The Matter of the 1964 E Settlement and the Representation of U Ltd and v Ltd (“The Trustees”)

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
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Text

[2020] JRC 140B

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, **Esq.**, Deputy Bailiff, **and** Jurats Olsen **and** Christensen

The Matter of the 1964 E Settlement and in the Matter of the Representation of U Limited and V Limited (“The Trustees”)

Advocate A. Kistler **for the Representor**

Authorities

Trusts (Jersey) Law 1984.

Trustee Act 1925

Lewin on Trusts (20th Edition at 46–026)

C v C [2015] EWHC 2699 (Ch)

English Variation of Trusts Act 1958

Kenyan Trustee Act

Recognition of Trusts Act 1987

Underhill & Hayton: The Law Relating to Trusts and Trustees (18th Edition)

The Hague Convention on the Law Applicable to Trusts and on their Recognition

Human Rights (Jersey) Law 2000

Trusts (Amendment No. 2) (Jersey) Law 1991

Re Portman Estate [2015] EWHC 536 (Ch)

Greville Bathe Fund [2013] (2) JLR 402

Re S Settlement [2001] JLR Note 37

Public Trustee v Cooper [2001] WTLR 901

Trusts — reasons for granting the application of the Representor.

Deputy Bailiff

THE

Introduction

1 On 25 th June, 2020, we granted the application of the Representor, in part. We now give our reasons for so doing.

2 The Representors are trustees of the 1964 E Settlement ("the Trust"), a discretionary trust established on 9 th January, 1964. The Trust was established by the settlor, who died in 2008, principally for her two children, B and C, and their remoter issue. Today the principal beneficiaries are B, C and the settlor's six adult grandchildren: D, E, F, G, H and J and her seventh grandchild K, who is a minor. The six adult grandchildren have been appointed life

interests in sub-funds and in due course the same will occur in respect of K. These beneficiaries are described as the “principal beneficiaries”. Certain other beneficiaries were not convened to the hearing of the Representation owing to the fact that their interests under the Trust were remote and accordingly, their interests would not be materially affected by the relief sought by the Trustees. These beneficiaries fell into three categories. First, the spouses of adult beneficiaries who, on B's side of the family, potentially benefit from a surviving spouse trust which gives them an interest in the income of their late spouses' sub-fund for a period of three years after the death of the spouse, subject to the Trustees' power to extend that period. Secondly, the wider beneficial class includes descendants of the settlor's brother-in-law who are the cousins and second cousins of the principal beneficiaries, but are highly unlikely to benefit under the Trust. Thirdly, there are other potential beneficiaries who currently have no interest under the Trust, but theoretically could do so if the Trustees revoked certain instruments. This is unlikely as the purpose of the Trust is to benefit the direct descendants of the Settlor.

3 The Trustees seek:

> (a) The Court's approval, under Article 51 of the Trusts (Jersey) Law 1984, as amended (“the Law”) in respect of a reorganisation of the corporate structure underlying the Trust;
>
> (b) An order granting the Trustees a power to self-deal under the provisions of Section 57 of the Trustee Act 1925, legislation of the United Kingdom.

4 The adult principal beneficiaries were all convened to the Trustees' application both on their own behalves and, where applicable, on behalf of their respective minor and unborn children and remoter issue. They have each written to the Trustees confirming that they have received the relevant documentation and support the Trustees' application, both in respect of their own interest and, where appropriate, those whom they have been appointed to represent. None of them attended the hearing of the Representation.

Jurisdiction of the Court

5 The Court has jurisdiction over the Trust pursuant to Article 5 of the Law as the Trustees are companies incorporated in Jersey, the Trust assets (the shares in underlying companies) are situate in Jersey by reason of those companies being incorporated in Jersey, and the administration of the Trust property is carried on in Jersey. However the Trust is not governed by Jersey law and accordingly most of the provisions of the Law have no application to the Trust.

The governing law of the Trust

6 The Trust was made in England by the Settlor when she was resident in England and the

first Trustees were also residents of England. The Trust contains references to English statutes such as the Law of Property Act 1925 and also contained a reference to the Trustee Act 1925 which was subsequently deleted by a variation to the Trust sanctioned by the English courts. Although the Trust does not contain an express choice of law clause, we agree with Nicholas Le Poidevin QC, Chancery counsel who has advised the Trustees that the terms of the Trust " *unambiguously imply a choice of English law*."

7 There have been a significant number of supplemental instruments executed with respect to the Trust over the years and a consolidated version of the Trust was exhibited to the affidavit sworn on behalf of the Trustees. It is not necessary for the Court to set out the individual instruments and their effects. However, the overall impact of these various instruments is to create sub-funds for the benefit of the principal beneficiaries. Currently the Trustees own shares in a number of holding companies *via* a nominee company and each principal beneficiary's sub-fund holds, through the nominee, all the issued shares in a separate holding company, which in turn holds various assets that make up the corpus of the Trust. All the holding companies are Jersey companies. The assets of the Trust are substantial.

The reason for the application

8 We have been assisted by the affidavit sworn by a director of the Trustees. The Trustees have been in office since 14 th February, 2013. The Trustees are private trust companies incorporated in Jersey in order to provide trustee services to the Trust and were incorporated in September 2011. The administration of the Trust was assumed, in early 2013, by L Limited, a dedicated family office which administers the offshore wealth of two branches of the Q family – the M branch and the N branch.

9 There is no provision in the Trust permitting self-dealing. The effect of the rule against self-dealing under English law will be considered at greater length below. The starting point is that a transaction affected by the rule will automatically be set aside.

10 The history of the Trust has been characterised in part by various instances of self-dealing by the Trustees. These are described as "category A transactions" and "category B transactions".

11 The category A transactions consist of sales of assets between the Trust and the O Trust, two other Q family trusts. An example of such a transaction was the sale of two property companies by the O Trusts to the Trust in 2016. The sale was motivated by the desire of the beneficiaries to exit and enter property investments respectively and the price paid was fixed by reference to professional advice. At company level the membership of the boards of the relevant companies was the same. At trustee level, whilst the trust companies were different, there was a substantial overlap between the membership of the boards of directors of each corporate trustee who played a key role in the sale.

12 Counsel has advised that such transactions are instances of self-dealing. The Trustees have not sought any orders from the Court in respect of these historic transactions.

13 As to category B transactions, these are transactions between the companies owned by the Trust themselves and consist of sales and reallocations of assets between sub-funds. An example was the reallocation of assets in 2014 between C's Funds on the one hand and C's Children's' Fund and B's Children's Fund on the other in order to repay a debt due by C's Fund. This reallocation occurred at company level between a company held in C's Fund as seller and another company owned by holding companies held in B's Children's Fund and C's Children's Fund as buyer in respect of the sale of shares in a third company. The purchase price was applied in repaying the loan and the adult beneficiaries signed letters of consent in respect of the transaction but did not take independent legal advice. On occasions, if one sub-fund is short of cash and another has cash but is short of equities, notional sales are made by the former to the latter so that the former ends up with the cash and the latter with the equities. These reallocations are done at market value, but are reordered internally as book entries. These are reallocations and not gifts. Counsel advises that these too are instances of self-dealing. Again no relief is sought in relation to these matters.

14 The Trustees have decided not to seek to unravel these historic transactions, whether category A or category B transactions, notwithstanding that they may be in breach of the self-dealing rule. Such an exercise would be costly and time-consuming, and in any event the Trustees do not believe that there has been any conflict between their personal interests and their duties as trustees or directors. They have consulted the principal beneficiaries in this regard and the principal beneficiaries are comfortable with no further action being taken.

15 Nonetheless, the Court's approval is sought for the re-organisation of the Trust. The Trustees propose to re-organise the Trust structure at the request of the beneficiaries in order to create greater independence for C's and B's sides of the family respectively. The proposed re-organisation is also intended to make the structure simpler to administer and more cost-effective.

16 The proposed changes are substantial and include separating the structure so that each side of the family has its own trustees and also separating the interests in the jointly-owned investment companies.

17 As to the appointment of new trustees, the Trustees will incorporate two new trust companies to be appointed as additional trustees of the Trust. There would then be four trustees with two of the trust companies continuing to look after the interest of C's side of the family as trustees of C's Fund and C's Children's Fund and the two new trustees would look after the interests of B's side of the family as trustees of B's Fund and B's Children's Fund.

18 The Trust would remain as one settlement for tax purposes, but each set of trustees would be able to carry out actions in respect of the sub-funds of the Trust of which they act as trustees such as making appointments, revocations or re-appointments, adding new administrative powers or creating surviving spouse trusts. The Trustees do not seek the blessing of the Court for this element of the re-organisation i.e. the appointment of additional trustees. There would still be commonality on the boards of the trustees and underlying companies and accordingly a self-dealing power would be required in the future in any event.

19 However the Court's blessing is sought in relation to the decision to effect a re-organisation of the underlying companies. It is not necessary to set out the nature of the assets held by each of the companies owned by the Trust. Some of the holdings will be unaffected by the proposed re-organisation. But, in relation to certain companies, assets will need to be sold and the proceeds moved elsewhere and henceforth certain assets and certain corporate vehicles will be held on behalf of C's side of the family and on behalf of B's respectively. As there is commonality between the boards of trustees and the boards of underlying companies, the re-organisation will require self-dealing on the part of the Trustees, and the Court is invited to bless the decision of the Trustees to give effect to this re-organisation. The Trustees confirmed to the Court that it is not said that this re-organisation is a *"momentous matter"* requiring the Court's approval and the Court is only invited to sanction the decision by reason of the element of self-dealing.

20 Secondly, the Trustees seek to vary the Trust to include powers to self-deal. They seek these powers in order to implement the proposed re-organisation as described above and to allow a general flexibility in the future to transact within the Trust and between the Trust and other P family trusts.

21 The proposed wording of the self-dealing power for the Trust is as follows:

> ***"(A) Subject to (B) below, the Trustees may enter into, procure or authorise any transaction with or between the following:***
>
> > ***(a) any of the Trustees (acting as trustee of this Settlement or any other Relevant Trust); and/or***
> >
> > ***(b) any trustee of a Relevant Trust (acting in such capacity); and/or***
> >
> > ***(c) any company of which any of the shares are held (directly or indirectly) in this Settlement or in any other Relevant Trust*** ,
>
> ***regardless of whether and even though any Trustee's fiduciary duty under this Settlement in respect of the transaction conflicts or may conflict with any other duties to which he may be subject*** .
>
> ***(B) The Trustees shall not enter into, procure or authorise any transaction***

mentioned in paragraph (A) unless they first obtain such professional advice as they consider necessary in order to satisfy themselves that the proposed terms thereof are at least as favourable to the beneficiaries of this Settlement as if it has been entered into with a third party at arm's length .

(C) For the purposes of (A) above, a "Relevant Trust" means a trust established for the benefit of any child or remoter issue (including illegitimate issue) or the spouses, widows or widowers of any child or remoter issue (including illegitimate issue) of the Settlor or [T]."

The rule against self-dealing

22 The English rule against self-dealing is explored in the opinion from Mr Le Poidevin. This is appropriate as the Trust is governed by English law and accordingly the Court is considering English law principles. The Court makes no finding as to the extent to which the English rule in respect of self-dealing applies in Jersey and, in any event, so far as the extent of the English rule against self-dealing is concerned, the Court did not hear argument, although the Court had full confidence in the opinion provided by Mr Le Poidevin in this regard.

23 Mr Le Poidevin says that the rule against self-dealing is concerned with a conflict between a trustee's interest and his duty. The core of the self-dealing rule is that a trustee is not allowed to purchase trust property. That is the rule even if there are independent trustees who approve of the purchase: the trustee must not put himself in a position where there is a conflict between his duty as such and his personal interest. If the rule is breached then, exceptional circumstances apart, the sale will automatically be set aside at the instance of a beneficiary even though the price is a fair one.

24 Although it is quite common for trust instruments to modify the rule against self-dealing, the Trust deed contains no such provisions.

25 The scope of the self-dealing rule is, evidently, extensive. The rule extends beyond sales to other transactions such as loans and it also applies not simply where the trustee is acting its own behalf but also where it does so as trustee of another trust. In other words a conflict between one duty and another is within the rule. Lewin on Trusts (20th Edition at 46–026) says that it is well settled that a conflict between duties in different fiduciary capacities is within the conflict rule on which the self-dealing rule is based. The absence of personal advantage of the trustee does not exclude the rule. The rule also applies where the parties to the transaction are separate companies but there are one of more common directors or an element of common ownership.

26 To return to the core of the self-dealing rule (that the trustee is not allowed to purchase trust

property), where a trustee sells trust property to a company of which it is the sole shareholder, it is in substance a sale to itself and it may be set aside. Where the sale is to a company in which the trustee has a minor interest, it may be that the sale will not be set aside if it can be shown that a fair price was paid and there is no other objection; but absent such proof there is still an infraction of the rule. The transactions in the context of this Trust are not directly within either of these examples, but Mr Le Poidevin says that since the rule applies not only where the trustee has a personal interest, but also where it has a conflicting duty as trustee of another trust, it seems to him to follow that the rule must equally apply to a transaction between a trustee acting as such and a company held by another trust of which he is also a trustee, or between companies of which one is held by the first trust and the other by the other trust, at any rate in circumstances where the trustees direct the affairs of the companies. The same must be true, though the trustees are different companies, if there is an overlap in the boards of directors.

27 He expresses the view therefore that the self-dealing rule is not excluded merely because the parties to the transactions are trust owned companies rather than the Trustees themselves or because the assets dealt with are those of the trust-owned companies and were not themselves directly-held trust assets. In the course of argument, counsel for the Representor said that it is not suggested, for the purposes of this application that the rule extends to transactions between trading companies owned by a trust where the underlying transactions would not be known about at trustee level – but this is not such a case.

28 It makes no difference, Mr Le Poidevin says, that the directors of the Jersey companies in question owed duties to those companies and not to the ultimate beneficiaries of the Trust. The complaint which might be made would be against the Trustees for self-dealing and would be made by a beneficiary of the Trust. It would be a necessary part of such a claim, if it was sought to set aside the transaction under challenge, that a trust-owned company benefitting from the transaction was bound by the rights of a disadvantaged beneficiary (by way of notice) and wrongdoing on the part of corporate directors would not be a necessary part of such a claim. Accordingly Mr Le Poidevin's view is that the relevant rules are those of trust law binding the Trustees and not those of company law binding the directors.

29 The primary remedy in those circumstances is to have the purchase or other transaction set aside. When the transaction is less egregious there are indications in the English case law that the transaction will not automatically be set aside, but the burden will be on those seeking to uphold it to establish that the conflict made no difference. The English authorities are not consistent and it is not easy to draw a precise line as to whether or not a transaction would be set aside on particular facts.

30 In respect of the application of the self-dealing rule to the Trust, Mr Le Poidevin expresses the view that the category A and category B transactions both fall foul of the rule. As to the category A transactions, his view is that there are clear instances of self-dealing as at company level the membership of the boards was the same and at trust level although the Trustees of the Trust and the other P family trust were different corporate entities, there was a substantial overlap of the directors and the boards played a pivotal role in the sales.

31 The category B transactions comprise re-allocations of assets between two companies held within the Trust. At company level there was an overlap in the membership of the boards and at trust level, since the companies were held within the same trust, the Trustees were necessarily the same.

32 As to the re-organisation, in particular the separation of interests of a family in the jointly-held investment companies, this will clearly be an act of self-dealing and the Trustees are seeking the approval of the Court to put this into effect. Mr Le Poidevin opines that one of the usual reasons for applying to court for approval of a proposed exercise of the Trustees powers is that there is an element of conflict of interest. He also observes that the approval that is sought in relation to the re-organisation has the same effect as a power to self-deal. We will return to this matter below.

Section 57 of the Trustee Act 1925

33 As to the Royal Court's power to make an order under Article 57 of the Trustee Act 1925, Mr Le Poidevin set out various advantages for the Trustee seeking relief from the Royal Court. Plainly there is some sense in this application being made to this Court bearing in mind the location of the Trustee, the trust property and the administration of the companies of the Trust, if the Court has the power to make such an order.

34 Article 47(3) of the Law provides:

> ***"Where in the management or administration of a trust, any sale, lease, pledge, charge, surrender, release or other disposition, or any purchase, investment, acquisition, expenditure or other transaction is in the opinion of the court expedient but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the terms of the trust or by law the court may confer upon the trustee either generally or in any particular circumstances a power for that purpose on such terms and subject to such provisions and conditions, if any, as the court thinks fit and may direct in what manner and from what property any money authorized to be expended and the costs of any transaction are to be paid or borne."***

35 However, it is within a part of the Law which only applies to Jersey law trusts.

36 The equivalent provision in English Law is Section 57 of the Trustee Act which is in very similar terms.

> ***"(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other***

disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income .

(2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order .

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust .

(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925."

37 The Court contemplated pursuant to Section 57 is the English court. This is made clear by Section 67 of the Trustee Act 1925 which provides that *"the court"* means the High Court.

38 However the Court finds that the Royal Court is able to exercise the Section 57 jurisdiction for the following reasons. Article 49 of the Law provides:

"(1) Subject to paragraph (2), a foreign trust shall be regarded as being governed by, and shall be interpreted in accordance with its proper law .

(2) A foreign trust shall be unenforceable in Jersey –

(a) to the extent that it purports –

(i) to do anything the doing of which is contrary to the law of Jersey ,

(ii) to confer any right or power or impose any obligation the exercise or carrying out of which is contrary to the law of Jersey, or

(iii) to apply directly to immovable property situated in Jersey;

(b) to the extent that the court declares that the trust is immoral or contrary to public policy."

39 Accordingly this Trust, as a matter of Jersey law, is governed by English law. The proper law of the trust necessarily means the whole of that law. If the Royal Court were to decide that it could not exercise the power conferred by section 57, it would not be applying the whole of English law to the Trust but only a truncated version of it. That reasoning was adopted in *C v C* [2015] EWHC 2699 (Ch) when the English court accepted that it could exercise the power conferred by the Kenyan equivalent of the English Variation of Trusts Act 1958 over a trust governed by Kenyan law. The same reasoning ought to apply to a Jersey court in the context of Section 57. *C v C* was an application under the Variation of Trust Act 1958 in relation to four family settlements. One of the settlements was governed not by the law of England and Wales but the law of Kenya. There was no express choice of law clause in the settlement but the settlor was domiciled in Kenya when it was made and there was a reference within it to a Trustee Ordnance of 1929 which clearly indicated an intention for it to be governed by Kenyan law. The trust assets were located in Kenya and the trustees and beneficiaries, or most of them, were resident and domiciled in Kenya. The Court had before it an opinion from a lawyer and advocate based in Kenya who gave evidence as to the terms of Section 62 of the Kenyan Trustee Act. The judge, His Honour Judge Hodge QC, sitting as a judge of the High Court said at paragraph 15:

> ***"Section 62 is said to give the court power to approve variations of trusts in terms which are said to be virtually identical to the 1958 Act in England."***

40 Kenyan counsel said that he took the view that if the English courts were to assume jurisdiction to vary the trust of a Kenyan settlement, the Kenyan courts would recognise and enforce the order of the English courts. Counsel in the case drew the Court's attention to two English authorities which supported the proposition that the English court had jurisdiction under the 1958 Act to vary the trusts of a foreign settlement. However, those two authorities in which English law was applied to the foreign trust, were decided before the Hague Convention on the Law Applicable to Trusts and on their Recognition which was scheduled to the Recognition of Trusts Act 1987. The judge noted that in the absence of an express choice of applicable law, Article 7 of the Convention provided that the trust is to be governed by the law with which it is most closely connected. At paragraph 22 the judge said:

> ***"I am satisfied here – and it is common ground – that the applicable law so far as the 1950 settlement is concerned is the law of Kenya rather than the law of England and Wales.*** Article 8 [of the Convention] provides that the applicable law is to govern the validity of the trust, its construction, its effects and the administration of the trust. In particular that law is to govern, by paragraph (h) of article 8, the variation or termination of the trust."

41 The judge went on to say that it was argued that in exercising the Court's jurisdiction under the 1958 Act the Court, on making a variation should apply the substantive law of the country governing the trust, pursuant to the terms of the Convention. If the law governing the trust did not permit variation, then the jurisdiction under the 1958 Act should not be exercised.

42 The judge expressly agreed with that proposition and referred to Underhill & Hayton: The Law Relating to Trusts and Trustees (18th Edition) which supported this proposition. At paragraph 33 the judge referred to Lewin and said:

> ***"33. Lewin on Trusts (19th edition) addresses the matter at paragraph 11–222. It states that a more difficult question is how the article affects the jurisdiction of the court to vary trusts under the 1958 Act. Having noted that the Act has been held to empower the English court to vary trusts governed by foreign law, the editors state that in doing so, the English court was applying its own law, which is said to be something, now forbidden by the article if it applies to variations by the court. Its words are appropriate to include such variations and the editors of Lewin consider that it does apply. If it does, the English court can no longer vary trusts governed by a foreign law, at least unless the foreign law contains a comparable provision and that provision is treated as giving the English court the power to do so. If the foreign law is expressed to confer a power to vary on "the court" (as the 1958 Act does) it may be read as referring only to the foreign court. But if the English court were to decide on that ground that it could not exercise the foreign power, it would be applying only a truncated form of the foreign law, not the whole of it, as the Convention prescribes. The editors therefore consider that a foreign power to vary trusts ought in principle to be available to the English court. The same considerations are said to apply to the conferral of additional powers on the trustees under section 57 of the Trustee Act 1958 and like powers elsewhere."***
>
> ***34. As will appear, I agree with the views expressed by the editors of Lewin on Trusts."***

43 The Hague Convention is directly applicable in England owing to the provisions of the Recognition of Trust Act 1987.

44 What is the position in Jersey? The Hague Convention on the Law Applicable to Trusts and on their Recognition ("the Convention") was extended to Jersey on 20 th December 1991 and is described in a Convention publication relating to the United Kingdom's instrument of ratification as having " *entered into force*" for Jersey on 1 st March 1992. The relevant terms of the Convention are Articles 6, 7 and certain parts of Article 8, which provide:

> ***"6. A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case*** .
>
> ***Where the law chosen under the previous paragraph does not provide for***

trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply .

7. Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected .

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to –

(a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) he place of residence or business of the trustee;

(d) the objects of the trust and the places where they are to be fulfilled .

8. The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust .

In particular that law shall govern –

…

(d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;

…

(h) the variation or termination of the trust;"

45 Accordingly, it is quite proper for the courts of Jersey to have regard to the terms of the Convention so long as it is not inconsistent with Jersey legislation. Jersey is, like the United Kingdom, a dualist jurisdiction where international treaties to which Jersey accedes are not adopted into the domestic law of the Island unless expressly incorporated by a Jersey statute. The Convention is a multi-lateral treaty. However, the Convention is not the subject of a Jersey statute which introduces all its terms in the same way that, for example, the European Convention of Human Rights has been implemented by the terms of the Human Rights (Jersey) Law 2000. Further there are certain provisions of the Law which operate with respect to Jersey Law trusts (e.g. Article 9) which expressly exclude rules of foreign law.

46 However, the Trusts (Amendment No. 2) (Jersey) Law 1991 states in its recital that it was a law "to amend further the Trusts (Jersey) Law 1984 in order to facilitate the extension to the Island of the Convention on the law applicable to trusts and on their recognition, signed at The Hague on 20th October 1984, and for ancillary purposes, sanctioned by Order of Her

Majesty in Council on 20th March 1991."

47 It was submitted to us that the purpose of this statute was to make small amendments to the Law in order to bring it into line with the Convention because the Law was otherwise compliant with the terms of the Convention. After the hearing and pursuant to the Court's request counsel provided the Report laid before the States in 1990 containing the Explanatory Note which would have accompanied the draft law when it was lodged for debate.

48 At the relevant passages from the Explanatory Note read:-

> ***"The main purpose of this draft Law is to amend the Trusts (Jersey) Law 1984 ("the principal Law") to enable the Convention on the Law Applicable to Trusts and on their Recognition, signed at the Hague on 20th October 1984, to be extended to Jersey*** .
>
> ***The purpose of the Convention is to provide for common conflicts of laws principles on the law applicable to trusts, which can be applied in states to which the Convention extends or is applied ("Convention states"), even those states whose domestic law does not include the concept of a trust ("non-trust states")*** .
>
> ***……***
>
> ***Before the Convention can be extended to Jersey it is necessary to amend Jersey law so as to comply with the minimum standards of the Convention in cases where such standards have not been reached or exceeded by the existing law, but subject to certain exceptional cases provided for by the Convention where non-compliance is permitted on grounds of public policy.*** All the amendments to the principal Law are for this purpose .
>
> ***Article 1 amends Article 4 of the principal Law (proper law of a trust) to follow more closely the wording of Articles 6 and 7 of the Convention.*** Thus, in place of the existing provision in sub-paragraph 1(b), referring to the proper law as the proper law intended by the settlor, the new sub-paragraph (1)(b) refers to the proper law as that implied from the terms of the trust .
>
> ***……***
>
> ***Article 3 deletes sub-paragraph 50(3)(a) of the principal Law, (which presently limits the right of following and recovering trust assets where the assets have become unidentifiable) to comply with the terms of Article 11(d) of the Convention.*** Exceptionally, the removal of this sub-paragraph will also affect Jersey trusts .
>
> ***Article 4 inserts a new paragraph (4) in Article 53 of the principal Law.*** The effect of this amendment is to exclude the application of the Jersey period of

prescription or limitation of actions to foreign trusts which have the law of a Convention state as their proper law. To apply the Jersey rules to such foreign trusts would be inconsistent with Article 8 of the Convention."

49 Accordingly, one of the amendments made by the Trusts (Amendment No. 2) (Jersey) Law 1991 was to amend Article 4 of the Law so as to incorporate the entirety, practically word for word, of Article 7 of the Convention. It was submitted to us with some force that, bearing in mind the contents of the amending law and the recital that the remainder of the Law was compliant with the Convention, although the Convention is not directly effective as a matter of Jersey law, it is appropriate for the Court to have regard to the contents of Article 8 of the Convention when considering the meaning and effect of Article 49(1) of the Law as set out above. Accordingly we had no doubt that this Court does have the power to make an order under Section 57 of the Trustee Act 1925.

50 Under Section 57, the power to be conferred has to be a power to effect a transaction in the management or administration of any trust property. There is no English authority specifically confirming that a general power to self-deal is within the terms of the section. Nonetheless, a power for a trustee to act as a paid director of a company in which the trust was invested, no express power being needed to enable the trustee to act unpaid, has been conferred under the section; and its wording appears apt to authorise the conferral of a general power, such as the power that we are asked to confer on the Trustees in this case.

51 In this regard, our attention was drawn to the English decision of *Re Portman Estate* [2015] EWHC 536 (Ch). This was a decision considering an application to vary a trust under Section 57 of the Trustee Act. Birss J said at paragraph 14:

> ***"In** Re Downshire **Evershed MR explained the purpose of section 57 at p248 as being to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries.** Ms Bedworth submitted that although in the passage at p248 the Master of the Rolls then referred to the authorisation of "specific dealings", it is clear from the words of the statute that the court not only has power to authorise a transaction on a 'one off' basis, it may also authorise the insertion of additional more general administrative powers. I accept that submission. The words used in s57(1) are "either generally or in any particular instance" and make it clear that the court's power is not confined to authorising specific transactions."

52 As to the appropriate approach that the Court should take, the judge said at paragraph 15:

> ***In** Alexander v Alexander [2011] EWHC 2721 (Ch) **Morgan J considered that the court needed to be satisfied of three matters in order to make an order under s57.** They are:
>
> ***(a) There is no power to carry out the transaction which the***

trustees wish to carry out under the trust deed (or provisions governing the trust);

(b) It is expedient that the trustees should be able to enter into the relevant transaction;

(c) The Court should exercise its discretion to confer the power on the trustees."

53 The judge agreed to vary the trust so as to include a *"power to trade"* and certain other general powers. He declined to grant the trustees a power generally to amend administrative powers in the future. In relation to this application he said:

> ***"I indicated that I was not persuaded that the court should confer this power on the trustees and then, on instructions, counsel withdrew the application in that respect so I do not have to decide the point.*** Nevertheless I wish to explain briefly why I was not persuaded. The effect of conferring this power would be to put the Court's power under s57 of the Trustee Act into the hands of the trustees, subject to the safeguard of counsel's opinion. That goes far further than any of the other powers conferred on this application."

54 Although not strictly relevant for the exercise of the Court's discretion under Section 57, we note that in the Jersey authority of In the matter of the *Greville Bathe Fund* [2013] (2) JLR 402, the Royal Court, when considering exercising the equivalent power (as set out above) to vary a trust under Article 47(3) of the Law, Commissioner Clyde-Smith presiding said, having set out the almost identical wording of Article 47(3), at paragraph 40:

> ***"40. There is no guidance to be derived on this article from Jersey case law, but it is similar to s.57(1) of the Trustee Act 1925. In*** *Alexander v. Alexander (1)* ***it was held that there are three matters to be considered in an application under s.57(1). The first is whether the court has jurisdiction to act under that sub-section. The second is whether it is expedient to confer the power which is sought. The third is whether the court should, in the exercise of its discretion, confer that power*** .
>
> ***41. Reference was made in that case to what is described as the helpful authority of*** *Royal Melbourne Hosp.* v. Equity Trustees (9) ***where the Supreme Court of Victoria described s.63(1) of the Australian Trustee Act (which is in similar terms) as being written in very wide and beneficial terms "that must be liberally construed." Quoting from the judgment*** ([2007] VSCA 162, ***at para. 150):***
>
> > ***"The words 'management or administration' in s 63(1) are, I think, of wide import and pick up everything that a trustee may need to do in practical or legal terms in respect of trust property.*** Thus, as to the English provision, it has been held the words refer to 'the managerial supervision and control of trust

> property on behalf of beneficiaries.' As to the similar New South Wales provision, it has been held the words refer to 'both the manner in which trust property is managed, administered, handled, directed or controlled and the ***actual carrying out of those functions.'*** As to the Victorian provision, in general terms, 'management' has been taken to include commercial and practical matters and 'administration' all the legal powers and duties that a trustee may need. The words management and administration largely overlap, but the linking word is 'or.' It was inserted to ensure that an unduly narrow interpretation was not adopted.""

55 Applying to the Trustees' application for an order granting the Trustees a power to self-deal the three stage test from *Alexander v Alexander* as set out in *Re Portman Estate* we find:

> (a) There is no power in the trust deed to carry out the transaction which the Trustees wish to carry out;
>
> (b) It is expedient for the Trustees to be able to enter into the relevant transaction. We make this finding because such powers are common and the power would allow the Trustees under the sub-funds to carry out the re-organisation which they seek in the interests of beneficiaries. We also note that the proposed power has been carefully formulated by those advising the Trustees and incorporates various safeguards to protect the beneficiaries, including the need for professional advice. We also note that the granting of this power would save the need for future applications to the Royal Court.
>
> (c) Accordingly, the Court decided to exercise its discretion to confer this power on the Trustees.

56 Mr Le Poidevin goes on to advise that this order would be recognised by the English Court on the footing that traditionally an English Court will regard the foreign court as having had jurisdiction if, inter alia, persons submitted to the jurisdiction of that court by voluntarily appearing. In this case all adult principal beneficiaries have indicated that they accept the jurisdiction of the court of Jersey.

Approval/sanction of the decision to re-organise

57 That leaves the question of the approval of the decision of the Trustees to enter into the proposed re-organisation. In short we declined to grant this order because the variation of the Trust which we granted would enable the Trustees to effect the proposed re-organisation in any event.

58 However, as we heard a significant amount of argument in relation to this issue, it is appropriate for us to make some general remarks about that aspect of the Representation.

59 The blessing of momentous decisions pursuant to Article 51 of the Law was considered in *Re S Settlement* [2001] JLR Note 37. This case adopted the approach from the English case of Public *Trustee v Cooper* [2001] WTLR 901. In that case, Hart J said:

> ***"At the risk of covering a lot of familiar ground and stating the obvious, it seems to me that, when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well)*** .
>
> ***…***
>
> ***(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 .
>
> ***(3) The third category is that of surrender of discretion properly so called.*** There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest. The cases within categories (2) and (3) are similar in that they are both domestic proceedings traditionally heard in chambers in which adversarial argument is not essential, although it ***sometimes occurs.*** It may be that ultimately all will agree on some particular course of action, or at any rate will not violently oppose some particular course of action. The difference between category (2) and category (3) is simply as to whether the court is (under Category (2)), approving the exercise of discretion by trustees or (under category (3)), exercising its own discretion."

60 In this case the Trustees have said that the re-organisation is not momentous, but that the Trustees are conflicted because of the element of self-dealing.

61 However, as set out in *Public Trustee v Cooper* the key issue for the Court then to determine is whether the conflict is so significant that the trustee is simply unable to make a decision itself and must surrender its discretion to the Court, or whether the trustee can, notwithstanding the conflict, make the decision itself. Hart J explained as follows:

> ***"Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed.*** One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries .
>
> ***Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court*** .
>
> ***Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision.*** In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict."

62 In this case the Court agreed with the Trustees that it would not have been necessary for the Trustees to have surrendered their discretion to the Court, notwithstanding the element of self-dealing in this case, as the Trustees had taken professional advice in relation to many of the affected transactions, appeared to have acted reasonably throughout and had the consent of all the adult principal beneficiaries in support of the application they had made, such beneficiaries being content to agree not to take any steps to disturb the relevant transactions, of which they fully aware. The Trustees may now carry out the reorganisation regardless of the element of self-dealing, owing to the self-dealing power which the Court has granted. The Court also found it unnecessary to sanction this decision to reorganise for broadly the same reasons that it declined to accept the surrender of discretion. Further, there is no personal conflict for the Trustees in this case, merely a conflict in respect of another trust or other companies within the same trust. This is not an uncommon situation and does not usually require an application to the court if adequate measures to achieve fair dealing between the parties have been taken, as they have been in this case.

63 Had the Court had to apply the well-known test prior to considering whether or not to approve the re-organisation, namely:

Then the Court would have found as follows:

(i) 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?

(ii) Are we satisfied that the opinion which the Trustee has formed is one at which a reasonable Trustee properly instructed could have arrived?

(iii) 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?

(a) As to the first limb, the Trustees have formed their opinion in good faith. The motive behind the restructuring is to provide greater independence for C's and B's sides of the family in the future. The proposed re-organisation is also intended to make the structure simpler to administer and more cost-effective. The Trustees' decision is therefore a desirable one for all parties concerned.

(b) As to the second limb, the Trustees' decision is reasonable. The alternative would be to leave the existing structure in place contrary to the wishes of the adult principal beneficiaries.

(c) As to the third limb, again the Trustees accept that the re-organisation requires self-dealing. However, the Trustees will not stand to gain personally. The Trustees have consulted with the adult principal beneficiaries in advance of acting and they have all written in support of the Trustees' proposed re-organisation. The Trustees have sought the sanction of the Court in advance of the transaction. It cannot be said that the Trustees' decision has been vitiated by any actual or potential conflict of interest.

Conclusion

64 Accordingly, the Court declined to approve the re-organisation of the Trust, but agreed to vary the Trust under Article 57 of the Trustee Act 1925 to include an authority to self-deal in the terms set out above.