, which she was finding a physical struggle. She not unreasonably needed assistance and would continue to do so as she got older (the mother is 66 and the father 86). As Mr Powell explained in his second affidavit of 27 th August, 2012, there was no definite view on the price that would be achieved on the sale of the commercial property and to ensure that the mother and father had an income of at least £100,000 per annum net of Income Tax they would require a lump sum of £1.8M which, allowing for an annual growth rate of 4% and an annual inflation rate of 2%, would provide that income over a period of 20 years. In so doing Hawksford took into account the other assets owned by the mother and father which following the sale should be debt free.

25 Accordingly, the decision as presented for consideration by the Court at the hearing (after adjustment for certain anomalies in the wording of the formula) was as follows:-

> *"1. That the building known as [ ] be sold as soon as possible for the best achievable price.*
>
> *2. That (subject to the giving of appropriate indemnities to the Trustee) the Trustee has decided in principle to distribute the net proceeds of sale (after deduction/retention of various sums to meet liabilities or contingencies including, but not necessarily limited to, the sums listed in the attached schedule).*
>
> *3. That the distribution of the net proceeds of sale should be made as follows:-*
>
> *(a) If the net sale proceeds are below £1.8 million, the entire sum should be paid*

to [the father and the mother].

(b) If the net sale proceeds are in excess of £1.8 million any amount above and beyond that to be split (subject to sub-paragraph (c) below: 50% to the father and the mother: 15% each to [the third son] and [the fourth son]; 10% each to [the first son] and [the second son.]

(c) If the net proceeds of sale exceed £5.5 million a £500,000 fund will be established for the benefit of the grandchildren….

The distributions to [the father and the mother] to be for them jointly (to pass by survivorship to the other on the death of one of them).”

26 A trustee cannot fetter the future exercise of its discretion and Mr Powell made it clear therefore that the decision as to the division of the assets as between the beneficiaries was a decision in principle only and was subject to any material change in circumstances between now and the date when the distributions would actually be made.

27 On the 25 th May, 2012, during this consultation process, the first son brought his own representation before the Court seeking directions as against Hawksford but this was superseded by the representation brought by Hawksford. On 1 st June, 2012, and in the context of the first son's representation the Court, of its own motion, directed that the mother should not exercise her power of removal of the trustee or of appointment of additional trustees without leave of the Court and this until further order. Whilst the mother had given her reasons for the use of this power in the past, which had not been the subject of legal challenge, the financial circumstances of the Trust were such that the Court in its supervisory capacity felt it prudent to ensure that Hawksford remained as trustee pending the outcome of its anticipated application for directions.

28 One of the factors Hawksford had taken into account in deciding upon the division of the assets amongst the family was the extent to which they had benefited in the past. This presented it with some difficulty, because no distributions appear to have been made at trust level. Instead, the family had benefited through loans made at group level, on, it would seem, the understanding that they would not be repaid. In its report of 28 th November, 2011, BBA calculated the loans received by each beneficiary and what are described as the cash benefits in terms of salaries, bonus and other such payments, some of which (in the case of the second son) had been loaned back to the companies. The figures did not include loans and cash benefits made through the Spanish companies (as the report into those companies had not been completed) or the obligations taken on by the group in respect of the first son's business.

29 Without going into the figures, some of which were disputed, Hawksford took the view that in broad terms the two elder sons had benefited to a greater extent than the two younger sons. As Mr Powell made clear, it was only one of a number of factors which Hawksford took into account when considering this issue which he listed as follows:-

"The Trustee has taken a number of factors into consideration, including the following:-

(i) the Trust is a discretionary trust and the Trustee is acting within its powers;

(ii) the respective needs of the current and prospective beneficiaries;

(iii) the benefit each beneficiary has already received from the Trust (whether in cash or otherwise);

(iv) the terms of the Letter of Wishes;

(v) the acceptance by all the adult beneficiaries that [the father] and [the mother] should be properly provided for during their lifetimes;

(vi) the wishes of the beneficiaries as expressed to the Trustee;

(vii) the health of the beneficiaries [ ];

(viii) the history of conflict in the Trust and the need for complete financial separation."

The protector

30 The consent of the protector is required for a distribution of income or capital. Following the untimely death of the second protector in January this year, Hawksford, which has the power to appoint a new protector, decided not to do so partly because the matter was coming before the Court by way of this application for directions and partly because of the limited cash reserves of the Trust and the difficulty in identifying someone who would not become a further focus for complaint by some of the beneficiaries. It was felt that the resources necessary to permit a new protector, who would realistically have to be a professional person, to read into the extensive history and understand the views of all the beneficiaries would be better used in making an application to the Court. None of the parties have taken issue with the stance of Hawksford in this respect but the absence of a protector does, in the view of the Court, present issues as discussed below.

The law

31 The starting point is the well-known case of *Re S* [2001] JLR N 37 and [2001/154] in which Birt, Deputy Bailiff, approved the comments of Robert Walker J in an unreported judgment cited in the English case of *The Public Trustee -v- Cooper* [2001] WTLR 903. This application falls within the second category of cases in which a trustee seeks the directions of the Court:-

"(2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is

> ***no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.*** Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do, but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

32 In a case in the second category where, as here, the trustee has not surrendered its discretion, it was held that the Court needed to consider three issues when fulfilling its role:-

> ***"1. Are we satisfied that the Trustee has in fact formed the opinion in good faith that the circumstances of the case render it desirable and proper for it to carry out each of the steps we have described earlier in this judgment?***
>
> ***2. Are we satisfied that the opinion which the Trustee has formed is one at which a reasonable Trustee properly instructed could have arrived?***
>
> ***3. Are we satisfied that the opinion at which the Trustee has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?"***

33 As noted in *Re Y* [2011] JLR 464 at paragraph 40, guidance on the role of the Court in an application where there is no surrender is given at paragraph 29–299 of Lewin on Trusts18th edition:-

> ***"The court's function where there is no surrender of discretion is a limited one.*** It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to

complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

34 Caution is relevant in this case as the hearing proceeded on the affidavit evidence filed by Hawksford (and the other parties) without any cross-examination (there was no application for cross-examination) and whilst Hawksford has set out its reasons fully, the beneficiaries have not had the benefit of the level of disclosure that would apply in an action for breach of trust.

35 In this case, some of the beneficiaries are not just arguing that the Court should withhold its approval; they seek orders from the Court imposing a different decision upon Hawksford. The limit of the Court's power in this respect was made clear in *S -v- L* [2005] JRC 109, a case in which the beneficiary applied for directions ordering the trustee to make an interim distribution out of the trust fund. Birt, Deputy Bailiff, said this at paragraphs 22 and 23:-

> ***"22. The Court agrees with Mr Le Cocq. Although the wording of Article 51(2) is indeed wide and the Court may have a theoretical jurisdiction to make an order as Mr Sinel submits, the jurisdiction of the court must be exercised on a sensible and principled basis. A settlor does not choose the Court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the instrument of trust have been conferred. If Mr Sinel's argument were to be accepted, the effect would be to constitute the Court as a trustee. That is not the Court's role. The Court's role is a supervisory one and it is simply to ensure that decisions taken by trustees are reasonable and lawful. The Court does not simply substitute its own discretion for that of the trustee unless the trustee surrenders its discretion to the Court and the Court agrees to accept such surrender (which it is not obliged to do).***
>
> ***We are not to be taken as approving every part of paragraph 29–100 of Lewin which we have set out above.*** We have not analysed or heard argument on every sub-paragraph in detail. But in our judgment the paragraph provides a helpful guide to the sort of circumstances in which the Court is likely to intervene in relation to a trustee's decision where the trustee has not surrendered its discretion. We draw particular attention to paragraph (4). The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a

different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at. All of this is consistent with the fundamental concept of trust law which is that the discretion of a trustee is conferred upon that trustee and the beneficiaries have to live with the decision of that trustee unless it is vitiated by one or more of the sort of circumstances set out in **Lewin**."

This has been followed in the case of *In re H Trust* [2007] JLR 569, *In re Y and Representation of the C Trust* [2012] JRC 086B.

36 One of the criticisms levelled at Hawksford by some of the beneficiaries is that it did not have sufficient or sufficiently accurate information in relation to the past history of the Trust, and in particular in relation to the Spanish companies. It is clear that a trustee has a duty to inform itself before taking a decision (see *Lewin* 29–146) but as stated by Robert Walker J in *Scott -v- National Trust* [1998] 2 All ER 705 at 718:-

> ***"In an imperfect world trustees (like other decision-makers), do often make decision which are based on less than complete information and less than full analysis and discussion, and there is real difficulty in formulating the test for determining when a decision is so flawed as to be invalid…… To impose too stringent a test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial reward; it may also lead to damaging uncertainty as to what has and has not been validly decided."***

37 Hawksford is a paid professional trustee but even so it has to give careful consideration as to whether the use of the trust fund to pay for financial investigations into the past is both proportionate and justified when balanced against the current needs of the beneficiaries.

Submissions

38 Mr Robertson submitted that the financial position of the Trust militated against further expensive investigations into the history and in particular, the history as to what had happened in Spain. The Trust was cash-flow insolvent and because of the relationship between the beneficiaries has become unworkable. As Mr Powell said at paragraph 61 of his first affidavit, even if a further report as to what had happened in Spain were commissioned, it would be unlikely to satisfy the parties, and would not therefore be conclusive. BBA had expressed the view to him that their report of 25 th November, 2011, was reasonably accurate in setting out the loan accounts for each beneficiary in respect of the Jersey side of the structure.

39 Hawksford had paid regard to the settlor's letter of wishes executed some sixteen years ago at a time when the settlor had very optimistic expectations as to the growing value of the trust assets, but he would not have foreseen the Trust becoming, as it has, an arena for warfare in the family and cash flow insolvent. It was best, Mr Robertson said, for the

commercial property to be sold and the proceeds of sale net of the very substantial liabilities, distributed.

40 In deciding how to divide the proceeds of sale between the beneficiaries, Hawksford had primary regard for the interests of the father and the mother, consistent with the letter of wishes, whilst at the same time taking into account the needs, in some cases urgent needs, of the other beneficiaries.

41 The various factors that Hawksford had to weigh up were not directly comparable and it was impossible to be precise as to their relative weightings. Hawksford had to consider the factors in the round and doing their professional best, reach a decision. This it had done after a very thorough consultation exercise with the beneficiaries and it was simply untenable in his view to suggest that this was a decision that no reasonable trustee could have arrived at.

42 In his skeleton argument, Mr Temple, for the mother (in her personal capacity and as curator of the father) and the third and fourth sons, reluctantly agreed that the property must be sold and accepted that notwithstanding the original intentions of the father, the Trust needed to be broken up in order to achieve financial separation from the first and second sons. However, his clients profoundly disagreed with the proposed division of the proceeds of sale; in essence, they said everything should go to the mother and father and in particular nothing to the first and second sons. Their reasons for disagreeing with the proposed division can be summarised as follows:-

(i) The proposal failed to take sufficient account of the settlor's letter of wishes and to give sufficient financial protection to the father and mother, who unlike their sons cannot earn for themselves.

(ii) It relied on incorrect financial information. Hawksford was particularly reliant upon the BBA report of the 25 th November, 2011, which it did not understand.

(iii) Hawksford's proposals failed to take into account the conduct and financial circumstances of the first and second sons. It was astonishing to them that Hawksford proposed to distribute 10% to the first son, whom the family regarded as a spendthrift who had lived an extravagant lifestyle and caused huge financial damage to the resources of the group through financial assistance given in respect of his business. The second son did not need the money as much as the other beneficiaries and it was his own decision to spend money on legal fees, which he now complains about. His past conduct was deeply regrettable in that he had sued the group, left the Spanish companies in a parlous state and repeatedly threatened and continues to threaten Hawksford.

(iv) The proposed grandchildren's fund was not reasonable as it goes against the trustee's overall objective of achieving financial separation as it will continue to preserve the financial link between them and will not be economic for a professional

trustee to administer.

43 Mr Temple's skeleton argument then went on to suggest detailed directions to be given by the Court to Hawksford as to the handling of the sale of the property.

44 In his oral submissions, Mr Temple said that in the absence of a protector, the Court should proceed with great caution because of the lack of any independent scrutiny of the profound steps Hawksford was proposing to take. The proposals did not provide sufficient financial security for the mother and father and the mother was very concerned as to whether she would have enough to live on. It was profoundly unfair that the first and second sons were getting anything at all. Rather than break up the Trust, it should be preserved for the mother and father and the third and fourth sons with the first and second sons being excluded from it. No rational trustee would have made this decision. Rather than getting to grips with the issues, Hawksford was sweeping them under the carpet on the basis that it was all too difficult.

45 Mr Temple pointed to two parts of the extensive historical correspondence from which it might be implied that the second son had substantial assets which had not been disclosed to Hawksford– what steps, he asked, had Hawksford taken to check into this? Even without this, the fourth son's affidavit had shown that the second son had benefited “hugely” more than the third and fourth sons.

46 In his skeleton argument, Mr Hanson, for the second son, submitted that the Court should sanction the proposed sale and distribution of assets but should refuse to sanction the suggested division between the beneficiaries. A major concern for the second son was that Hawksford may have taken into account the fourth son's analysis of the “distributions” he had received – an analysis he had refuted in detail in his affidavit.

47 Mr Hanson put forward alternative proposals for distribution, not on the basis that it should be imposed upon Hawksford but that the Court should require Hawksford to consider the same. A further concern for the second son was the lack of independence on the board of the Jersey companies. Now that the sole asset in Jersey was one fully let commercial property, he could not see the justification for the cost of paying two directors some £180,000 per annum. There was no business left to be conducted and he produced a quotation from a local agent who had agreed to manage the property for £5,000 per annum.

48 A further concern was in relation to the litigation he and his wife had brought against the group for the repayment of the loans he had made; given the personal bias of the mother and fourth son against him, Hawksford should not have left them in control of the conduct of the defence to that action.

49 However, at the hearing, and having reflected on the legal principles that applied in an application of this kind, his client, whilst disagreeing with the decision of Hawksford that he

and the first son should receive less than their brothers, accepted that the decision of Hawksford could not be described as being one that no reasonable trustee could have arrived at and that there were no grounds upon which the Court could properly intervene with the exercise of Hawksford's discretion.

50 Mr Hanson reiterated his client's concern over the composition of the board and how further litigation, in particular litigation against the former trustees into which his client would most probably be joined as a third party, would simply serve to continue the warfare between the family further depleting what might be left of the trust fund.

51 His client was comforted by the explanation put forward by Hawksford at the hearing that it had not acted upon the " *mere suspicions"* as he described them put forward by the fourth son in relation to the benefit he had received from the Trust. He wanted an end to all of this and financial separation. On instructions Mr Hanson provided a response that appeared on the face of it and without further inquiry to dispel the notion that his client had undisclosed assets.

52 In terms of the grandchildren's trust his client was supportive but in response to the Court's concerns as to its viability (as set out below) he said his client was concerned about the administrative costs that would be incurred in running such a small fund.

53 The first son, who represented himself, read a prepared statement to the Court. He was facing bankruptcy and such was his financial predicament that he had brought his own representation to the Court seeking directions that had been superseded by the representation of Hawksford. He responded to a number of criticisms that had been made about his previous lifestyle and current assets which it is not necessary for us to elaborate upon here, but he supported the decision of Hawksford which if implemented would let the family go their separate ways and hopefully, " *move on and seek some peace"*.

54 Mr Goulborn, for the minor and unborn beneficiaries, accepted that given the deep divisions between the members of the family, financial separation was necessary and therefore the decision both to sell the property and terminate the Trust should be blessed.

55 As the grandchildren's fund, which he anticipated would be a discretionary settlement in standard form, would not come into being until £5.5M net of liabilities was achieved, he submitted that the Court should fix a minimum sale price of say £33M requiring Hawksford to return to the Court if that could not be achieved. In any event if the net proceeds were less than £5.5M, but above the minimum of £1.8M required for the mother and father, then he submitted that the grandchildren should share in that proportionately.

Decision

56 It was accepted by the parties that the decisions of Hawksford were separable. The Court gave its immediate blessing to the decision to sell the commercial property at the best achievable price. The financial circumstances of the Trust militated in favour of Hawksford proceeding with the sale and none of the beneficiaries materially demurred from it. In any event, it was clearly a rational decision. As to the mechanics and timing of the sale these were matters of commercial judgement which it was best left to Hawksford to handle, acting on the advice of its duly appointed agents.

57 Setting a minimum price would serve no purpose other than creating delay (which could jeopardise any sale) and incurring further legal costs which the Trust could ill afford. Such a proposal might have some logic if there was a choice open to the Trust as say between selling and retaining the property, but there was no choice here and there was nothing the Court or anyone else could do if the best price netted less than £5.5M, the point at which the grandchildren's fund would be triggered.

58 The Court reserved its decision on the remainder of the decision because it wished to consider the implication of there being no protector and the possibility of giving further directions to Hawksford to facilitate the winding up of the Trust if that were to proceed. However, the Court indicated that it was minded to approve the distribution of the proceeds of sale net of liabilities and the division as between the beneficiaries but it was not minded to approve the setting up of a fund for the grandchildren. We remain so minded.

59 Taking first the decision to distribute the net proceeds of sale effectively terminating the Trust, we can see no basis for finding that this was a decision no reasonable trustee could have made. Initially, we questioned why it was necessary to terminate the Trust, which although it served no fiscal purpose remained a convenient vehicle from which to provide financially in particular for the mother and father, but as the hearing continued, we began to appreciate just how deep the divisions had become. None of the parties wanted the Trust to continue, save latterly for Mr Temple's clients, but that was only on the basis that the first and second sons would be excluded.

60 It was clear that this Trust was in reasonable financial shape at the time of the father's stroke in 1999 and that the financial position had deteriorated between then and the current time when the Trust finds itself insolvent on a cash-flow basis, with liabilities that are too high to realistically permit refinancing, and with beneficiaries in immediate need of financial assistance.

61 Thus, while the Court appreciates that there remains a deep sense of grievance in particular on the part of the mother and the third and fourth sons about the proposed division, Hawksford had, in our view, no alternative but to proceed to make its decision on the information it had, having thoroughly consulted with all the adult beneficiaries and on the basis that whilst it noted the allegations and counter-allegations, it could not fairly or properly reach any conclusions in respect of the same. This is not, as Mr Temple said, to sweep the matter under the carpet. It is a simple recognition of the financial reality.

62 In our view, it was reasonable and proper for Hawksford to place reliance upon the BBA report of the 25 th November, 2011, about the loan account movements on the Jersey side and to proceed without commissioning further costly investigations as to what had happened in Spain. We agree with Mr Robertson that when taking into account a variety of factors, which the trustee is required to do, it is impossible to apportion precise weightings to each. The exercise of discretion is not an exact science susceptible to that kind of analysis. Hawksford took the view, in our judgement reasonably, that in broad terms the first and second sons had benefited from the Trust to a greater extent than the third and fourth sons and, taking into account all the other factors before it, reached a perfectly reasonable and rational decision as to the division.

63 Accordingly we are satisfied in relation to each of the three issues we had to consider following *Re S* (paragraph 32 above) and we bless this part of the decision.

64 The same does not apply, in our view, to the proposed grandchildren's fund. Hawksford included this proposal at the prompting of the second son and it set the figure at £500,000 as being the minimum for a trust to be financially viable. In our view, it is an irrational proposal for these reasons:-

(i) The whole purpose of terminating the Trust is to create a complete financial separation between the members of the family. This proposal joins them together again. All of the grandchildren are minors and therefore their parents will inevitably deal with their interests on their behalf. It is currently only the second and fourth sons who have children, but it is between them that relations are perhaps worst.

(ii) All of the grandchildren have immediate need for assistance with their education. Assuming a return of 4% the trust would produce an income of £20,000. Allowing for trustee's fees and administration costs, the income would be quite insufficient to help all five in any meaningful way and recourse would have to be had to capital, a fact conceded by Hawksford. That means that within say a year, the trust will fall below the minimum level at which it is financially viable.

(iii) It was clear that Hawksford itself would not undertake the trusteeship of this trust. On inquiry from the Court, it was suggested by Hawksford that a smaller trust company might take on the trusteeship for a fixed fee of £7,000 or £8,000 per annum, although no inquiries had been made of any potential trustee. Assuming proper disclosure of the family background here, we think it highly unlikely that any professional trustee would take on this trust on a fixed fee basis, but even if it did so, such fee arrangements are invariably reviewable. On a time basis, this family could absorb the whole of the income if not more in trustees' fees generated by their correspondence.

(iv) Perhaps understandably, there had been no detailed thought given to the precise terms of the trust. There was a suggestion that it would be for education only and the

class of grandchildren would close at some given point. Mr Goulborn talked about the parents being means tested in order to ensure fairness. However, it seems to us that the very task of drafting the trust and trying to agree its terms would, in the context of this family, give rise to very considerable argument and therefore cost.

65 This was a well-intentioned proposal, but it has not been properly thought through; which is perhaps not surprising, bearing in mind the other issues with which Hawksford has been grappling. In our view it will lead to the depressing prospect of much of the benefit, if a trustee could be found, being taken in professional fees. Mr Goulborn was duty bound to support the proposal, but he had no real answer to the issues raised by the Court and when pressed had to accept, hand on heart, that there was a significant risk that it would lead to conflict. If the proposal does not go ahead then the four sons will receive a proportion of what would have gone into this trust, which they can use, at no cost, to benefit their children. For these reasons, we therefore decline to bless this part of Hawksford's decision.

Protector

66 The trust instrument provides that any disposition of income or capital requires the prior or simultaneous written consent of the protector; there are of course other powers which also require the protector's consent as referred to above. The Court inquired as to how Hawksford intended making distributions in accordance with its decision if there was no protector in office to give that consent.

67 Mr Robertson submitted that as a matter of construction there is no obligation under the trust instrument to have a protector in office and that in the absence of any protector, the trustee could exercise its powers ignoring the requirement for the protector's consent.

68 Clause 14, which deals with the protector, provides for the appointment of the first protector, and for his replacement from time to time. The second protector had not made provision for his successor (as we understand it) and the power of appointment therefore vests in the trustee, pursuant to Clause 14(4):-

> *"If at any time there is no Protector the power of appointment of a new Protector shall be vested in the Trustees and any such appointment by the Trustees shall be made by written instrument signed by the Trustees and the person being appointed by them as Protector."*

69 There is no provision to the effect that the trustee is under no obligation to appoint a protector if the office is vacant and that if there is no protector in office the trustee can exercise its powers as if the requirement for the protector's consent were omitted.

70 Mr Robertson relied on two provisions in part of the trust instrument as varied dealing with the resignation and appointment of trustees in support of his submission:-

> *"11(2) If a Trustee dies or being a corporation is dissolved (otherwise than for the purpose of amalgamation or reconstruction) or gives notice under sub-clause (1)(a) hereof of his intention to resign his office as Trustee hereof or is made bankrupt or refuses or is unfit to act as Trustee or is incapable of acting as Trustee or is being or has been removed under clause 11(1A) hereof then*
>
> *(a) [the mother] or if she is dead or incapable or of unsound mind the Protector or if there is none*
>
> *(b) the continuing Trustee or Trustees or if there are none*
>
> *(c) the Trustee or Trustees desiring to resign from the trusts hereof or if there are none*
>
> *(d) the personal representatives or liquidator (as the case may be) of the last surviving or existing Trustee*
>
> *may by writing appoint one or more persons…to be a Trustee or Trustees…*
>
> *(3) [the mother] or if she is dead or incapable or of unsound mind the Protector or if there is no Protector the Trustee or Trustees may from time to time by writing appoint another person or persons…..*to be an additional Trustee or additional Trustees" [our emphasis]

In reliance upon these provisions, Mr Robertson submitted that the deed was ambiguous as to whether or not there need be a protector in office and that we should resolve that ambiguity in favour of his construction of the trust instrument.

71 As much as the Court wishes to assist Hawksford and the beneficiaries to proceed with the winding up of the Trust without further unnecessary expense, we cannot agree with this construction of the trust instrument. The provisions to which Mr Robertson refers are standard and simply cover the situation where the office of protector is vacant for whatever reason – in this case as the result of the protector's death. It is quite clear from the deed as a whole that it was intended that there should be a protector in office and therefore the powers which require the protector's consent cannot be exercised without that consent. If the office is vacated for whatever reason the trustee is under an obligation to exercise its power to appoint a replacement. Express wording requiring that consent cannot simply be ignored.

72 Mr Robertson's secondary position in what was a brief submission was that the Court should exercise its inherent jurisdiction to give the protector's consent either to the proposed distributions when they are made (which would require Hawksford bringing the matter back before the Court at the appropriate time) or to a variation of the trust instrument to remove the office of protector. The power to vary the trust instrument is contained in clause 13(1) which is in the following terms:-

> *"Subject to the overriding restriction imposed by Clause 15 hereof the Trustees*

> *may (with the prior or simultaneous written consent of the Protector) at any time or times during the Discretionary Period by writing make any alterations deletions or additions to the provisions of this Trust (other than Clause 15 hereof) which they consider in their absolute discretion to be for the benefit of all or any one or more of the Beneficiaries."*

(Clause 15 is of no relevance).

73 Mr Robertson referred us to Trust Protectors by Andrew Holden and to the judgment of Hegarty JA in *Rawcliffe -v- Steel* [1993–1995] MLR 426 in which he said this: -

> ***"It seems to me that, once a power is categorized as a fiduciary power, the donee of the power is in a position sufficiently analogous to that of a trustee in the traditional sense to make it difficult to see why the court cannot appoint a person to exercise those powers, even in cases which fall outside the limits of the particular cases that I have instanced.*** In my judgment, though the jurisprudence may not be as fully developed as in the case of a trustee in the classical sense, there is a legal framework within which discretionary powers of this kind are to be exercised which is independent of the particular person exercising those powers and which, to some extent at least, constrains and guides him. I therefore consider that the court's inherent jurisdiction to appoint a new trustee extends so as to enable it, in appropriate circumstances, to appoint a person to exercise fiduciary powers under a trust even though he may not be a trustee in the classical sense. Furthermore, I take the view that the court could, if necessary, in the last resort, itself exercise fiduciary powers under a trust, though it would not normally do so."

74 The Court is not attracted to the proposal that it should be asked to give the protector's consent to these distributions. That would involve the Court in carrying out a quite different role to that in which it is engaged today and it would be undesirable to confuse the role of the Court in that way.

75 The Court would, however, be minded to give consent to a variation in the special circumstances of this case. If the Trust were to continue, there would be no question of the Court doing so; it would simply require Hawksford to exercise its power to appoint a new protector. However, the Court has now blessed a decision effectively to terminate the Trust which is now entering a different and final phase of its life. Appointing a protector would simply give rise to delay and unnecessary cost in a situation in which the decisions of the trustee have already been blessed by the Court. It seems to us that in these unusual circumstances and in principle, it would be appropriate for the Court to exercise its inherent jurisdiction to supervise trusts in this way in order to facilitate the winding up of the Trust.

76 The parties have indicated that they would support such a variation. We therefore invite Hawksford to bring such an application when this judgment is handed down. It should be supported by a skeleton argument and authorities so that the Court can be satisfied that it is

appropriate for it to act in this way.

Curatorship

77 Mr Temple assured the Court that there was no conflict between the mother in her personal capacity as a beneficiary and in her capacity as curator of the father. We entirely accept that she is devoted to the father, whom she has cared for since his stroke in 1999, and that she can see no distinction between their interests. But there is no escaping the potential for conflict. When the Court asked how the mother intended to deal with a distribution from the Trust, she informed us through counsel that she intended to place the whole amount into the curatorship. We are told that the father's Will had been lost and that therefore he would be likely to die intestate, in which event half of his personal estate would devolve upon his sons by way of *légitime.* We questioned therefore how placing all of a distribution into the curatorship could be in her interests. At the same time paying the funds into her account would not be in the interests of the father; she might for example predecease him or be unable to continue his care.

78 The decision of Hawksford refers to any distribution to the mother and father being to them jointly and for the survivor. There was no opportunity at the hearing to explore how that can properly be done, where the father is subject to a curatorship.

79 The question was raised but no argument heard as to whether the mother should have applied to the Court under Article 43(17) of the Mental Health (Jersey) Law 1969 for consent to the stance she was taking in this application on the father's behalf. Article 43(17) is in the following terms:-

> ***"43(17) Where it appears to a curator to be necessary or expedient for any of the purposes of paragraph (15) to arrange for or authorize –***
>
> ***(a) the sale, exchange, charging or other disposition of, or dealing with, any property of the interdict;***
>
> ***(b) the acquisition of any property in the name, or on behalf of, the interdict;***
>
> ***(c) the conduct of legal proceedings in the name, or on behalf, of the interdict including the presentation of a petition for divorce or nullity of marriage, for presumption of death and dissolution of marriage, or for judicial separation;***
>
> ***(d) the exercise of any power, including a power to consent, vested in the interdict, whether beneficially or as guardian or trustee or otherwise*** ,
>
> ***the curator shall apply to the court for consent to the curator's action setting out the grounds on which the curator considers such action to be necessary or expedient for any such purpose and the Court, except in a***

case where a power to be exercised under sub-paragraph (d) of this paragraph is a power of appointing trustees or retiring from a trust, shall appoint 2 Jurats to examine the application and the grounds on which it is founded and, if both the Jurats so appointed are satisfied that the proposed action of the curator is necessary or expedient as aforesaid, they shall deliver to the curator their consent in writing to the action to which the application relates, and, where both the Jurats so appointed are not satisfied, they shall submit to the Court a report in writing setting out their reasons for withholding their consent and the Court shall make such order in the matter as it thinks just."

80 The father has been convened to these proceedings but they are not being conducted in his name or on his behalf and it would seem therefore that there is no absolute requirement for such an application, although in our view it would have been a desirable application to have been made, bearing in mind the mother's own personal interest in the matter.

81 Mr Temple accepted that an application to the Court under Article 43(17) would be necessary to obtain the Court's approval to the precise method by which any distribution from the Trust would be handled in the interests of the father.

82 Whilst we can understand the desire to avoid the costs that might be incurred in the appointment of an independent person to act as curator, we are concerned as to whether the voice of the father is in danger of being lost in this matter and suggest that consideration should be given to the appointment of an independent curator. At the very least, we feel that the mother should consult another lawyer in her capacity as curator so that she can receive independent advice as to the father's interests in the distribution that is to be made. We note in this respect that in addition to distributing funds outright, Hawksford has wide powers of appointment under Clause 2 of the trust instrument so there is considerable flexibility as to how their purported share of the Trust can be applied for their benefit.

Granddaughter

83 The child of the fourth son is illegitimate, the parents not having married. They are no longer together. Hawksford is concerned that it is not clear whether illegitimate children are included within the class of beneficiaries of the Trust and proposes therefore to exercise its power under Clause 1(4) of the trust instrument to add the child as a beneficiary.

84 Sensibly, none of the other parties opposed this part of Hawksford's decision and we have no difficulty in blessing it. The power can only be exercised with the prior or simultaneous written consent of the protector and Hawksford will be in a position to proceed with the appointment once the trust instrument is varied to remove that requirement.

Further directions

85 We were told that fees of around £383,000 have been incurred by the parties on this application and we suggest that the opportunity should be taken now, whilst the Trustee and the beneficiaries are before the Court, for the Court to be invited to give any further directions that might properly be given in order to avoid, if possible, the cost of any further applications. We think it may be appropriate for the Court to do so in order to facilitate Hawksford in what is now in effect a winding up of the Trust so that it can proceed to do so in a cost effective manner, preserving as much of the capital as is possible for the benefit of the beneficiaries.

86 In his first affidavit at paragraph 60, Mr Powell acknowledges that Hawksford is under a duty to consider the actions of its predecessors and other parties and to seek to make good any losses to the trust fund.

87 The fourth son, in his first affidavit, talks of a " *black hole"* in the trust accounts which he attributes to the actions of the second son and the failure of previous trustees, in particular Nautilus, to control him. In paragraph 18 of his second affidavit, he states that the potential claim against Nautilus in view of the losses incurred in connection with the first son's business and the Spanish companies is substantial. He states that " *the trustees' Representation is silent on this claim which we wish to continue with"*. By " *we"*, we presume he means himself, the mother and the third son.

88 In order to protect itself from a claim that it has failed to investigate and pursue these matters, Hawksford may have no option other than to incur further time and expense, firstly in investigating the past history of the Trust and the activities of the Spanish companies, secondly in seeking legal advice on the merits of any claim and thirdly, in bringing a Beddoes application.

89 Mr Robertson told us that Hawksford estimated that £100,000 should be reserved for this exercise on the basis, as we understand it, that the remaining funds would be distributed to the beneficiaries, but we question whether that can be enough. It seems to us that if the trustee is investigating a claim with a view to seeking directions as to whether to pursue the same, it needs to keep in reserve enough to finance the litigation to its logical conclusion. It would arguably be imprudent to put itself in a position where it is advised that it has a good cause of action but has no funds to pursue the same. That reserve must be enough not only to cover its own costs but the amount of any adverse costs order. We would have thought that a very substantial reserve would be required to ensure that the Trust could finance what could well be lengthy and costly litigation. We do not know how well the sale of the commercial property will go and the size of any surplus but it might be thought that the Trust cannot now afford such an exercise, which could delay its ability to provide funds for the family if not threaten altogether its ability to do so. The priority may now be the preservation of funds for the benefit of the beneficiaries and in particular, the mother and the father.

90 The stage may have been reached where if any beneficiaries wish causes of action to be investigated and pursued by the Trustee, then they should fund the exercise and take on the commensurate risk, not the Trust. We have no power to intervene, but if Hawksford is of this view, the Court might be invited, for example, to direct it to distribute the trust fund and terminate the Trust without further investigating or pursuing any such causes of action, save and to the extent that any beneficiary or beneficiaries agree to fund the same out of their own assets or such other or varied direction that it may propose. We would need of course to hear from the other parties before doing so.

91 In paragraph 90 of his first affidavit, Mr Powell says that save for the Nautilus claim, the Trustee will "require all beneficiaries to confirm that they will bring no further litigation against each other or the trust companies in Jersey or in Spain in respect of the history of the Trust at all". This was not discussed at the hearing but desirable as it may be to prevent any future litigation, we doubt whether such conditions can be properly imposed upon the beneficiaries in relation to causes of action that they may have, either against each other or against the trustee or former trustees. Such causes of action, if they exist, constitute their personal property, but in pursuing the same personally, they take on all the risks associated with hostile litigation. The Court is more concerned with causes of action which some beneficiaries may wish Hawksford to pursue at the cost of the trust fund and at no risk to themselves.

92 In terms of the Spanish companies, Hawksford has proposed that they be wound up and at paragraph 89 of Mr Powell's first affidavit set out its detailed proposals. Hawksford might consider inviting a direction to proceed to wind up the Spanish companies in the manner it proposes or as it may be advised without any further investigation. Again we would need to hear from the other parties before giving any such direction.

Supervision of mother's powers

93 It is well established that the power to appoint and remove trustees is a fiduciary power, to be exercised in the interests of all of the beneficiaries (see Lewin on Trusts 18 th edition, paragraphs 14–39 and the classic statement to that effect by Kay J in the case of *In re Skeats' Settlement* [1889] 42 CHD 522). In view of the state of relationships between the beneficiaries and the mother's firm opposition to what Hawksford has proposed, she is in our provisional view in a position of conflict which would make it inappropriate for her to consider exercising her power to appoint and remove trustees without leave of the Court. We would be minded therefore to continue the order made on 1 st June, 2012, until further order. To be fair to the mother, however, we have not heard from Mr Temple on whether it would be appropriate for us to do so or indeed from the other parties and we will therefore invite submissions on the matter when this judgment is handed down.

Composition of the board

94 The second son has consistently objected to the composition of the board of the holding company (and the Jersey subsidiaries), which includes as it does both the mother and the fourth son (who constitute a majority on the board), whom the second son continues to see as both biased and incompetent.

95 At paragraph 74 of his first affidavit, Mr Powell says this:-

> *"The Trustee has, however, given serious consideration to the removal of the Board having regard to the wider picture and in particular the recognition that having any family member on the Boards has been at the root of the problems for the Trust.* One significant practical point is the difficulty in finding substitutes given the solvency issues of the companies which have been present for some considerable time and arguably are getting worse as time goes by. The Trustee will be giving the composition of the Board further consideration but, as matters stand, it is likely that the Trustee will ask family members to stand down at a time to be agreed taking into account all commercial considerations."

The implication is that officers of Hawksford may be reluctant to take on the role of director in view of the potential solvency issues.

96 There is no business left to conduct and the board of the holding company has the following sustantive tasks before it:-

(i) The sale of the commercial property at the best achievable price.

(ii) The winding up of the Spanish companies.

97 Now that a decision has been made by Hawksford effectively to wind up the affairs of and terminate the Trust and subject to the caveat we express below, we do not think it appropriate, in the light of the state of relations between the beneficiaries, to entrust that role to a board of which the majority comprise members of the family, members incidentally who fiercely opposed the decision of Hawksford at least in part. We think the time has come for Hawksford, in the interests of all of the beneficiaries, to take direct control of the boards of the holding company and Jersey subsidiaries. Having taken on the trusteeship, Hawksford cannot shrink from that task because of concerns over the solvency of the Jersey companies, which no longer conduct any kind of business. In any event the Trust is solvent on the balance sheet test and it is vital that the surplus is realised without delay for the benefit of the beneficiaries; we feel Hawksford's hand on the tiller is now required to ensure that this is done expeditiously and in a cost effective manner. By way of caveat we acknowledge that this was not the subject of full discussion before the Court and there may be considerations of which we are unaware which might militate against Hawksford taking control of the boards at this stage. We also accept that different considerations apply to the control of the Spanish subsidiaries that we understand are managed by professional agents.

Summary

98 In summary:-

(i) We have already blessed the decision of Hawksford to sell the commercial property at the best achievable price.

(ii) We bless the decision in principle of Hawksford to distribute the net proceeds of sale of the property in the manner proposed.

(iii) We do not bless the decision of Hawksford to establish a fund for the grandchildren.

(iv) We bless the decision of Hawksford to appoint the child of the fourth son as a beneficiary.

(v) We invite Hawksford to apply to vary the Trust to remove the office of protector.

(vi) We invite submissions on the directions that might now be given to Hawksford to facilitate the winding up and termination of the Trust in the most cost effective manner.

(vii) We invite submissions on whether we should continue the order of 21 st June, 2012, that the mother should not exercise her power of removal of trustees or appointment of additional trustees without leave of the Court and this until further order.

(viii) We recommend that Hawksford takes control of the boards of the holding company and Jersey subsidiaries.

99 We will hear submissions on these matters when this judgment is handed down for which we suggest at least half a day should be reserved.